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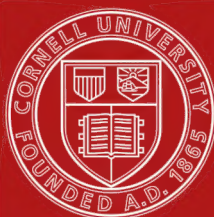
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A TREATISE
ON THE
AMERICAN LAW OF ADMINISTRATION.

VOL. II.

A
TREATISE
ON THE
AMERICAN LAW OF ADMINISTRATION.

BY
John Gabriel
J. G. WOERNER,
AUTHOR OF "AMERICAN LAW OF GUARDIANSHIP."

SECOND EDITION.

IN TWO VOLUMES.

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CHAPTER XXXII.

WHAT CONSTITUTES ASSETS.

§ 304. HAVING in the two preceding chapters examined the nature and kind of property to which the title of the executor or administrator of a deceased person extends, it becomes necessary to point out the circumstances which make it his duty to possess himself of such property for the purpose of disposing of it in accordance with the requirements of the law. While the property is in the possession of the personal representative, it is generally designated by the term "assets;" and it may be profitable to consider the nature of assets generally, before treating of the duties and liabilities of executors and administrators in respect of the management of the estate coming into their hands.

§ 305. **Meaning of the Term Assets.**—In modern usage the term assets (derived from the French *assez*, sufficient) is equivalent to property available, not for enjoyment, but in trust or custody for the payment of demands; thus, the property held by executors and administrators is assets for the

Property held
by executors
and adminis-
trators for the

payment of a deceased person's debts, legacies, and distributive shares, is called assets.

And sometimes property lawfully received by an executor or administrator, though belonging to another, is so called.

payment of debts and distributive shares to legatees and heirs,¹ sufficient to make the executor or administrator chargeable to a creditor or party in distribution so far as such property extends.² The term has been extended to include property or money lawfully received by an executor or administrator after the death of his testator or intestate, although belonging to another.³ But usually goods of a third person, and the proceeds of any sale of them, mixed with the goods and money of an intestate, and coming with them into the hands of the administrator, are not deemed assets in his hands, but continue the goods of such third person, if they can be traced in specie;⁴ but it is not sufficient that such person has an inchoate or incomplete right or title to the property: in such cases it goes as assets to the personal representative of the person entitled to the possession.⁵ And if the prop-

¹ Abb. Law Dict., tit. Assets; Sto. Eq. Jur. § 531.

² Wms. Ex. [1655]; Burr. Law Dict., tit. Assets; 2 Bla. Comm. 510. In Shepard's Touchstone assets are described as follows: "All those goods and chattels, actions and commodities, which were deceased's in right of action or possession as his own, and so continued to the time of his death, and which after his death the executor or administrator doth get into his hands as duly belonging to him in right of his executorship and administration, and all such things as do come to the executor and administrator in lieu and by reason of that, and nothing else, shall be said to be assets in the hands of the executor or administrator to make him chargeable to a creditor or legatee." (p. *496.) Story says: "In an accurate and legal sense all the personal property of the deceased, which is of a salable nature, and may be converted into ready money, is deemed assets. But the word is not confined to such property; for all other property of the deceased which is chargeable with his debts or legacies, and is applicable to that purpose, is in a large sense assets." Sto. Eq. Jur. § 531.

³ Per Taney, C. J.: "Upon a full consideration of the nature of, and of the various decisions upon, the subject, we are of opinion that whatever property or money is lawfully received or recovered by the executor or administrator, after the death of his testator or intestate, in

virtue of his representative character; he holds as assets of the estate; and he is liable, therefore, in such representative character, to the party who has a good title thereto": *De Valengin v. Duffy*, 14 Pet. 282, 290. See also *Thurston v. Lowder*, 40 Me. 197, 202; *Thurston v. Doane*, 47 Me. 79, 82; *Matti of Hobson*, 61 Hun, 504. In such case he is not liable personally, but as administrator: *Simpson v. Snyder*, 54 Iowa, 557; *Call v. Houdlette*, 70 Me. 308, 313; *Mulford v. Mulford*, 40 N. J. Eq. 163; but see authorities, *infra*.

⁴ *Cooper v. White*, 19 Ga. 554; *Knight v. Knight*, 75 Ga. 386, 390; *Hutchinson v. Reed*, 1 Hoffm. (N. Y.) 316, 337; *Moses v. Murgatroyd*, 1 John. Ch. 119, 128; *Montgomery v. Armstrong*, 5 J. J. Marsh. 175; *Thompson v. White*, 45 Me. 445; *Schoolfield v. Rudd*, 9 B. Mon. 291, 294; and the administrator is personally liable to the owner of the goods in trover: *Yelland v. Shinholster*, 15 Ga. 189; *Newsum v. Newsum*, 1 Leigh, 86; *McCustian v. Ramey*, 33 Ark. 141, 148. It is held that the administrator may be held at the owner's election either individually or as representative: *De Valengin v. Duffy*, 14 Pet. 282, 291; *Pryor v. Morgan*, 170 Pa. St. 568, 584. But see, as to the character of his liability, *Mulford v. Mulford*, 40 N. J. Eq. 163, and cases in preceding note.

⁵ *Wait, Appellant*, 7 Pickering, 100; *Bigelow v. Paton*, 4 Mich. 170. So the administrator is entitled to the possession of personalty covered by a bill of sale

[* 646] erty in the hands of the * decedent belonging to others, whether in trust or otherwise, has no ear-marks and is not distinguishable from the mass of his own property, it falls within the description of assets, and the owner has no remedy to recover such property except to come in as a general creditor,¹ though, by statute in some States, fiduciary debts constitute a preferred class.²

Money or property of others having no ear-marks by which it can be distinguished, is assets.

But money held in a fiduciary capacity has been decided not to lose its distinctive character merely because it is so intermingled with other funds that the particular coins or bills cannot be identified; it is enough if the fund can be substantially followed, and the recent tendency seems not to require the same strictness of proof as formerly.³

Money held in fiduciary capacity.

from the intestate, but never delivered: *Palmer v. Palmer*, 55 Mich. 293.

¹ *Trecothick v. Austin*, 4 Mas. 16, 29; *Matter of O'Brien*, 45 Hun, 284; *Johnson v. Ames*, 11 Pick. 173; *Attorney-General v. Brigham*, 142 Mass. 248, 250; *Fowler v. True*, 76 Me. 43; *Pryor v. Davis*, 109 Ala. 117; *Bobbitt v. Jones*, 107 N. C. 658; *State v. Osborne*, 69 Conn. 257.

² See *post*, § 368.

³ *First National Bank v. Hummel*, 14 Colo. 259; *Kirby v. Wilson*, 98 Ill. 240, 246; *Hubbard v. Irrigating Co.*, 53 Kans. 637; *Smith v. Combs*, 49 N. J. Eq. 420, 425. See *Springfield Inst. v. Cope-land*, 160 Mass. 380. Says Judge Biggs, in *Ulrici v. Boeckeler*, 72 Mo. App. 661, 667: "The modern decisions have cut loose from the rule ['ear-mark' doctrine] and declare that whenever it is shown that particular funds or the *existing* assets of an insolvent estate have been increased by trust money, a court of equity will declare a trust or priority."

A Nevada court has gone to the length of holding, that since the unpaid capital stock of a corporation is regarded as a trust fund, held in reserve by the stockholders for the benefit of creditors, the stockholders are trustees for the creditors of the corporation, and that suits to establish and enforce the trust are maintained against the representatives of deceased persons on the theory that the decedent held money equal to the amount of the unpaid stock in trust for the creditors, which, although incapable of identification, passed into the hands of the ex-

ecutor or administrator, and does not constitute a part of the estate of the deceased. It sanctioned the decree of a chancery court enforcing the claim of a creditor of a corporation without having first been presented to the executor or the probate court for allowance: *Thompson v. Crocker*, 19 Nev. 242, 245. The case ignores the distinction between the rights of creditors and those of distributees or legatees against the estate of a deceased person, which is emphasized in the case of *Gunter v. Janes*, 9 Cal. 643, 661, cited by the Nevada court as authority for the trust doctrine. This "trust fund" theory, without some statutory support, does not seem to warrant the conclusions drawn therefrom in the Nevada case. The trust character impressed upon the property of a corporation secures it to the payment of the debts of the company before it can be distributed to the stockholders, but does not mean that such property cannot be sold or transferred to *bona fide* purchasers for a valuable consideration: *Fogg v. Blair*, 133 U. S. 534. "Neither the insolvency of the corporation, . . . nor the failure to collect in full all stock subscriptions, . . . give to the simple contract creditors any lien upon the property of the corporation, nor charge any direct trust thereon." *Alberger v. Bank*, 123 Mo. 313, 324, quoting from *Hollins v. Coal & Iron Co.*, 150 U. S. 385. The presumption that a deceased stockholder held in his hands the money for his unpaid subscribed stock, or that any of it passed to his representative, might not be

So constructive trusts in real estate, though standing in the decedent's name, are likewise held to be enforceable against the administrator and general creditors;¹ but before the *cestui que trust* can claim specific real or personal property, he must show that it is the identical property originally covered by the trust, or that it is the fruit or product thereof in a new form.²

Whether and under what circumstances the *cestui que trust* must prove his claim under the probate law, is discussed hereafter;³ also the law in relation to property in the hands of an administrator which the intestate held *in auter droit*.⁴

§ 306. **Assets not possessed by the Decedent.**—Not only chattels in possession, but all such which the executor or administrator might by reasonable diligence possess himself of, constitute assets with which he is chargeable.⁵ So property which was never in the testator or intestate is regarded as assets when it comes to the executor or administrator;⁶—such as money received from the United States government by an executor or administrator, in consequence of a treaty with a foreign nation, as indemnity for loss of property taken from the decedent by such foreign nation,⁷ when given as compensation for injuries suffered by the aggrieved parties; but when held to be simple gratuities, such awards do not constitute assets,⁸ even though, in fact, received by the administrator of the estate of an intestate claimant.⁹ But it was

Property accruing after death is assets.

Government awards and bounties.

unjust to the heir or legatee, but would certainly give to a corporation creditor an unfair advantage over other creditors of the decedent's estate: and to give to the former an action against the estate apart from and independent of the regular tribunal created by the law for the distribution of the decedent's estate, seems too violent an interference with the ordinary administration of the law to be warranted by the presumption that the unpaid stock subscription is in the executor's hand in the shape of cash.

¹ And general creditors are not protected against such trust, though they had no notice of it: *Murphy v. Clayton*, 113 Cal. 153.

² *Orcutt v. Gould*, 117 Cal. 315. See also *Phillips v. Overfield*, 100 Mo. 466.

³ § 402, p. *848.

⁴ § 312.

⁵ See *post*, § 310; *Gray v. Swain*, 2 Hawks (N. C.), 15.

⁶ *Wms. Ex.* [1656], mentioning the cases of a renewal of a lease by the executor, a lease made pursuant to a cove-

nant with the testator before his death, and delivery of goods and merchandise to an executor under a contract with the testator during his lifetime, or damages recovered by the executor for the non-performance of such a contract.

⁷ *Grant v. Bodwell*, 78 Me. 460, 464; *Foster v. Fifield*, 20 Pickering, 67, 70; *Rogers v. Hosack*, 18 Wend. 319, 333.

⁸ *Gillan v. Gillan*, 55 Pa. St. 430; *Gardner v. Clarke*, 20 Dist. Col. 261, 269; *Mulledy's Succession*, 47 La. An. 1580 (this was a congressional appropriation to the heirs and legal representatives of one of the victims of the Ford Theatre disaster); *Blagge v. Balch*, 162 U. S. 439 (a French Spoliation Claim, as to which *infra*).

⁹ And the proceeds are not applicable to the payment of his debts: *Matter of Cooley*, 6 Dem. 77. The money in this case grew out of one of the "indirect" claims, which had been rejected by the Court of Arbitration of the Alabama Claims, and was part of the funds appropriated by Congress out of the surplus

held by the U. S. Supreme Court (reversing the Supreme Court of Massachusetts, and disapproving the decisions in New York, Maryland, and Maine), that a claim decided by the Court of Commissioners of Alabama Claims to be a valid claim against the United States, is property which passes to the assignee of a bankrupt under an assignment made prior to the decision.¹ So a claim against the Government for wrongful seizure of intestate's goods, in his lifetime, is assets.² The proceeds of the French Spoliation Claims are held not to be assets, but to be distributable to those who were next of kin at the time of the passage of the Act.³ And whether such claims be held pure gratuities or not, the right to present them must be treated as property for the purpose of giving the probate court jurisdiction to grant letters, especially when the tribunal charged with the distribution of the fund would not recognize any but an administrator appointed in the State as competent to receive the fund.⁴ Bounty for sugar raised, constitutes assets;⁵ but not arrearage of pension due to a widow at the time of her death, payable to the executor for the use of her children.⁶

In like manner damages assessed during the lifetime of a testator for laying out a highway through his land, but not payable until a day occurring after his death, constitute assets;⁷ salary voted to a person after his decease and

Damages payable after death.

remaining after satisfaction of the so-called "direct" claims. So in the analogous case of an assignee in bankruptcy claiming money appropriated under the same award, it was held not to be assets: *Taft v. Marsili*, 120 N. Y. 474; *Brooks v. Ahrens*, 68 Md. 212; *Kingsbury v. Mattocks*, 81 Me. 310; *Heard v. Sturgis*, 146 Mass. 545.

¹ *Williams v. Heard*, 140 U. S. 529.

² *Briggs v. Walker*, 171 U. S. 466.

³ *Clement's Estate (Bailey's Appeal)*, 160 Pa. St. 391; *Gardner v. Clarke*, 20 Dist. Col. 261; *Codman v. Brooks*, 167 Mass. 499; *Sargent v. Sargent*, 168 Mass. 420. This view is further emphasized in *Blagge v. Balch*, 162 U. S. 439 (excluding legatees, creditors, and assignees, and holding that these awards though payable to the administrator do not constitute assets in his hands, he simply acting as representative of the next of kin). All of these cases emphasize that the appropriations for the French Spoliations Claim were mere gratuities, and in this respect disapproving or overruling *Blach v. Blagge*, 157 Mass. 144, and *Clement's Estate*, 150 Pa. St. 85; and also *Codman v. Brooks*,

159 Mass. 477, in which it had been held that these claims passed under the will of the original sufferer, or under the statute of distributions to his next of kin, and that in either case they were assets protected by the administration bond.

⁴ *Manning v. Leighton*, 65 Vt. 84, 99. Even regarded as gratuities, the ascertainment of the next of kin to whom the fund descends is within the jurisdiction of the probate court: *Clement's Estate*, 160 Pa. St. 391; *Sargent v. Sargent*, 168 Mass. 420, reviewing the authorities, and deciding that the probate court could appoint an administrator for the sole purpose of collecting such a fund.

⁵ *Gardère's Succession*, 48 La. An. 289.

⁶ *Perkins v. Perkins*, 46 N. H. 110, but holding that the administrator was liable to the children on his bond where he had collected the fund and been ordered to pay.

⁷ *Welles v. Cowles*, 4 Conn. 182, 188; *Goodwin v. Milton*, 25 N. H. 458, 473; *Astor v. Hoyt*, 5 Wend. 603; *Neal v. Knox & Lincoln Railroad*, 61 Me. 298, 300; but since as a general rule an executor has no power over the realty,

Salary voted after death. paid to his executors;¹ dividends of tolls collected by * a turnpike company before the death [* 647] of a stockholder;² money recovered on an appeal bond given to the obligees as executors;³ and surplus arising from trustee's sale of real estate after the death of the grantor, after discharging the debt, is sometimes held to be assets;⁴ and the personal representative holds as assets property acquired by him in compromise and settlement of a claim by the estate for the realty itself,⁵ or for unpaid purchase money of real estate, under sanction of the court.⁶ Realty bought by an administrator for the estate at his own sale, to satisfy a judgment in favor of his estate, may be treated as personalty until his official duties touching it are performed;⁷ and realty acquired in satisfaction of a judgment in favor of the estate is held by him in trust until it is ascertained that it is not needed to pay debts and administration expenses.⁸ So also real estate purchased by him for the estate in foreclosing a mortgage debt due the estate is assets for which he must account.⁹

Property may likewise accrue to the executor or administrator in remainder, and become assets.¹⁰ Where a tenant in fee remainder. devises his whole estate to one for life or until her marriage, and upon her death or marriage to be divided among his children, the share of one of the children dying, leaving an heir, is assets in the hands of the administrator under the statute of Massachusetts, though otherwise at common law.¹¹ Damages for injury resulting in death, recovered by the personal representative for the benefit of the widow or next of kin, are not usually considered assets.¹² The money due upon a policy of life insurance payable to a testator or intestate for the sole use and benefit of himself,¹³ or to his legal representatives,¹⁴ or accord-

money received by him from a railroad company for the release of a right of way over the estate's lands, is not assets in his hands: *Hankins v. Kimball*, 57 Ind. 42.

¹ *Loring v. Cunningham*, 9 Cush. 87.

² *Welles v. Cowles*, 4 Conn. 182, 187.

³ *Sasscer v. Walker*, 5 G. & J. 102.

⁴ *Jones v. Lackland*, 2 Gratt. 81, 86.

But it is usually held that such surplus goes to the heirs like real estate, and not to the administrator: *Ante*, § 279, and cases there cited.

⁵ *Bryan v. Craig*, 64 Ark. 438 (though the title was taken in the representative's individual name).

⁶ *Beadle v. Steele*, 86 Ala. 413, 420.

But the proceeds of realty not sold in his official capacity are not assets: *Transue's Estate*, 141 Pa. St. 170; *Woods v. Legg*, 91 Ala. 507.

⁷ *Jackson v. Roberts*, 95 Ky. 410, 413; *Lockman v. Reilly*, 95 N. Y. 64, 70.

⁸ See authorities cited *ante*, § 279.

⁹ *Briggs v. C. K. R. Co.*, 56 Kans. 526, 530.

¹⁰ *Wms. Ex.* [1657], mentioning, among other cases, that of a lease for years bequeathed to A. for life, afterwards to B., who dies before A., it is assets in the hands of his executor; so a remainder in a term for years is assets, though it never vested in the testator's possession, and though it continue still a remainder.

¹¹ *Whitney v. Whitney*, 14 Mass. 88.

¹² *Ante*, § 295, p. * 628.

¹³ *Union Life Ins. Co. v. Stevens*, 19 Fed. Rep. 671, 676; *Harding v. Little-dale*, 150 Mass. 100; or "for his own order": *Bogden v. Ins. Co.*, 153 Mass. 544.

¹⁴ *Kelley v. Mann*, 56 Iowa, 625; *John-*

ing to his will,¹ is assets which it is the administrator's duty to collect and inventory; and he and his sureties are liable for a failure to administer the avails of such insurance. So of insurance against loss by fire payable to the legal representatives of the insured;² but where the premium was paid after the death of the owner by his widow, who was also his administratrix, it was held doubtful whether an action at law lay in favor of the administratrix.³ And a life insurance payable to a particular person other than the insured or his representatives constitutes no part of the insured's estate,⁴ but vests in the beneficiary as a gift, taking effect in possession on his death; if the beneficiary die before the insured, the insurance constitutes assets in the hands of the personal representatives of the beneficiary.⁵

son *v. Van Epps*, 110 Ill. 551; unless by these terms next of kin, heirs, &c., be intended, in which case the administrator as such is not chargeable with nor entitled to the proceeds of the insurance as assets: *Murray v. Strang*, 28 Ill. App. 608; *Griswold v. Sawyer*, 125 N. Y. 411, and cases cited. It has been held that the administrator must sue if the policy is to the "legal representatives," even when the funds will not constitute assets for payment of debts; he sues as trustee for the next of kin: *Sulz v. M. Assoc.*, 145 N. Y. 563, 573. As to the construction to be given to the words "legal" or "personal" representative, see *post*, § 423, p. *906. In Mississippi the statute exempts insurance payable to the executor or administrator to the extent of \$5,000 in favor of the heirs or legatees: *Coates v. Worthy*, 72 Miss. 575; and under the statutes of Tennessee it is held that the insurance money on a policy payable to the legal representatives goes to the widow or next of kin exempt from decedent's debts, though the administrator may collect it: *Rose v. Wortham*, 95 Tenn. 505. So in Iowa the exemption is held to include collateral liens: *Larrabee v. Palmer*, 101 Iowa, 132.

¹ *Winterhalter v. Workmen*, 75 Cal. 245; see, also, *Ashby v. Costin*, L. R. 21 Q. B. 401, 405, distinguishing between a case where the member of an order chooses to bequeath such insurance by his will, in which case it is assets of his estate, and where he does not exercise such power, but dies intestate, when it is not assets of his estate, the property remaining in the insurance order.

² Although the property insured was real estate, and was destroyed after the owner's death: *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88, 91; *Nichols' Appeal*, 128 Pa. St. 428. But it has been held that in such case, while the proceeds are subject to the payment of debts, yet they must be treated as real estate, the administrator being treated as a trustee for the heirs: *Wyman v. Wyman*, 26 N. Y. 253, 262; *Sauner v. Phoenix Co.*, 41 Mo. App. 480. If the appointment of the executor or administrator cannot for any reason be made with ordinary promptness, the heirs or parties in interest should procure the appointment of a temporary administrator, who has the right to make the proof of loss, give notice, &c.; and a failure to secure such appointment, resulting in a non-compliance with the terms of the policy as to the time and conditions of bringing suit thereon, will defeat the claim: *Mathews v. Am. C. Co.*, 154 N. Y. 449.

³ *Portsmouth Ins. Co. v. Reynolds*, 52 Gratt. 613, 631.

⁴ *Jones v. Patty*, 73 Miss. 179, 185; *Cables v. Prescott*, 67 Me. 582, citing earlier cases; *Bishop v. Curphey*, 60 Miss. 22; *Re Van Dermoor*, 42 Hun, 326; *Heydenfeldt v. Jacobs*, 107 Cal. 373; *Bomash v. Iron Hall*, 42 Minn. 241. So in case of a sum payable by a relief association to the appointee: *Eastman v. Assoc.*, 62 N. H. 555; *Iowa, &c. Assoc. v. Moore*, 34 U. S. App. 670.

⁵ *Conigland v. Smith*, 79 N. C. 303, approved in *Simmons v. Biggs*, 99 N. C. 236; see also *U. S. Trust Co. v. Ins. Co.*, 115 N. Y. 152. But in some States it is held that, if all the beneficiaries die, the policy

§ 307. **Accretions, Interest, Rents, Profits.**—It is obvious that goods and profits which have accrued since the death of the

Assets include *testator or intestate from property in the hands [* 648]
interest. of the executor or administrator are likewise

Rents. assets,¹ including interest received by him, and revenues from the estate in his charge,² all rents accruing from

real estate, proceeds of sale thereof, and damages for injuries thereto, when such real estate itself constitutes assets.³ Where the executor or administrator undertakes to carry on the decedent's trade, or does so in pursuance of a provision of articles of copartnership entered into by the deceased, or by direction of the testator in the

will, or under the directions of a court of chancery, the proceeds of such trade are assets for which the executor or administrator is liable.⁴ So the good will of the decedent's business;⁵ but a license to sell intoxicating

liquors is personal to the licensee and not such property as will pass to his administrator as assets of his estate;⁶

but if the grant of a license had increased the value of the fixtures, good will and unexpired term of a lease, the executor is liable to be surcharged with the enhanced value which might have been obtained by a sale.⁷ Chattels

reverts to the estate of the assured: thus in Ohio, where the insurance premiums were paid by the assured, the policy being payable to his wife, or in case of her prior death to his daughter, and it occurred that both died before the assured without issue, it was held that the policy was payable to the assured and became assets, like other personalty of his estate, and that the administrator of the deceased beneficiaries had no interest therein: *Ryan v. Rothweiler*, 50 Oh. St. 595. See further on this subject *Gambis v. Cov. Mut.*, 50 Mo. 48; *Shields v. Sharp*, 35 Mo. App. 178; *Johnson v. Van Epps*, 110 Ill. 551. In some States, when the beneficiary dies before the assured, the courts are inclined to make the funds payable to the heirs of the beneficiary as ascertained by the law of descent, but not as assets of the estate of such beneficiary: *Conrad's Estate*, 79 Iowa, 396. None of these cases should be confounded with the rules governing fraternal and benevolent associations in which the beneficiary has usually no vested interest before the death of the member assured: see *Masonic Assoc. v. Bunch*, 109 Mo. 560.

¹ *Wingate v. Pool*, 25 Ill. 118; *Mer-*
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chant's Case, 39 N. J. Eq. 506, affirmed 41 N. J. Eq. 349. As to what executors and administrators must charge themselves with, see *post*, on accounting.

² The subject of interest for which executors or administrators are liable is discussed *post*, § 511. See also *Soldini v. Hyams*, 15 La. An. 551; *Ray v. Doughty*, 4 Blackf. 115, 116; *Smiley v. Smiley*, 80 Mo. 44, 46.

³ *Ante*, § 300; *post*, § 513; *Boylston v. Carver*, 4 Mass. 598, 609; *Palmer v. Stevens*, 11 Cush. 147, 150; *Terry v. Ferguson*, 8 Port. 500; *Harper v. Archer*, 28 Miss. 212; *Baldwin v. Timmins*, 3 Gray, 302; *Vaughn v. Deloatch*, 65 N. C. 378; *Toerring v. Lamp*, 77 Iowa, 488.

⁴ See this subject treated *post*, § 328, and authorities there referred to; also *Kellar v. Beelor*, 5 T. B. Mon. 573.

⁵ *Thompson v. Winnebago Co.*, 48 Iowa, 155. The subject of good will is more fully considered in connection with partnership estates, *ante*, § 127.

⁶ *Porter v. Johnson*, 96 Ga. 145, 155; *Blumenthal's petition*, 125 Pa. St. 412; *Grimm's Estate*, 181 Pa. St. 233.

⁷ *Buck's Estate*, 185 Pa. St. 57.

real or personal, to which the executor or administrator becomes entitled after the death of the testator or intestate, by force of a condition, are assets,¹ as well as such chattels which the decedent had mortgaged or pledged, and which the executor or administrator redeemed.² In like manner, the money furnished by heirs in order to save the realty from being sold for debts is assets.³

Property
redeemed.

§ 308. **Property in Foreign Jurisdiction.**—It appears from the examination of the authority of foreign executors and administrators,⁴ that there is not unanimity on the question of their liability for assets, or rather for property of the decedent, found in different jurisdictions. The ancient doctrine of the common law was, that “assets in any part of the world shall be said to be assets in every part of the [* 649] world.”⁵ * This doctrine, applied in its general scope, without reference to the authority or liability of particular administrators in different jurisdictions, is as valid now as it has been at any time, and is objectionable only as containing an unmeaning truism, resolvable into the proposition that assets are assets. The attempt to give it a more particular application is ascribed, generally, to an ancient case, in which it is asserted to have been held by the court that, “if the executor have goods of the testator in any part of the world, he shall be charged in respect of them; for many merchants and other men, who have stocks and goods to a great value beyond sea are indebted here in England; and God forbid that these goods should not be liable for their debts: for otherwise there would be a great defect in our law.”⁶ Judge Story points out that the language employed makes a domestic executor or administrator liable for all assets of the testator or intestate which are locally situated abroad, and cannot be maintained to-day, because he has not, by virtue of his domestic letters, authority to collect them or to compel payment or delivery thereof to himself.⁷ Some of the American courts, however, have not only gone the length of recognizing, to its full extent, the doctrine asserted in this case, but have also held that a foreign executor or administrator, having received assets in a foreign country, is liable to be sued where he has taken no new letters of administration, and the estate

Ancient doctrine that assets in any part of the world shall be assets in every part of the world.

Applied in
Dowdale's
Case.

Criticised by
Story.

A foreign executor held liable for assets received abroad, although he took

¹ Wms. Ex. [1660].

² *Ibid.*, citing numerous English authorities. The assets in such case are only so much as they are worth beyond the sum paid on their redemption; and if the executor redeem with his own money, he shall be indemnified out of the estate,

if necessary, by the sale of the chattel itself.

³ *Littlefield v. Eaton*, 74 Me. 516, 522.

⁴ *Ante*, §§ 158 *et seq.*

⁵ *Touchstone*, 496.

⁶ *Dowdale's Case*, 6 Co. 47, 48.

⁷ *Sto. Conf. L.*, § 514 *a.*

out no letters there. has not been positively settled in the foreign State.¹ According to Story, these decisions, to the extent of making a foreign executor or administrator liable here for assets received by him abroad in his representative character, and brought here, are not easily supported; and there are other cases hold otherwise. American authorities which indicate a very different doctrine.² It is very clear that an administrator cannot be held accountable for property which it was not in his power to recover or obtain possession of; hence the doctrine *that [* 650] assets anywhere are assets everywhere is true only as applied to property which the administrator may lawfully collect or recover under the law of the forum granting the letters; for only such property is "assets" within the definition given in Touchstone. It is accordingly held, that an executor appointed in one State cannot be held to account for assets received in another State.³ The liability of the executor or administrator in such case is in his individual capacity, not enforceable in the probate court, but in a court of law proceeding according to the ordinary forms, or in a court of chancery.⁴

§ 309. **Debts as Assets where Debtor resides.**— Debts due by simple contract are said to follow the debtor, and are deemed to be the property of the deceased where the debtor resides at the time of the creditor's death. Hence, since each portion of the estate of a decedent leaving property in several jurisdictions must, as we have before seen,⁵ be administered in the country in which it is lawfully taken into possession and held, such debts constitute assets only in the State or country where the debtor resides.⁶ A corporation debtor to an estate may be regarded as present in and inhabiting, for the purpose of suit by the administrator, a State where it has an agent upon whom, pursuant to the laws of that State, process may be served, though the home office is elsewhere.⁷ Promissory notes, whether

¹ Sto. Conf. L., § 514 b; *Swearingen v. Pendleton*, 4 S. & R. 389, 392; *Evans v. Tatem*, 9 S. & R. 252, both of which last mentioned cases are based upon the authority of *Dowdale's Case*, *supra*; *Bryan v. McGee*, 2 Wash. (U. S. C. C.) 337; *Campbell v. Tousey*, 7 Cow. 64.

² *Fay v. Haven*, 3 Met. (Mass.) 109; *Selectmen of Boston v. Boylston*, 2 Mass. 384; *Goodwin v. Jones*, 3 Mass. 514; *Norton v. Palmer*, 7 Cush. 523; *Tunstall v. Pollard*, 11 Leigh, 1.

³ *Morrill v. Morrill*, 1 Allen, 132; *McPike v. McPike*, 111 Mo. 216 (exempting also the administrator's sureties); *Smith v. Smith*, 13 Ala. 329; *Vermilya v.*

Beatty, 6 Barb. 429; *Sparks v. White*, 7 Humph. 86.

⁴ *Smith v. Smith*, 13 Ala. 335; *Austin v. Gage*, 9 Mass. 395, 401; *Cabanne v. Skinker*, 56 Mo. 357, 368; *State v. Osborn*, 71 Mo. 86.

⁵ *Ante*, § 158.

⁶ *Partnership Estate of Ames*, 52 Mo. 290, 293; *Kohler v. Knapp*, 1 Bradf. 241, 247; *Holcomb v. Phelps*, 16 Conn. 127, 135; *Young v. O'Neal*, 3 Sneed, 55; *Saunders v. Weston*, 74 Me. 85, 90.

⁷ *New England Co. v. Woodworth*, 111 U. S. 138; and see *Sulz v. M. R. F. L. Assoc.*, 145 N. Y. 563.

negotiable or not, form no exception;¹ but the notes or other evidences of debt themselves—the things in possession—are assets where found, to recover which the administrator may maintain trover or other remedy;² and if the administrator collect the debt, although the debtor reside within another jurisdiction, he is of course liable for the amount so received.³ Debts due by specialty, however, are held to be the property of the deceased where the securities are at the time of his death.⁴ So judgment debts are held to be assets in the jurisdiction where the judgments are recorded; and leases where the land lies.⁵ Debts due from the government

Specialty debts where the securities are found.

[* 651] * of the United States are not located at the seat of government, but may be collected by the administrator appointed in the State where the deceased had his domicile at the time of his death, in any State or place where the government may choose to pay them.⁶

The subject of the *situs* of debts enters into the consideration of ancillary and domiciliary jurisdiction,⁷ and jurisdiction over estates of non-residents;⁸ and will again be referred to in connection with the subject of accounting for assets received in a foreign jurisdiction.⁹

§ 310. **Property lost through Administrator's Negligence as Assets.**—We have seen that the term assets is applicable not only to property actually taken into possession by the executor or administrator, but to all which he might have possessed himself of by

¹ *Slocum v. Sanford*, 2 Conn. 533; *Owen v. Miller*, 10 Ohio St. 136; *Wyman v. Halstead*, 109 U. S. 654; *Becroft v. Lewis*, 41 Mo. App. 546.

² *Bullock v. Rogers*, 16 Vt. 294, 296.

³ *Woodfin v. McNealy*, 9 Fla. 256.

⁴ See also cases cited *ante*, § 205, p. * 441, note 9.

⁵ *Holcomb v. Phelps*, 16 Conn. 127, 135; *Slocum v. Sanford*, *supra*, in which case Gould, J., says: "With respect to the questions of probate jurisdiction, the cases establish this distinction, that debts by specialty, or judgment, have a temporary locality; but that those due by simple contract have not. The former are regarded as effects only at the place where the securities are found at the death of the creditor. The latter follow the person of the debtor, and are considered as effects in that jurisdiction in which the debtor is at that time domiciled. . . . The reason of the distinction probably is, that as specialties and judgments, from the solemnity which the law attaches to

them, constitute, or create, the right of action, or interest to be administered, and are themselves things visible, they are to be regarded as specific chattels; but that writings of a less solemn nature, as notes, and other unsealed documents, which are only evidence of parol contracts cannot be so considered, and therefore that the debts of which they are evidence follow the person of the debtor, and are effects at the place of his domicile" (p. 535).

⁶ *Wyman v. Halstead*, 109 U. S. 654, 657; *Vaughan v. Northup*, 15 Pet. 1, 5; *Mackey v. Coxe*, 18 How. 100, 105; *Davis v. Chapman*, 83 Va. 67, 72; *Manning v. Leighton*, 65 Vt. 84. It has been heretofore mentioned that a claim against the government will not alone support a grant of letters on the estate of one who dies domiciled elsewhere: *ante*, § 205, p. * 441.

⁷ *Ante*, §§ 157 *et seq.*, particularly § 162.

⁸ *Ante*, § 205.

⁹ *Post*, § 537.

Administrator is liable for property which he ought to have recovered, and for property lost through his neglect.

fides; ³ but

He is required to exercise the care and skill of a prudent man in his own business.

the exercise of reasonable diligence.¹ Hence he is chargeable with personal property belonging to the estate of his testator or intestate, and lost through his negligence, although it never came to his hands.² It has been held that he is not liable for the loss of assets, even if he had them in possession, unless he has been guilty of such gross neglect as will amount to *mala* the prevalent rule as to the liability of executors and administrators requires of them that degree of care and skill which prudent men exercise in the direction and management of their own affairs.⁴ The *liability of executors and administrators with [* 652] regard to assets will be more fully considered in connection with the subject of their accounting.⁵

§ 311. **Debts of Executors or Administrators as Assets.**—In the absence of statutory provisions to the contrary, the nomination by a testator of his debtor as executor operates the extinguishment of the debt, because an executor cannot maintain an action against himself; and the personal action once suspended by the voluntary act of the creditor, it is forever gone and discharged,⁶ except against the creditors of the testator. But in equity the debt is presumed to have been paid by the executor, and constitutes assets for the payment of the testator's debts and legacies,⁷ or a trust for the next of kin,⁸ because in equity that which the law requires to be done must be presumed against the obligor to have been done.⁹ The

At common law, nomination by a testator of his debtor as executor extinguishes the debt.

In equity debt is presumed to be paid, and constitutes assets in executor's hands.

¹ *Ante*, § 306.

² *Tuttle v. Robinson*, 33 N. H. 104, 120; *Gray v. Swain*, 2 Hawks (N. C.), 15, 17; *Williams v. Morehouse*, 9 Conn. 470; *Eaton v. Walsh*, 42 Mo. 272; *Beall v. Darden*, 4 Ired. Eq. 76; *Freeman v. Cook*, 6 Ired. Eq. 373, 376; *Hellmann v. Wellenkamp*, 71 Mo. 407; *Harris v. Parker*, 41 Ala. 604.

³ *Deberry v. Ivey*, 2 Jones Eq. 370, 375.

⁴ *Merritt v. Merritt*, 62 Mo. 150, 157, and cases cited; *Webb's Estate*, 165 Pa. St. 330; *In re Moore*, 96 Cal. 522, 525; *State v. Gregory*, 119 Ind. 503, 509. "An administrator is not required to insure the estate of his intestate, but he is required to be honest, faithful, and diligent": *Dortch v. Dortch*, 71 N. C. 224, 226; *post*, § 336, p. *708 and cases there cited.

⁵ *Post*, ch. lv. As to their liability 688

for debts not collected by them, see *post*, §§ 324, 522.

⁶ The law is the same where a creditor appoints one of several joint, or even of joint and several, debtors his executor; for a release to one of several obligors, whether bound jointly, or jointly and severally, discharges the others. So the debt is equally released where one of several debtors is indebted to the testator; for they cannot sue without making the debtor a plaintiff also, which he cannot be against himself. Nor can the surviving executor sue after the death of the debtor executor, for at common law the debt became entirely extinct: *Wms. Ex. [1312] et seq.*

⁷ *Fleming v. Bolling*, 3 Call, 75, 84; *Brown v. Selwin*, Cas. Temp. Talb. 240.

⁸ *Carey v. Goodinge*, 3 Bro. C. C. 97.

⁹ *Wms. Ex. [1314]*, with numerous English authorities.

appointment of a debtor as administrator of his creditor's estate has a similar effect for the same reasons; but since the appointment of the administrator is not the voluntary act of the intestate, the debt is not extinguished, but the action therefor only suspended by such appointment; hence the administrator *de bonis non* of the intestate has an action against the representative of a deceased administrator debtor.¹

Appointment of debtor as administrator suspends the remedy for the debt.

In America the equitable rule above mentioned is the rule at law also, and, in the absence of statutory regulation of the subject, the debts of executors and administrators are *prima facie* assets in their hands, to be accounted for like any ordinary assets.² This principle is extended to the

In America debts of executors and administrators are *prima facie* assets.

[* 653] surety of an administrator appointed * administrator *de bonis non* in the place of his principal on the bond, who has been removed with assets in his hands for which the bondsman is liable.³ And so where one of two administrators was liable as principal in a bond to the intestate, this liability was held assets in the hands of the administrators, for which both were liable.⁴ Most of the States have regulated this question by statute, declaring that the appointment of a debtor as executor or administrator shall not operate to extinguish the debt. So in Alabama,⁵ Arizona,⁶ Arkansas,⁷ California,⁸ Colorado,⁹ Delaware,¹⁰ Florida,¹¹ Georgia,¹² Idaho,¹³ Kansas,¹⁴ Kentucky,¹⁵ Maryland,¹⁶ Mississippi,¹⁷ Missouri,¹⁸ Nevada,¹⁹ New Hampshire,²⁰ New Jersey,²¹ North Caro-

Statutes declaring that appointment of a debtor as executor does not extinguish debt.

¹ Ferebee v. Doxey, 6 Ired. L. 448.

² Crow v. Conant, 90 Mich. 247, 253; Hodge v. Hodge, 90 Me. 505; Griffith v. Chew, 8 Serg. & R. 17, 33; Eichelberger v. Morris, 6 Watts, 42; Ipswich Company v. Story, 5 Met. (Mass.) 310, 313; Winship v. Bass, 12 Mass. 199, 202; Tarbell v. Jewett, 129 Mass. 457, 460; Hall v. Hall, 2 McCord Ch. 269, 316; Farys v. Farys, Harp. Ch. 261, 263; Williams v. Morehouse, 9 Conn. 470, 475; Bacon v. Fairman, 6 Conn. 121, 126; Griffin v. Bonham, 9 Rich. Eq. 71; Mitchell v. Rice, 6 J. J. Marsh. 623, 628; Weems v. Bryan, 21 Ala. 302, 306; Wright v. Lang, 66 Ala. 389, 397; Tracy v. Card, 2 Oh. St. 431, 448 *et seq.*; Campbell v. Johnson, 41 Oh. St. 588; Rader v. Yeargin, 85 Tenn. 486.

³ It was held to be the duty of the administrator *de bonis non* to charge himself with the penalty of the bond as assets; the chose in action being converted by operation of law into a chose in possession, as if there had been judgment and

execution: Jacobs v. Morrow, 21 Neb. 233, 238. And see, to same effect, Choate v. Thorndyke, 138 Mass. 371; Banks v. Speers, 103 Ala. 436.

⁴ Bassett v. Granger, 136 Mass. 174.

⁵ Code, 1895, § 4258.

⁶ Rev. St. 1887, ¶ 1082.

⁷ Dig. of St. 1894, § 107.

⁸ Code Civ. Pr. 1885, § 1447.

⁹ Mills' Ann. St. 1891, § 4658 (as to executors).

¹⁰ L. 1874, p. 545.

¹¹ Rev. St. 1892, § 1860.

¹² Code, 1895, § 3410.

¹³ Rev. St. 1887, § 5424.

¹⁴ Gen. St. 1897, p. 528, § 66.

¹⁵ St. 1894, § 3889.

¹⁶ Publ. Gen. L. 1888, art. 93, §§ 224, 225.

¹⁷ Ann. Code, 1892, § 1865.

¹⁸ Rev. St. 1889, §§ 99, 100.

¹⁹ Gen. St. 1885, § 2778.

²⁰ Publ. St. 1891, ch. 189, § 12.

²¹ Gen. St. 1896, p. 1426, § 8.

lina,¹ North Dakota,² Ohio,³ Pennsylvania,⁴ Rhode Island,⁵ South Carolina,⁶ Texas,⁷ Virginia,⁸ Utah,⁹ West Virginia,¹⁰ and Wyoming.¹¹ The debt of the executor or administrator is in these States

Statutes declaring debts of executors assets, as if cash in hand,

to be accounted for as other debts or assets.¹² But in some of the States the statute makes the executor or administrator liable for the amount of his debt as for so much cash in hand; as, for instance, in California,¹³ Kansas,¹⁴ Nevada,¹⁵ New York,¹⁶ Ohio,¹⁷ Oregon,¹⁸ South

Carolina,¹⁹ and Texas.²⁰ It is clear that in these States a solvent administrator's note in favor of the estate is cash assets and the sureties *on his bond are liable;²¹ but in some of the [* 654] States it is held that the administrator and his sureties are

whether executor is solvent or not.

equally liable, whether or not the administrator was solvent during any period of the administration, by operation of the legal fiction, that where the right to demand

and the liability to pay co-exist in the same person, the law presumes instantaneous payment, and extinguishes the debt.²² So held in Alabama,²³ Massachusetts,²⁴ Ohio,²⁵ South Carolina,²⁶ Louisiana,²⁷

¹ Code, 1883, § 1431.

² Rev. Code, 1895, § 6382.

³ Bates' Ann. St. 1897, § 6069.

⁴ Pep. & L. Dig. 1895, p. 1473, § 89.

And the appointment will not release the testator's judgment debt against the executor so as to give a junior lien creditor a preference: *Anderson v. Anderson*, 183 Pa. St. 480.

⁵ Gen. L. 1896, p. 725, § 6.

⁶ 1 Rev. St. 1893, § 2022. But the debt, it is held, is considered cash in the executor's hands: *Hall v. Hall*, 2 McC. Ch. 209.

⁷ Sayles' Tex. St. 1897, § 2011.

⁸ Code, 1887, § 2648.

⁹ Comp. L. 1888, § 4102.

¹⁰ Code, 1891, p. 864, § 13.

¹¹ Rev. St. 1887, § 2062.

¹² "Assets" meaning in this respect simply debts due the estate: *McCarty v. Frazer*, 62 Mo. 263. This case holds that the case of *Eaton v. Walsh*, 42 Mo. 272, must not be understood as making the administrator liable on his bond for a debt owing by him to the intestate, without proof of his solvency at some time during the administration.

¹³ Code Civ. Pr. § 1447.

¹⁴ Gen. St. 1897, p. 528, § 66.

¹⁵ Gen. St. 1885, § 2778.

¹⁶ 3 Banks & Bro. (1882), p. 2296, § 13.

¹⁷ Bates' Ann. St. 1897, § 6069.

¹⁸ Code, 1887, § 1117.

¹⁹ *Hall v. Hall*, 2 McC. Ch. 209.

²⁰ Sayles' Civ. St. 1897.

²¹ And the liability of the sureties is not affected by the fact that one of them is surety on the note: *Johnson v. Hicks*, 97 Ky. 116.

²² But where the sole beneficiary and the administrator collusively induce one to become surety for the administrator, in order to charge him with the worthless debt of his insolvent principal, there being no other assets, the surety is not liable for such debt: *Campbell v. Johnson*, 41 Oh. St. 588. The sureties are not, however, exonerated from liability by the fraud of the executor, if the beneficiaries are innocent of participation therein: *McGaughey v. Jacoby*, 54 Oh. St. 487.

²³ *Wright v. Lang*, 66 Ala. 389, 397, and earlier Alabama cases.

²⁴ *Leland v. Felton*, 1 Allen, 531, 535; *Chapin v. Waters*, 110 Mass. 195; *Stevens v. Gaylord*, 11 Mass. 256, 269; *Sigourney v. Wetherell*, 6 Met. 553.

²⁵ *McGaughey v. Jacoby*, 54 Oh. St. 487.

²⁶ *Griffin v. Bonham*, 9 Rich. Eq. 71, 77; *Jacobs v. Woodside*, 6 S. C. 490; *Schnell v. Schroeder*, Bai. Eq. 334, 339; *Charles v. Jacobs*, 9 S. C. 295.

²⁷ *Succession of Bailey*, 30 La. An. 75, 78, citing *Fuselier v. Babineau*, 11 La. An. 393.

California,¹ and Connecticut.² But not all States favor the proposition that the statutory conversion of the administrator's debt is equivalent to its collection in cash. "Even," says Sherwood, J., in rendering the opinion of the Supreme Court of Missouri on this point, "had the legislature in express terms provided that debts due to the testator by the executor should be money in his hands, the deduction would not follow whereby worthless assets are transmuted into cash, unless, indeed, the creative faculty can be accorded to our law-makers, or the touch of Midas to their enactments."³ So it is said in the case of *Baucus v. Barr*,⁴ quoting from *Baucus v. Stover*,⁵ with reference to the liabilities of sureties in such case, that "the sureties did not covenant to augment the estate out of their own." It is accordingly held in a number of States that the executor or administrator may defend against his official liability by showing that at the time of the grant of letters he was, and until the time of the final settlement he remained, insolvent. So, for instance, in Indiana,⁶ Maine,⁷ Missouri,⁸ New Jersey,⁹ New York,¹⁰ Oregon,¹¹ Pennsylvania,¹² Tennessee,¹³ and Vermont.¹⁴ In New Hampshire the question remains undecided.¹⁵ Since in such cases the chief importance of the question of liability concerns the bondsmen on the

administration bond, and as the liability of the sureties [* 655] * depends upon the happening of a breach of its conditions

within the time covered by the bond, it may be important to fix the exact time when the principal became chargeable with assets, or entitled to credit for disbursement. In this respect the principle is applicable, that an insolvent fiduciary cannot transfer his mere indebtedness in one capacity to himself in another, so as to exonerate one set of sureties and charge another set, without some act in manifestation of the transfer.¹⁶ The question of the administrator's liability for his own indebtedness is also considered in connection with the subject of accounting.¹⁷

§ 312. *Property in auter Droit not Assets.* — It is very obvious

¹ *Trewick v. Howard*, 105 Cal. 434, 446.

² *Davenport v. Richards*, 16 Conn. 310, 316.

³ *McCarty v. Frazier*, 62 Mo. 263, 265.

⁴ 45 Hun, 582, 586, affirmed in 107 N. Y. 624.

⁵ 89 N. Y. 1, 6.

⁶ *Condit v. Winslow*, 106 Ind. 142 (*arguendo*); *State v. Gregory*, 119 Ind. 503.

⁷ *Inferentially*: *Potter v. Titcomb*, 7 Me. 302.

⁸ *McCarty v. Frazer*, 62 Mo. 263, 265; *Young v. Thrasher*, 48 Mo. App. 327.

⁹ *Harker v. Irick*, 10 N. J. Eq. 269; *Terluine v. Aldis*, 44 N. J. Eq. 146, 152.

¹⁰ Now settled by the case of *Baucus v.*

Barr, 107 N. Y., affirming s. c. 45 Hun, 582. In *Baucus v. Stover*, 89 N. Y. 1, the point had been left undecided.

¹¹ *United States v. Egglestone*, 4 Sawy. 199, 201.

¹² *Garber v. Commonwealth*, 7 Pa. St. 265; *Piper's Estate*, 15 Pa. St. 533, 537.

¹³ *Rader v. Yergin*, 85 Tenn. 486.

¹⁴ *Lyon v. Osgood*, 58 Vt. 707, 715.

¹⁵ *Norris v. Towle*, 54 N. H. 290, 294; *Jones v. Chase*, 55 N. H. 234.

¹⁶ This subject is discussed *ante*, § 255, p. * 551, in connection with the liability of sureties.

¹⁷ *Post*, § 512.

that property to which the testator or intestate had not an absolute or beneficial title cannot become assets in the hands of the executor or administrator, although the legal title may, in some instances, pass to him. His duty in taking possession of and preserving trust funds is treated in connection with the general subject of taking charge of the estate;¹ but it may be here stated, that money or property held by one in trust for another is not assets in the hands of the personal representative.² Where goods are sold by a factor for a principal abroad, and the factor dies before payment, the authority to receive the payment does not pass to the administrator, and payment to him is a mispayment.³ Where property attached in the hands of trustees is assigned by the owner, and the attachment is afterward dissolved by his death, the assignee, and not the administrator of the assignor, is entitled to it.⁴ So a promissory note; taken by an agent or employee in his own name for money of the principal loaned by him to a third party, is not payable to the agent's administrator, but to the principal.⁵ And where an administratrix recovered on *acceptances which had been [* 656] assigned to her by a debtor of her intestate, with directions to apply the proceeds, or so much as might be necessary, to the payment of the indebtedness, a sum in excess thereof, this excess was held not to constitute assets in her hands, but that she was individually liable as for money of the debtor received by her to his use.⁶

If the decedent at the time of his death had specific property in his hands belonging to others, and it can be clearly traced or distinguished from his own, such property does not constitute assets;

¹ *Post*, § 321.

² *Per* Gray, C. J., in *National Bank of Troy v. Stanton*, 116 Mass. 435, 439; *United States v. Cutts*, 1 Sumn. 133; *Green v. Collins*, 6 Ired. L. 139; *Colburn v. Broughton*, 9 Ala. 351, 364; *Fisher v. Fisher*, 1 Bradf. 335, 342; *Bloxham v. Hooker*, 19 Fla. 163, 172; *Rowley v. Fair*, 104 Ind. 189. So it was held that where a married woman deposits her own money with another person, to deposit it in his name in trust for her, the trust thereby created is terminated by his death; and if the administrator obtains it, he will be personally liable to her: *Farrelly v. Ladd*, 10 Allen, 127. The same principle governs as to a note belonging to another: *Prescott v. Ward*, 10 Allen, 203.

³ *Merrick's Estate*, 8 W. & S. 402. So where a factor employs an agent to sell

flour consigned to him, and dies, and the agent pays the proceeds of the sale of the flour to his principal's administrator, these proceeds are not assets, but the specific property of the consignors of the flour: *Hutchinson v. Reed*, 1 Hoffm. Ch. 316, 340. So a commission merchant holding funds as the proceeds of products owned by a deceased person, holds the same in trust, and cannot legally pay to any one but the administrator: *Sparrow's Succession*, 39 La. An. 696.

⁴ *Coverdale v. Aldrich*, 19 Pick. 391.

⁵ And if the administrator collect such note after it has been demanded by the owner, he will become *personally* liable for the money: *Thompson v. White*, 45 Me. 445.

⁶ *Cronan v. Cotting*, 99 Mass. 334, 336.

but if the property be of such a nature that it has no ear-mark, and cannot be distinguished from the mass of the decedent's own property, it is assets, and the owner must come in as a general creditor of the estate.¹

Where a person has a general power of appointment, either by deed or will, and executes this power, the property appointed is deemed in equity part of his assets, and subject to the demands of his creditors in preference to the claims of his voluntary appointees or legatees.² This doctrine is well established in England,³ and is followed in America in a number of cases, so that it may be said to be established in equity.⁴ The doctrine is, however, denounced in strong language by Gibson, C. J., of the Supreme Court of Pennsylvania,⁵ criticised by Story,⁶ its extension deprecated in Vermont,⁷ and the rule held to be abolished by force of statute in New York.⁸

Property appointed by a testator under a power.

§ 313. **Legal and Equitable Assets.**—In England, and in some of the American States, a distinction is recognized between assets which may be reached at law, or legal assets, and such as can be administered only in equity, or equitable assets. Legal assets must be administered by the executor or administrator in due course of administration, having regard to the rules of priority among creditors recognized at law, which will be considered more fully [* 657] * hereafter;⁹ but equitable assets, although debts are to be paid out of them before legacies, are to be distributed among creditors *pari passu*, without regard to priority of one debt over another.¹⁰ The true test whether assets are legal or equitable was held to be, not whether the executor or administrator, but whether the *claimant*, can reach them without

At law legal assets are applied to the satisfaction of creditors according to their priority;

equitable assets *pari passu*.

¹ For authorities, see *ante*, § 305, where the nature of the representative's liability in such case is considered, and *post*, § 402, where the necessity of complying with the law relating to the presentation of claims is pointed out. As to the priority of debts of the decedent owing in a fiduciary capacity, see *post*, § 368.

² *Clapp v. Ingraham*, 126 Mass. 200, 202.

³ 2 Jarm. * 623; 4 Kent, * 339; see *Meggison on Assets*, p. 30.

⁴ *Clapp v. Ingraham*, *supra*; *Smith v. Garey*, 2 Dev. & B. Eq. 42, 49; *Johnson v. Cushing*, 15 N. H. 298; *Knowles v. Dodge*, 1 Mackey (D. C.), 66; *Tallmadge v. Sill*, 21 Barb. 34; *Olney v. Balch*, 154 Mass. 318.

⁵ *In Commonwealth v. Duffield*, 12 Pa. St. 277, 279.

⁶ Story, Eq. § 176, note 3.

⁷ *Wales v. Bowditch*, 61 Vt. 23, 38.

⁸ *Cutting v. Cutting*, 86 N. Y. 522; *Crooke v. County*, 97 N. Y. 421, 457.

⁹ *Post*, §§ 365 *et seq.*

¹⁰ *Wms. Ex. [1680] et seq.* The distinction is said to rest upon the principle, that in natural justice and conscience, and in contemplation of a court of equity, all debts are equal, and the debtor is equally bound to satisfy them all, whether by specialty or by simple contract. Therefore, since a claimant upon equitable assets is under the necessity of going to a court of equity to reach them, that court will act only according to the rule of doing justice to all creditors without any distinction as to priority. *Plunket v. Pen-son*, 2 Atk. 290, 294.

Property coming to the executor or administrator *virtute officii* is legal assets.

Property chargeable in equity with payment of debts or legacies is equitable assets.

Distinction between legal and equitable assets unimportant in America.

resorting to a court of equity. But the more accurate statement is held by Story to be, that "Legal assets are such as come into the hands and power of an executor or administrator, or such as he is intrusted with by law, *virtute officii*, to dispose of in the course of administration. . . .

Equitable assets are, on the other hand, all assets which are chargeable with the payment of debts or legacies in equity, and which do not fall under the description of legal assets."¹ According to this view, an equity of redemption in either personal or real property is legal assets, and so treated in the administration of the estates of deceased persons.² It follows from the rule,

that, where a voluntary conveyance is set aside at the instance of prior creditors, subsequent creditors will participate in the fund, that the proceeds of the sale of such property are also to be treated as legal assets.

In most of the American States, the whole matter of assets is regulated by statute, and the distinction between legal and equitable assets is of little or no practical importance, not only because in many instances the necessary equity powers to deal with this subject are vested in the probate courts, but chiefly because the statutes themselves determine the powers, duties, and liabilities of executors and administrators, and the manner of subjecting the property of decedents to the payment of their debts. Thus, it is held that under the intestate laws of Pennsylvania there is no distinction * between legal and equitable creditors, or legal and [* 658] equitable assets.³ So in Missouri⁴ and New York.⁵ Hence the question whether an executor or administrator is competent or under obligation to bring an action at law or suit in equity to set aside a conveyance of property made by the deceased for the purpose of defrauding his creditors depends, generally, upon the direct provision of the statute on the subject.⁶

¹ Story, Eq. Jur. §§ 551, 552; Wms. Ex. [1682], citing, in approval of Judge Story's definition, *Cook v. Gregson*, 3 Drew. 547; *Shee v. French*, 3 Drew. 716.

² *Roosevelt v. Fulton*, 7 Cow. 71, 77, *et seq.*

³ *Sperry's Estate*, 1 Ashm. 347, 351.

⁴ "We are of opinion," says Hough, J., in the case of *Titterington v. Hooker*, 58 Mo. 593, 597, "that the precise and simple yet effective provisions of our administration law, whereby the whole estate of a decedent, both real and personal, may be subjected to the payment of his debts, were designed to entirely

supersede the more cumbrous machinery of the common law, and that the whole doctrine of equitable assets, marshalling assets in equity for the payment of debts, and bills for discovery of assets and account, is without application here, save in so far as the principles underlying those proceedings may be invoked in illustration or explanation of analogous remedies afforded by our statute." Cited and approved in *Pearce v. Calhoun*, 59 Mo. 271, 274.

⁵ *Per Surrogate Bradford*, in *Bloodgood v. Bruen*, 2 Bradf. 8, 10.

⁶ *Ante*, § 296. As in New York, pro-

§ 314. **Personal and Real Assets.** — Assets are also distinguished, at common law, as personal and real, the latter being liable, in the hands of the heirs, for debts of the ancestor on bonds, covenants, and other specialties when the decedent bound himself and his heirs.¹ The liability of real estate was extended by statute² to all debts, whether on simple contracts or on specialty, and heirs and devisees made liable to the same suits in equity for simple contract debts of their ancestor or testator as they had at common law been liable to for debts by specialty. It was held that these statutes did not specifically charge the real estate descended or devised, but made the heir or [* 659] *devisee liable *personally*.³ But in the American States the subjection of real estate of deceased persons to the payment of their debts is so fully covered by statutory law that it becomes necessary to devote a separate chapter to the consideration of the general principles and of the mode of proceeding common to them.⁴ It may be stated here, however, that the general rule in America is to hold the real estate of deceased testators and intestates liable for the payment of all their debts, without regard to quality or degree, and mostly their legacies, in all cases where the personalty is insufficient for such purpose; and this without recourse to equity, by summary proceedings in the probate courts.⁵ The liability of real estate in the possession of heirs and devisees, after the close of administration in the probate court, is treated in a subsequent chapter.⁶ The tendency of legislation and judicial construction in the several States is to discharge the real estate from any

viding that persons "having received, taken, or interfered with the property or effects of a deceased person" shall not be liable as executors in their own wrong; "but shall be responsible as a wrongdoer in the proper action to the executors or . . . administrators." R. S. ch. 8, tit. 3, art. 1, § 17. Under this statute it was held that the administrator of a vendor having fraudulently assigned property, may maintain an action against the fraudulent vendee as a *wrongdoer*, to recover the value of the property and all damages: *McKnight v. Morgan*, 2 Barb. 171, reversing former rulings that the administrator had no right of action against a fraudulent vendee as announced in *Osborne v. Moss*, 7 John. 161. See also *Babcock v. Booth*, 2 Hill (N. Y.), 181, 185.

In Vermont, the statute provides that the administrator of an insolvent estate

may, upon order of the probate court, sell the property fraudulently conveyed by the decedent, and it was held that this provision authorized a proceeding in equity to recover such property: *McLane v. Johnson*, 43 Vt. 48, 60.

¹ Wms. Ex. [1687]. *Post*, § 574.

² 3 W. & M. c. 14; 10 Geo. IV.; 1 Wm. IV. c. 47; 3 & 4 Wm. IV. c. 104.

³ Wms. Ex. [1691], citing *Spackman v. Timbrell*, 8 Sim. 253; *Richardson v. Horton*, 7 Beav. 112; *Piman v. Insall*, 1 Mac. & G. 449, 458; and many others, illustrative of various questions arising out of the principle involved.

⁴ *Post*, chap. l.-liii.

⁵ *Piatt v. St. Clair*, 6 Ohio, 227, 237; *Titterton v. Hooker*, 58 Mo. 593, 4 Kent, 421, 422.

⁶ *Post*, §§ 574 *et seq.*

liability for unsecured debts not established before the probate court within a certain time, ranging from two to seven years after the grant of letters testamentary or of administration, or a certain time after the maturity of the debt, generally one or two years.

[* 660]

* CHAPTER XXXIII.

OF THE INVENTORY AND APPRAISAL.

§ 315. **Office and Necessity of the Inventory.** — One of the most important duties incumbent upon executors and administrators, involving equally their own protection and that of the estates committed to their care, is the making of an accurate inventory of all the property, both real and personal, including chattels in possession and choses in action, as well as contingent or prospective interests.¹ The ancient ecclesiastical law was very strict with respect to the making of inventories,² and the consequence of neglecting to make one seems to have been to prevent the executor from relying on the want of assets.³ Inventories are required from executors and administrators by statute in every State in the Union, and the making of "a true and perfect inventory of all the goods, chattels, credits, and estate that have or shall come to his hands, possession, or knowledge," is usually one of the conditions of the bond given by them; so that the mere omission to make and return the inventory is a breach of the bond, and renders the executor or administrator liable,⁴ but does not *render void proceedings

Penalty for failure to return inventory was that the executor could not rely on want of assets.

Omission to file inventory constitutes a breach of the bond, but does not invalidate the acts of administration.

¹ "The great object of this highly important requirement of the law regarding an inventory is to enable the judge of probate and the parties in interest to know what property belongs to the estate. Without it they could not understandingly call the executor or administrator to an account": Dutton, J., in *Moore v. Holmes*, 32 Conn. 553, 559. See, as to the like duties of guardians to file inventories, *Woerner on Guardianship*, § 95.

² "And if any executor refuse to make an inventory, and nevertheless presume to administer the goods of the deceased he may be punished at the discretion of the bishop or ordinary. The reason is, lest the executor, being disposed to deal unfaithfully, should defraud the creditors or legataries, by concealing the goods of the deceased": *Swinb. on Wills*, pt. 6, § 6.

³ *Wms. Ex.* [974], note (a); *Swinb. on Wills*, pt. 3, § 17, pl. 8. "If the executor enter to the testator's goods," says *Swinburne*, "and make no inventory thereof, then may every legatary recover his whole legacy at his hands; for in this case the law presumeth that there is sufficient goods to pay all the legacies, and the executor doth secretly and fraudulently subtract the same: whereas otherwise the executor is presumed not to have any more goods, which were the testator's than are described in the inventory, the same being lawfully made."

⁴ *Commonwealth v. Bryan*, 8 S. & R. 128; *Edmundson v. Roberts*, 2 How. (Miss.) 822; *Forbes v. McHugh*, 152 Mass. 412; *Ellis v. Johnson*, 83 Wis. 394; *Scott v. The Governor*, 1 Mo. 686; *Sherwood v. Hill*, 25 Mo. 391; *Wilson v. Keeler*, 2 Chip. (Vt.) 16. "It would often be

Or omitting property known to belong to the estate.

had under such administration.¹ *A fortiori*, the wilful omission to include in the inventory any property known to the administrator to belong to the estate of his intestate is a breach of his official bond.²

The presumption arising against an executor or administrator by reason of his failure to return an inventory, although not sufficient of itself to charge him with the payment of debts or legacies,³ is yet a strong circumstance in support of the charge of improper conduct,⁴ and the omission of assets therefrom is a fraud, or its equivalent,⁵ unless it arose out of an honest mistake of fact or misconception of the law.⁶

The apparent exception to the requirement of an inventory existing in those States in which executors who are also residuary or sole legatees are allowed to give bond to pay debts and to take the estate without accounting therefor, is not in reality an exception; for by the terms of the statute itself it is not an administration without inventory, but administration is wholly dispensed with.⁷

§ 316. **Within what Time the Inventory must be filed.**—The time for the return of the inventory into court is fixed in the different States at different periods. In South Carolina, it is within the discretion of the probate court to fix the time;⁸ in Louisiana, the inventory must be made by a notary appointed for that purpose, if the heir, within ten days after the death, elects to take with benefit of inventory;⁹ in Arizona,¹⁰ Idaho,¹¹ Nevada,¹² and Tennessee,¹³ it must be returned at the first term of the court after the appointment of the executor or administrator; in Iowa,¹⁴ within fifteen days; in Wyoming, within

extremely difficult, if not impossible, to prove what property came into the possession of an executor if he were excused from making and returning an inventory thereof": *Potter v. McAlpine*, 3 Dem. 108, 128, holding a provision in a will that no inventory should be filed, to be against public policy and invalid. This case was quoted with approval in *Higgins' Estate*, 15 Mont. 474. But it has been held in Connecticut that a suit on an executor's bond for the mere technical breach in failing to file an inventory cannot be maintained where no harm has been done, and no one would be benefited: *State v. Smith*, 52 Conn. 557, 565.

¹ *Cooper v. Horner*, 62 Tex. 356, 364.

² *Bourne v. Stevenson*, 58 Me. 499.

³ *Leeke v. Beanes*, 2 Harr. & J. 373; *Wilson v. Slade*, 2 Harr. & J. 281. The inventory and appraisal of choses in action

is not important in itself: *Adams v. Adams*, 22 Vt. 50, 63. It is not conclusive of any one's rights: *Lewis v. Lusk*, 35 Miss. 696.

⁴ *Hart v. Ten Eyck*, 2 John. Ch. 62, 79; "and which always inclines the court to bear harder on such executor" Sir John Strange, in *Orr v. Kaine*, 2 Ves. Sen. 294; *Moses v. Moses*, 50 Ga. 9, 30.

⁵ *McNeel's Estate*, 68 Pa. St. 412.

⁶ *Speakman's Appeal*, 71 Pa. St. 25; *Booth v. Patrick*, 8 Conn. 106.

⁷ See *ante*, § 202.

⁸ Rev. St. 1893, § 2041.

⁹ *Garl. Rev. Code of Pr. 1894*, §§ 974 *et seq.*

¹⁰ Rev. St. 1887, ¶ 1078.

¹¹ Rev. St. 1887, § 5420.

¹² Gen. St. 1885, § 2774.

¹³ Code, 1884, § 3082.

¹⁴ Code, 1897, § 3310.

twenty days;¹ in Michigan² and North Dakota,³ within [* 662] thirty days; in Pennsylvania,⁴ Colorado,⁵ and * Oregon,⁶ and Washington,⁷ within one month; in Arkansas,⁸ Indiana,⁹ Kansas,¹⁰ Mississippi,¹¹ Missouri,¹² and Texas,¹³ within sixty days; in Alabama,¹⁴ Connecticut,¹⁵ and Florida,¹⁶ within two months; in California,¹⁷ Illinois,¹⁸ Kentucky,¹⁹ Maine,²⁰ Maryland,²¹ Massachusetts,²² Minnesota,²³ Nebraska,²⁴ New Hampshire,²⁵ New Jersey,²⁶ Rhode Island,²⁷ New York,²⁸ Ohio,²⁹ Utah,³⁰ and Vermont,³¹ within three months; in Georgia,³² Virginia,³³ and West Virginia,³⁴ within four months; and in Delaware,³⁵ within six months. The practice under the canon law, and in the prerogative court of Canterbury, followed in some of the country jurisdictions of England, was to require an inventory to be exhibited *before* probate or grant of letters;³⁶ and under peculiar circumstances, instead of requiring an inventory, the court would issue a *commission* for the *appraisement* of the goods, and the *inspection* of the bonds, leases, and other writings, which was held to be a more solemn inventory.³⁷

In the American States no inventory can be required until an executor or administrator has been appointed by the court having jurisdiction, or until the executor has taken upon himself the administration; but a commission is, in most States, required to be appointed by the judge or court of probate, consisting of two, three, or sometimes five

No inventory before appointment of executor or administrator.

1 Rev. St. Wyoming, § 2040.

2 How. St. 1882, § 5869.

3 Rev. Code, 1895, § 6380.

4 Commonwealth v. Bryan, 8 S. & R.

128.

5 Ann. St. 1891, § 4729.

6 Code, 1887, § 1112.

7 Code, 1896, § 5435.

8 Dig. of St. 1894, § 59.

9 Ann. St. 1894, § 2415.

10 Gen. St. 1889, § 2823.

11 Ann. Code, 1894, § 1864

12 Rev. St. 1889, § 82.

13 Sayles' Tex. St. art. 1969.

14 Code, 1896, § 119.

15 Gen. St. 1888, §§ 578, 579, under penalty of \$20, for the delay of each additional month, which penalty does not exclude an action on the bond: State v. French, 60 Conn. 478.

16 McClell. Dig. 1881. Omitted in Rev. St. 1892, in the chapter treating of appraisements and inventories.

17 Code Civ. Pr., § 1443. But an inventory subsequently filed is not invalid: Phelan v. Smith, 100 Cal. 158, 169, an inventory is returned when completed

by the appraisers and submitted for judicial action, and is not invalid because the executors have omitted to attach their affidavits: *In re Lux*, 100 Cal. 593.

18 St. & C. Ann. St. 1896, p. 289, ¶ 51.

19 St. 1894, § 3849.

20 Rev. St. 1883, ch. 94, § 43.

21 Publ. Gen. L. 1888, art. 93, § 210.

22 Publ. St. 1882, ch. 132, § 5.

23 Gen. St. 1891, § 5095.

24 Cons. St. 1893, ch. 12, § 1253.

25 Publ. St. 1891, ch. 189, § 1.

26 Gen. St. 1896, p. 2366, § 50.

27 Publ. St. 1882, ch. 185, § 1.

28 Forsyth v. Burr, 37 Barb. 540, 542.

29 Bates' Ann. St. 1897, § 6023

30 Comp. L. 1888.

31 St. 1894, § 2400, § 4098.

32 Code, 1882, §§ 2517, 2518.

33 Code, 1887, § 2673.

34 Code, 1891, ch. 87, § 2.

35 Laws, 1874, p. 545, § 19.

36 Phillips v. Bignell, 1 Phillim. 239, 240.

37 Watson v. Milward, 2 Lee's Cases (6 Eng. Eccl. R.), 332.

discreet and disinterested persons, whose duty it is to value, or *appraise*, the effects inventoried by the executor or administrator, Appraisers and or conjointly with him to make out the inventory. witnesses.

They are known, generally, as *appraisers*, and in all cases act under oath. In Missouri the law requires the appointment of two *witnesses* to be present and assist in the making of * the inventory, and it is a penal offence for the executor [* 663] or administrator to open or examine the papers, money, or other property of the deceased in their absence; but the appraisers are appointed by the administrator.¹

If the executor or administrator neglect to file the inventory, provision is made for the citation and attachment of the delinquent by the spontaneous action of the court, without motion or petition by creditors or distributees;² and if he disobey the citation, he may be coerced by fine or imprisonment for contempt of court, or be removed from office for neglect of duty. But creditors and distributees of a decedent have also the right to require the executor or administrator to file an inventory, and an application for an order of the probate court for that purpose will not be refused, if made within a reasonable time.³ A petition to require the inventory of a debt due by one of the executors will not, however, be entertained from his co-executor; such motion must proceed from some person having an interest in the estate.⁴

Inventory compelled by the court acting without motion.
But interested persons may petition for an order requiring the inventory; but not one executor against a co-executor.

In most States, it is required that, if, after returning the inventory, other goods or property of any kind come to the hands or knowledge of the administrator, an additional inventory shall be exhibited, including the newly discovered assets.⁵ But in Massachusetts the law is otherwise; having returned an inventory to the judge of probate, the administrator is not required, if property not in-

Inventory of property discovered after filing original inventory.

¹ Rev. St. 1889, §§ 72, 73, 81.

² See, for instance, *Poole v. Burnham*, 99 Iowa, 493.

³ And it is no excuse that the executor has assets to a large amount over and above all debts against the estate, and offers to deposit security sufficient to secure any debt which may be recovered against the estate; or that it would be troublesome or expensive to make an inventory, or that the creditor praying for the order is actuated by curiosity and a design to abuse the process of the court: *Forsyth v. Burr*, 37 Barb. 540; *Thomson v. Thomson*, 1 Bradf. 24. And it is sufficient, in such case, that the creditor swear posi-

tively to a debt due him from the estate to enable him to move for such order; the surrogate will not proceed to try the validity of the debt before making the order: *Gratacap v. Phyfe*, 1 Barb. Ch. 485, 489; *Schmidt v. Heusner*, 4 Dem. 275.

⁴ *Dowdy v. Graham*, 42 Miss. 451.

⁵ *Commonwealth v. Bryan*, 8 S. & R. 128; *Moore v. Holmes*, 32 Conn. 553; both of these cases holding that the failure to file an additional inventory is as much a breach of the bond as the failure to file the original one. See *Patten's Estate*, 7 Mackey, 392; *Chifflet v. Willis*, 37 Tex. 245.

cluded therein should subsequently come to his knowledge or possession, to return a second inventory; but he is bound to account for the same in his final settlement.¹

[* 664] *§ 317. **What Property must be inventoried.**—The inventory must include all personal property of the decedent, of whatever kind or nature, which is or may become assets. To this extent the statutes of all the States are alike. But with respect to the property appropriated by the law for the immediate support of the widow and children, in which neither the creditors nor other legatees or heirs can have any interest, there is some diversity in the legislation. In many, if not most, of the States, provision is made excluding such property from the general inventory;² in several of them, the executor or administrator, or the commissioners appointed to appraise the property, are required to make a separate inventory and appraisal of the property allowed or set out to the widow or family;³ but in others no provision is made on this subject. In these States, it seems that in the absence of a statutory provision to the contrary, it is the administrator's duty to inventory and cause to be appraised the widow's absolute property, together with the property generally; and having charged himself with the amount thereof, he will be entitled to take credit for whatever amount he turns over or pays to the widow, either upon order of the court, or in compliance with the statutory allowance.⁴

Real estate constitutes assets to pay debts, and when necessary for that purpose it goes to the personal representative and must obviously be inventoried.

[* 665] But since it cannot always be known at the time of making the inventory whether the personal property is or is not sufficient to pay the debts, or whether recourse must be had to the real estate for that purpose, it is provided by statute in England, and most of the American States, that all real estate belonging to the decedent shall be included in the original inventory, or, if discovered subsequently, in an additional inventory.⁵ Specific

All property constituting assets must be inventoried.

minor chil-

Property going to the widow or minor children generally excluded, or put into a separate inventory.

Where such property is charged in the inventory, the executor or administrator is entitled to credit in his account.

Real estate must be inventoried.

¹ Hooker v. Bancroft, 4 Pick. 50.

² So in Alabama, Florida, Indiana, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, Ohio, and probably some others.

³ For instance, in Michigan, Minnesota, Nebraska, New Jersey, Ohio, and Vermont. In New York the property must be included in the inventory, but not appraised: Matter of Shedd, 60 Hun, 367.

⁴ Godfrey v. Getchell, 46 Me. 537, 539; Drew v. Gordon, 13 Allen, 120; Griswold v. Chandler, 5 N. H. 492.

⁵ But not lands lying in another State; Peck v. Mead, 2 Wend. 470. In Massachusetts realty now is, but formerly was not, required to be inventoried: Henshaw v. Blood, 1 Mass. 35; Prescott v. Tarbell, 1 Mass. 204. A growing crop, planted after the death of the decedent, is no part of the real estate in-

Property of others in the hands of the deceased need not be inventoried.

personal property in the hands of a testator or intestate at the time of his death, belonging to others, which he holds in trust or otherwise, and which can be clearly traced and distinguished from his own, is not assets, but is to be held by the executor or administrator as the deceased himself held it;¹ and it is not, of course, to be inventoried.

In almost every State the statute enumerates the different kinds of personal property which is required to be inventoried, such as "goods, chattels, money, books, papers, and evidences of debt," etc. This includes debts due by the executor or administrator, because in America the appointment of an executor or administrator who happens to be a debtor to the testator or intestate does not cancel the debt.² He is to inventory *all* the personal property of which he has any knowledge; hence it has been held that assets belonging to a deceased resident, situated in another State, must be included;³ but this can apply to such assets only as are not in the rightful possession of an administrator in such other State,⁴ or that

Property in other States, not in possession of a lawful executor or administrator.

may come within * the jurisdiction of the State granting the [* 666] letters. In those of the States in which the executor or administrator is authorized to impeach the conveyance of his intestate or testator on the ground of fraud against creditors,⁵ he must also inventory all property so fraudulently conveyed.⁶ Property in the possession of other parties, if it belong to the decedent's estate, must also be inventoried.⁷ And it is proper, and the duty of the administrator, to inventory all property found among the effects of the deceased, if he does not

Property which the administrator may recover as having been fraudulently conveyed.

Property belonging to the deceased, in possession of others.

whether the property will be wanted to pay debts: *Minor v. Mead*, 3 Conn. 289; *Andruss v. Doolittle*, 11 Conn. 283; *Andrews v. Tucker*, 7 Pick. 250. In Mississippi he is not required to inventory such property: *Snodgrass v. Andrews*, 30 Miss. 472.

ventoried: *Rodman v. Rodman*, 54 Ind. 444, 447; and in Indiana real estate need not be inventoried until it is necessary to sell it for payment of debts: *Burns' Ann. St.* 1894, § 2500. In Ohio, the real estate is to be included in the inventory, if so ordered by the court: *Bates' Ann. St.* 1897, § 6025.

¹ See *ante*, §§ 305, 312, and cases there cited in connection with the discussion of this subject.

² *Weems v. Bryan*, 21 Ala. 302, 307. And see *ante*, § 311; *post*, § 512.

³ *Butler's Estate*, 38 N. Y. 397.

⁴ *Ante*, §§ 158, 308; *Sherman v. Page*, 85 N. Y. 123, 129.

⁵ *Ante*, §§ 296, 314.

⁶ And this without waiting to see

⁷ *Turner v. Ellis*, 24 Miss. 173, 180; *Potter v. Titcomb*, 10 Me. 53; *Williams v. Morehouse*, 9 Conn. 470; but see *Hignutt v. Cranor*, 62 Md. 216, 220. The fact that the administrator before appointment sold the property to pay his own claim against the estate, although with the consent of the beneficiaries, will not excuse the filing of an inventory: *Silverbrandt v. Widmeyer*, 2 Dem. 263.

know them to belong to another; and if property so inventoried be sold in good faith, the true owner cannot claim it from the administrator in person, but only out of the estate.¹ So of money in the hands of the wife at the time of the husband's death.²

Property found among effects of the deceased not known to belong to another.

The executor or administrator can be required to inventory only the property which belonged to the decedent at the time of his death, in his own right, or to which the personal representative is entitled in his official capacity, as distinguished from the heir, legatee, widow, or donee *mortis causa* of the testator or intestate.³ The court has no power, therefore, to compel the administrator to inventory property not clearly be-

Court has no power to compel inventory of property not belonging to the estate, nor to try the title to property between the personal representative and a stranger.

longing to the estate.⁴ On the other hand, the [* 667] court *should not reject an inventory exhibited because it contains property the title to which is in dispute;⁵ because, as appears in a former chapter,⁶ the probate court has no power to try the title to property between the personal representative and strangers.

If no property come to the knowledge of the administrator, he cannot, of course, make an inventory;⁷ but he should nevertheless file an affidavit showing that no assets came to his hands, for the information of the court and parties in interest. Thus an administrator *de bonis non* must file an inventory, although he take all the property, not as administrator, but as trustee.⁸

Return if no property of the deceased is found.

¹ *Waterhouse v. Bourke*, 14 La. An. 358; *Bourne v. Stevenson*, 58 Me. 499; *Mulford v. Mulford*, 40 N. J. Eq. 163; *ante*, §§ 305, 312.

² Although given to her by her husband before the marriage, or earned by herself, if it was not under the statute her own separate property: *Washburn v. Hale*, 10 Pick. 429; *Richardson v. Merrill*, 32 Vt. 27; *Speakman's Appeal*, 71 Pa. St. 25. But it was held error to charge an administratrix with the proceeds of bonds which her husband, the intestate, had placed in her hands, and with which she purchased a house, taking the title in her own name, during his lifetime: *Shuttleworth v. Winter*, 55 N. Y. 624.

³ *Toller*, 248; *Wms. Ex.* [980].

⁴ *Snodgrass v. Andrews*, 30 Miss. 472. "For otherwise," says Handy, J., "he might be compelled to subject himself to a *prima facie* liability for the property, by including it in the inventory when it might not really be the property of the

estate, — a position of hazard and responsibility which it would be unjust to coerce him to assume": p. 487. On the other hand, it is said that the executor or administrator is not the sole judge of what shall be inventoried; necessarily the ultimate determination must rest in the court; if the representative refused to inventory any property, the court would be powerless to administer on the estate; but such order to inventory property for the estate, claimed personally by the administrator, is not an adjudication of the right of property, but in the nature of a preliminary investigation to determine probabilities: *Simms v. Guess*, 52 Ill. App. 543.

⁵ *Gold's Case*, Kirby, 100.

⁶ *Ante*, § 151.

⁷ In such case the failure to make an inventory constitutes no breach of the bond: *Walker v. Hall*, 1 Pick. 19; *Hall v. Bramble*, 2 Dak. 189, 203, 204.

⁸ *Dana's Case*, Tuck. 113.

§ 318. **Details of the Inventory.**—The inventory should not only be full and complete, so as to include every item of property belonging to the estate, but it should set out each item separately, with the amounts indicating the value or appraisement in detail. As a question of policy, it is evident that the additional labor and expense involved in minutely itemizing each article, account, note, bond, etc., rather than grouping or aggregating them and stating the value or amount in the sum, is insignificant when compared with the importance of the safeguard thus obtained for the interests of the estate, and the protection thereby afforded to the executor or administrator who is disposed to act with diligence and in good faith. It may be assumed as the experience of courts and judges, that a large proportion of the litigation arising in the settlements of estates is due to inattention and inaccuracy in making inventories and keeping the accounts, under the mischievous delusion that honesty and good faith are sufficient to accomplish the ends of administration. But this is not only a question of policy addressing itself to the judgment of parties managing estates; it is a legal obligation. The statute in nearly every State requires not only "a full, true, and perfect inventory," etc., but also directs that each article of property shall be separately appraised and its value noted. It is the duty of the court to which an inventory is returned to reject it if *not made [* 668] in compliance with law, and require a new one which shall be in due form.¹

The inventory should contain a minute description of each article of property.

Statutes of most States require this.

¹ Such items as, "Cash, bonds, notes, etc., \$13,993.06," "Household goods and kitchen furniture, \$298.00," "Horses, cows, and swine, \$268.00," do not, strictly speaking, constitute an inventory, but rather an abstract or compendium of one. "Surrogates would do right to reject such papers as inventories. They often work injury to creditors and legatees, and sometimes involve executors and administrators in serious difficulty. In fact, it is impossible to settle any estate with intelligence and accuracy without other aids than they furnish": *Vanmeter v. Jones*, 3 N. J. Eq. 520, 538. A more emphatic illustration of the necessity of accurate and detailed inventories is found in *Pursel v. Pursel*, 14 N. J. Eq. 514. "The whole difficulty," says the Ordinary, in delivering the opinion of the prerogative court, "has grown out of the defective character of the inventory, and exhibits in a striking point of view the impropriety of suffering such inventories to be filed. . . . They do not

answer the design of the law. They fail to furnish to parties interested the very information which they were designed to supply. They often lead, as in this case, to useless litigation, imperil the rights of parties, impose upon courts the painful duty of groping for the truth in the dark, or of deciding by uncertain and unreliable tests of truth. The court below were misled entirely by the defects and virtual misrepresentations of the inventory, and this court was saved from falling into the same error mainly by exhibits offered on the part of the exceptant. In this case, it is true, the loss of the mistake would have fallen where it justly belonged, on the head of the party guilty of the negligence that occasioned it. But it falls, it is to be feared, too often upon unsuspecting heirs and confiding relatives, who are made the victims of the carelessness or fraud which covers up the real truth under the shelter of general and unintelligible inventories. . . . I feel it my duty to protest earnestly against

§ 319. **Indication of the Value of Assets.** — The utility and value of the inventory depend in a great measure upon the reliance that may safely be placed on the value of the property therein listed. Provision is therefore made in many of the statutes, that either the executor or administrator making the inventory, or the commissioners appointed to make the appraisal, shall state as fully and accurately as may be possible to them whether the debts inventoried are sperate, doubtful, or desperate,¹ or what, in the opinion of the executor or administrator, may be collected of the securities and debts.² Debts inventoried without comment, or showing that they are desperate or doubtful, must be accounted for, unless the executor or adminis-
 [* 669] trator show that set-offs existed, *or that the debtors were insolvent;³ and the presumption of solvency of the debtor is stronger where the administrator himself is the debtor.⁴ Debts inventoried as desperate the administrator will not be charged with,⁵ and the sale of notes and accounts inventoried as valueless and of bad debts is proper, and the administrator is chargeable only with the proceeds of such sale.⁶ Debts of non-resident insolvent debtors may, it has been held, be omitted from the inventory entirely.⁷ The appraisers must also estimate the value of chattels in possession belonging to estates, noting each article exhibited to them, and affixing the price which, in their opinion, it is worth. It has already been mentioned that the statutes require great minuteness and particularity in the appraisement, — a provision which appraisers should never lose sight of.

The inventory should indicate the value of assets.

Of choses in action, whether good, doubtful, or desperate.

Debts inventoried without comment are *prima facie* good; the *onus* is on the administrator to prove them worthless.

§ 320. **Appraisement of the Goods.** — The importance and responsibility of the office of appraisers or commissioners to value the property belonging to the estates of deceased persons are not al-

the practice, not only from the embarrassment it has occasioned in this particular case, but because I regard it as a *fruitful source of litigation, and as opening a wide door to fraud and injustice*. Justice requires that in all cases the requirements of the statute should be strictly complied with" (p. 518 *et seq.*).

¹ Colorado, Ann. St. 1891, § 4729; Illinois, St. & C. Ann. St. 1891, p. 289, § 51; Maryland, Publ. Gen. L. 1888, art. 93, § 221; Mississippi, Ann. Code, 1892, § 1864.

² Kansas, Gen. St. 1889, § 2823; Maine, Rev. St. 1883, ch. 64, § 46; Ohio, Bates' Ann. St. 1897, § 6035.

³ Graham v. Davidson, 2 Dev. & B.

Eq. 155, 170; see on this point, *post*, § 522.

⁴ Hickman v. Kamp, 3 Bush, 205; Lloyd v. Lloyd, 1 Redf. 399; but he is not precluded from showing a defence to the same: Bell's Estate, 25 Pa. St. 92, 95.

⁵ Finch v. Ragland, 2 Dev. Eq. 137; Shafer v. Shafer, 85 Md. 554. See *post*, § 522.

⁶ Succession of Pool, 14 La. An. 677.

⁷ Black v. Whitall, 9 N. J. Eq. 572, 587. Nor is an administrator required to inventory any notes of non-resident debtors, at least when administration has been granted in the State of such debtor: Grant v. Reese, 94 N. C. 720, 731.

Appraisements are not conclusive as to the value of the goods appraised;

but always *prima facie* evidence thereof, and conclusive as to other parties acting upon their showing.

ways sufficiently appreciated. Although not technically, in most cases, conclusive either for or against the executor or administrator,¹ the inventory and appraisal are in every instance *prima facie* evidence, and therefore decisive always when not obviously erroneous, or when clear and convincing evidence is not attainable to rebut their *prima facie* validity. And they are of necessity conclusive when other parties have been governed by, or act upon the faith of, such * appraisalment.² Nor are their duties free from [* 670] difficulty: the statute requires the property to

be appraised "at its true value," and leaves the appraisers to their own resources to find what "true value" is. If they suppose it to be the actual cost of the article to the late owner, deducting a reasonable sum for deterioration by reason of the use it may have been subjected to, they may reach the true value of such article to the widow, heir, or legatee, provided that they are entitled to it specifically, *and have occasion for its use*. The price so found would probably constitute the *intrinsic* value of the article, whether the recipient had use for it or not; but would the intrinsic value be the *true* value, in the sense of the statute, if he had no use for it? The Supreme Court of the United States construed "true value," in the tariff act of 1818, to import "actual cost;"³ but Thompson, J., who delivered the opinion, reached this conclusion from the context in the same act, and, by analogy, from previous enactments. In subsequent acts of Congress on the same subject, the words "market value" were substituted for "true value," and it was held that the

¹ The statutes in most, if not all, of the States give to both the inventory and appraisal *prima facie*, but not conclusive, validity as evidence for and against the executor or administrator. See the statutes as before quoted. So held in *Hoover v. Miller*, 6 Jones L. 79; *Horton v. Barto*, 17 Wash. 675; *McGinity v. McGinity*, 19 R. I. 510; *Estate of Fernandez*, 119 Cal. 579, 584; *Cameron v. Cameron*, 15 Wis. 1; *Willoughby v. McCluer*, 2 Wend. 608; *Matter of Mullon*, 145 N. Y. 98; *McNabb v. Wixom*, 7 Nev. 163, 172; *Williams v. Petticrew*, 62 Mo. 460; *Carroll v. Connet*, 2 J. J. Marsh. 195, 210; *Reed v. Gilbert*, 32 Me. 519; *Morrill v. Foster* (in which it is held that, since the law compelled the administrator to inventory all real and personal property, the inventory amounted to an admission that he had no knowledge whether the deceased had title or not), 33 N. H. 379, 386; *Little v. Birdwell*, 21

Tex. 597; *Grant v. Reese*, 94 N. C. 720; *Succession of Dean*, 33 La. An. 867; *Stewart's Appeal*, 110 Pa. St. 410, 422; *Reese's Appeal*, 116 Pa. St. 272; *Wheeler v. Bolton*, 92 Cal. 159 (holding that as the inventory would be inadmissible as evidence of any matter not required to be expressed therein, so the valuation of a tract of land as an entirety would not be even *prima facie* evidence of any particular portion of such tract, and it was error to take such entire valuation as a basis to ascertain the value of a part), 170.

² So, in Pennsylvania, an appraisalment approved by the court is held to be a matter of record possessing the effect of a judgment, and open to no collateral review, but conclusive upon the matter to which it relates: *Seller's Estate*, 82 Pa. St. 153.

³ *United States v. Tappan*, 11 Wheat. 419, 421, *et seq.*

appraisers appointed to value imported goods, when the collector suspected the invoice to be fraudulent, were bound to assume, as the basis of value, the wholesale price of the goods in the principal markets of the country from which they were imported at the time of importation.¹ And such market value was held to include the

price of shipment, and all previous cost at the place of ex-
[* 671] portation.² The result to be arrived at from these * adjudica-
tions seems to be, that the intrinsic value, or actual cost, of

an article is not its "true value" in a legal sense. This
would rather appear to consist in its *exchangeable* value.

It is so interpreted in a scientific sense: "Value . . .
has a distinct meaning only when it is used as * value in
exchange."³ It is tersely so expressed in the popular phrase that

"property is worth what it will bring." Appraisers are therefore
not concerned about the cost of the property submitted

to them for valuation, nor its intrinsic value, but only
in the amount of dollars and cents which it can be ex-
changed for. With regard to the further question as to

what method of exchange is to be contemplated by them
for the purpose of valuation, it must be remembered
that executors and administrators are not required to be

merchants or salesmen, and that the law requires the sale of prop-
erty of deceased persons, generally, to be at public outcry to the
highest bidder. The price which, in their opinion, property will
bring at such a sale, should then, it would seem, be their valuation
or appraisal.⁴

Appraisers are officers of the court appointing them; and since

price," but that the latter may be resorted
to in doubtful and suspicious cases as a
means of ascertaining the former, "for it
may be fairly presumed, in ordinary cases,
that the market value, and no more, and
no less, is generally given for a commod-
ity. The terms, however, are not identic-
al in their meaning, nor is the one
necessarily the true interpretation of the
other." *Alfonso v. United States*, 2 Sto.

421, 429.

³ 9 Chambers' Encycl., tit. "Value."

⁴ Such a valuation may imply an ad-
vantage to a widow or legatee entitled to
property amounting to a certain sum at
its appraised value, because they may
thus obtain property at less than its in-
trinsic value. But there seems to be no
injustice in such an advantage, and upon
any other basis of valuation injustice could
not with certainty be avoided.

Appraisers should value
the property at
the price which
they believe it
will bring at a
public sale to
the highest
bidder.

¹ *Stairs v. Peaslee*, 18 How. (U. S.)
521, 525.

² *Grinnell v. Lawrence*, 1 Blatchf. 346,
348. In the tariff act of 1799 it is pro-
vided, "that if any goods . . . shall not
be invoiced according to the *actual cost*
thereof," etc.; that in a prosecution for
the forfeiture other proof of the *actual*
and *real cost* of the goods shall not be ex-
cluded at the trial; and that the owners
and consignees shall specify, among other
things, the *prime cost* and charges, etc.
It was held that the terms "actual cost,"
"real cost," and "prime cost" were of
equivalent import, and mean the true and
real price paid for the goods upon a *bona*
fide and genuine purchase, although below
the ordinary market price: *United States*
v. 16 Packages of Goods, 2 Mas. 48, 52,
et seq.; and *Story, J.*, affirmed this view
in a later case, and held that the term
"actual cost" does not mean "market

price," but that the latter may be resorted
to in doubtful and suspicious cases as a
means of ascertaining the former, "for it
may be fairly presumed, in ordinary cases,
that the market value, and no more, and
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any other basis of valuation injustice could
not with certainty be avoided.

Fees of appraisers fixed by statute.

their fees are regulated by statute, they cannot receive compensation in excess thereof, unless the parties interested consent thereto.¹

¹ Matter of Harriott, 145 N. Y. 540, in which the court says that if a custom prevailed to pay larger fees in large estates, it should be discontinued. But though appointed by the court appraisers are held in Rhode Island not to be officers of the court, at least in the sense that they are bound by the decision of the court cutting down their fees as charged by

them; and that the administrator pays them at his peril, if it appear that their charges are excessive, the court saying that in that State the administrator need not pay such claims until passed on by the court, and seeming to place these claims on the same basis with those of creditors of the deceased, instead of costs: *Fairbanks v. Mann*, 19 R. I. 499.

[* 672]

* CHAPTER XXXIV.

DUTIES OF EXECUTORS AND ADMINISTRATORS IN TAKING CHARGE
OF THE ESTATE.

§ 321. **Duty of Administrators to take Estate into Possession.**—

It is the duty of executors and administrators to collect and take into possession all the goods and chattels that belonged to or were in the possession¹ of the late testator or intestate at the time of his death, so far as they have knowledge thereof,² and which they may recover by the exercise of reasonable diligence and prudence. For any wilful or negligent omission to do so,³ or to protect and preserve the same until they are delivered to those to whom they belong by the terms of the will or Statute of Distribution,⁴ they make themselves liable on their bond. It is for the administrator to determine what property belongs to the estate in his charge;⁵ and to bring the necessary suit at law or in equity to recover the same, without waiting for an order from the probate court to that effect.⁶

Executors and administrators must take into possession all goods and chattels of the deceased of which they have knowledge.

The administrator must determine at his peril what property belongs to the estate.

¹ The administrator may bring trover against a mere wrongdoer, or one having no better title than the intestate had, even if such party be the ultimate distributee: *Cullen v. O'Hara*, 4 Mich. 132. But in obtaining possession of property of the estate which is withheld, the administrator should resort to legal process; he has no right to break open doors and commit like acts of violence to secure possession: see *Mitchell v. Mitchell*, 54 Minn. 301.

² *Malinda and Sarah v. Gardner*, 24 Ala. 719, 725.

³ *Schoul. Ex. § 269*, citing *Page v. Tucker*, 54 Cal. 121.

⁴ Although specifically bequeathed to trustees who refuse to accept the trust: *Casperson v. Dunn*, 42 N. J. Eq. 87.

⁵ If he is administrator of two estates, he is presumed to retain what is due from one to the other, whether debt or unliquidated damages: *Draghon v. French*, 4

Port. 352; and after electing to which of the two estates personal property pertains, and manifesting such election by some certain, clear, and unambiguous act, he is estopped from denying that such property belongs to such estate: *McLane v. Spence*, 6 Ala. 894; s. c. 11 Ala. 172. The administrator must decide at his peril whether property belongs to the estate or not: *Pattison v. Coons*, 56 Mo. 169, 172.

⁶ *Post*, § 324; *Schoul. Ex. § 288*, citing *Jordan v. Pollock*, 14 Ga. 145, 155, and *Reid v. Butt*, 25 Ga. 28, 31. An exception to the right of the administrator to sue for property without order of the probate court is suggested in Georgia in the case of ejectment against heirs for real estate needed to pay debts: *Carruthers v. Bailey*, 3 Ga. 105, 111, which *dictum* is repeated in the case of *Jordan v. Pollock*, *supra*.

The duty of taking possession of trust funds which remain in the hands of a decedent at the time of his death, and settling his accounts in relation to the trust, devolves primarily upon his executor or administrator; the latter is not bound to proceed in the execution of the trust, but must preserve the fund for those entitled.¹ But the trust fund, not having been the property of the deceased, passes into the custody of the representative, who is a kind of bailee for the true owner.² But if an administrator claims and receives such trust fund in his capacity of executor or administrator, he will not, on removal from office, be heard to deny the right of his successor to its possession on the ground that he is accountable only to the *cestui que trust*.³

* Their authority is co-extensive with that of the law of [* 673] the State or country granting their letters; hence including all such property in his own State, their duty is to take into possession all the goods, rights, chattels, and credits of the late decedent found within and in some States as much as he may lawfully obtain in other States; this jurisdiction.⁴ And it has been held that, where a testator left property within another jurisdiction, it is the duty of the executor to take probate of the will there, or such other steps as may be necessary to enable him to collect such property.⁵ But this doctrine is greatly at variance with the views entertained in other States, in some of which courts go to the length of holding that an administrator cannot be made liable for property of the intestate actually received in another jurisdiction;⁶ and the case of *Schultz v. Pulver*,⁷ holding the administrator liable for not collecting assets in a foreign State, was decided by a court nearly evenly divided, some of the Senators expressing themselves very earnestly against the

¹ *Lucas v. Donaldson*, 117 Ind. 139, 141.

² As expressed by Bissell, J., in delivering the opinion of the Court of Appeals of Colorado in *Hummel v. Bank*, 2 Col. App. 571, 577. So it was held in *Kansas*, per *Gilkeson*, P. J., in *Harris v. Calvert*, 2 Kans. App. 749, 757: "If the property which was under the control of the testator as guardian come into the hands of the executor . . . he merely holds it for its preservation until the person for whose benefit it is held can establish his right thereto . . . in the proper forum." In *Anderson v. Northrop*, 30 Fla. 612, 635, however, it is held that an executor becomes clothed with the character of trustee over all personal property held in trust by his testatrix, and as such substituted trustee is amenable to an accounting therefor in equity; and see *Schenck*

v. Schenck, 16 N. J. Eq. 174, 182. It has already been mentioned that specific trust funds are not to be inventoried as property of the estate: *ante*, § 317; and that such funds do not constitute assets in the ordinary sense: *ante*, § 312.

³ *Estate of Glover & Shepley*, 127 Mo. 153, 161.

⁴ *Goodwin v. Jones*, 3 Mass. 514, 519.

⁵ *Helme v. Sanders*, 3 Hawks (N. C.), 563; *Williams v. Williams*, 79 N. C. 417, 421; *Schultz v. Pulver*, 11 Wend. 361. And if an administrator has obtained judgment in his own State, he may sue upon it in another State to which the judgment debtor has removed, since he sues then in his own right: *Hall v. Harrison*, 21 Mo. 227; and see on this point, *ante*, § 162.

⁶ See *ante*, §§ 157, 160, 308.

⁷ 11 Wendell, 361.

prevailing opinion.¹ Where foreign executors and administrators are permitted to maintain actions without new probate or appointment in the State *rei sitæ*, in consequence of which the Statute of Limitation is held to run from the date of the foreign probate or appointment,² it would seem necessary, to avoid the loss to the estate of assets so situated, that the executor or administrator should collect the same; but even in case where an administrator was made party in such State, it has been ruled that he is not liable for omitting to plead or defend.³ The appointment of a domestic administrator in such State will clearly defeat the right of any foreign executor or administrator to recover the assets;⁴ and it is self-evident that, in those States in which the authority of foreign executors and administrators is not recognized, the Statute of Limitations cannot be held to run before the appointment of a domestic administrator;⁵ the chief reason for holding administrators liable to collect such property does not, therefore, exist.

Statute of Limitation may run against the administrator where he can sue in a foreign State;

but not where the authority of a foreign administrator is denied.

§ 322. **Right of Administrator paramount to the Heir or Legatee.**—The executor or administrator stands as the representatives of those to whom the personal property of the deceased devolves, whether creditors, legatees, or distributees; and his actions in respect thereof, in the absence of fraud or collusion, is conclusive upon them.⁶ And, since the executor or administrator is entitled to the possession of all the personal property and chattels of the decedent, neither heirs nor legatees can prevent him from taking and collecting the same,⁷ and subjecting to sale a sufficient amount thereof to

¹ See dissenting opinions of Senators Edwards and Tracy, pp. 366 and 369.

² As in Alabama: *Bell v. Nichols*, 38 Ala. 678, 680; *Manly v. Turnipseed*, 37 Ala. 522, 530.

³ *Davis v. Smith*, 5 Ga. 274, 295. But the decision in this case is based upon the supposition that a Georgia administrator cannot bring suit as such in Alabama: *per Nisbet, J.*, pp. 295, 296.

⁴ *Broughton v. Bradley*, 34 Ala. 694; *Gibson v. Ponder*, 40 Ark. 195; *Sherman v. Page*, 85 N. Y. 123, 129.

⁵ "*Contra non valentem agere non currit præscriptio*": *Broom's Leg. Max.*, 903 (7th ed.); *Angell on Lim.*, § 55, and notes; *Gallup v. Gallup*, 11 Met. (Mass.) 445, 447; *Hobart v. Connecticut Turnpike Co.*, 15 Conn. 145, 147; *Lee v. Gause*, 2 Ired. L. 440.

⁶ See *ante*, § 199.

⁷ And if money due to a deceased

person be paid to the children or heirs who would be entitled on distribution, yet his administrator may recover it from them: *Eisenbise v. Eisenbise*, 4 Watts, 134. So an executor may recover in trover for property left in possession of the residuary legatee upon his promise to pay specific legacies, which for several years he neglected to do: *Carlisle v. Burley*, 3 Me. 250, 254; *Cook v. Burton*, 5 Bush, 64, 67. And he may sue in trover a legatee to whom he has himself delivered a note, which was an asset of the estate which the legatee had claimed as his own property and collected for his own use: *Harris v. Cable*, 104 Mich. 365. Until distribution the administrator is absolutely entitled to the possessions of all personal property, and any interference therewith, by any person, which has the effect of depriving him of the possession, is a conversion, and he is entitled to re-

pay the debts and legacies, unless they should furnish him with money to do so.¹ As a rule, only the executor or administrator can maintain actions in behalf of the estate,² or make distribution.³ And his duty and authority to collect the estate and take possession of the same is not affected by an injunction forbidding him from distributing the estate.⁴ So money payable by the terms of an act of the legislature, on a warrant "upon presentation thereof by the said T. H., or by his agent with the signature of said H. indorsed thereon," is payable to the administrator after his death.⁵ Since the heirs are

The personal representatives, not heirs or legatees, are the proper parties to recover money due the deceased;

so against a surviving partner.

neither necessary nor proper parties to an action⁶ to recover the indebtedness due to the intestate, it is a misjoinder if the suit is brought in the name of the administrator and heirs; if the administrator refuses or neglects to bring the action, the remedy of the heirs is on the administrator's bond.⁷ It is the duty of the administrator of a deceased partner to recover the share of such deceased partner in the firm of which he was a member; but the mere fact that the surviving partners have made final settlement of the partnership estate in the probate court does not invest the administrator of the deceased partner with the title to the partnership property.⁸

So, although in most States the real estate descends at once to the heirs or devisees free from the control of the personal representative,⁹ so that actions concerning the same must be maintained by or brought against the real, and not the personal representative,¹⁰ yet the right of the administrator to subject the real estate to sale for the payment of debts is paramount to the claims of the heir or devisee, or of his vendee or assignee.¹¹

*** § 323. Their Duty to prosecute and defend Actions [*675] pending by or against the Estate.**—It is their duty to

Executors and administrators should act for

prosecute and defend all actions commenced by and against the testator or intestate which survive to or against the personal representative.¹² There may also

cover therefor without proving any debts to satisfy which the property is necessary: *Horton v. Jack*, 115 Cal. 29, 34.

¹ Succession of Boyd, 12 La. An. 611.

² See authorities *ante*, § 200, on the necessity of administration; also *post*, § 293, as to who should sue for injuries to the decedent's property rights, &c.

³ *Post*, § 566, where the effect of voluntary distribution is discussed.

⁴ *McCutchen v. McCutchen*, 8 Port. 151.

⁵ *Hicky v. Dallmeyer*, 44 Mo. 237.

⁶ *McCustian v. Ramsey*, 33 Ark. 141. *Ante*, § 200.

⁷ *Hellman v. Wellenkamp*, 71 Mo. 407.

⁸ *Tiemann v. Molliter*, 71 Mo. 512. This subject is discussed in connection with the estates of deceased partners, *ante*, §§ 123 *et seq.*

⁹ *Post*, §§ 338, 344.

¹⁰ *Ante*, § 293.

¹¹ *Post*, § 471.

¹² As to what actions survive, see *ante*, §§ 291 *et seq.* As to the revival of judgments obtained against the decedent in his lifetime, see *post*, § 369, p. * 777.

be judgment after the death of a party if verdict has been rendered before in actions which do not survive.¹ Thus, as a matter of practice at common law, as well as under statutes in the several States, judgment will be entered on the verdict, on motion, as of a preceding day or term of the court, whenever an action, continued or postponed for the purpose of obtaining a disposition which may relieve a dissatisfied party from a verdict, would otherwise fail by the death of a party to it.² Where the testator or intestate died before final judgment, the action, at common law, abated; but by the common law Procedure Act,³ as well as by statutes in the several American States,⁴ the action may be continued in the name of the personal representative by his voluntary appearance, or the service upon him by the other party of a *scire facias*, or notice.⁵ It has also been

deceased in all actions; and may take judgment on a verdict rendered before his death.

¹ Horner v. Nicholson, 56 Mo. 220, 226.

² Currier v. Lowell, 16 Pick. 170, 173; Kelley v. Riley, 106 Mass. 339, 341; and where the rights of third parties are not affected, a judgment erroneously entered after the death of the plaintiff will be vacated, and judgment rendered on the verdict in the name of the administrator, on suggestion of the death of the party: Stickney v. Davis, 17 Pick. 169, 171. So the record may be amended *nunc pro tunc* to show that it was really rendered in favor of the personal representative instead of the party, after his death, and without notice to the defendant; and where such judgment is rendered by a foreign court of general jurisdiction, and the transcript is properly certified under the act of Congress, it must be presumed that the allowance of such amendments appertained to the jurisdiction of the court: Gunn v. Howell, 35 Ala. 144, 161, *et seq.* Also Goddard v. Bolster, 6 Me. 427; Brown v. Wheeler, 18 Conn. 199, 207, *et seq.*; Campbell v. Mesier, 4 Johns. Ch. 334, 342; Lewis v. Soper, 44 Me. 72.

³ 15 & 16 Vict. c. 76, § 136.

⁴ See *ante*, § 292, and the various statutes.

⁵ In Vermont this must be done at the next term: Tyler v. Whitney, 8 Vt. 26. In New Hampshire the administrator, in order to continue the action in favor of his intestate, must indorse the writ or prosecute the action within two terms of the court: Merrill v. Woodbury, 61 N. H. 504. In Massachusetts there is no limita-

tion: Bank of Brighton v. Russell, 13 Allen, 221. In Maine the *scire facias* to renew must be had within four years: McLellan v. Lunt, 14 Me. 254. In Connecticut it is held that the administrator cannot, as a matter of right, enter into a case after the next term after the plaintiff's death, unless he show good reason for the delay: Johnson v. New York, &c., 56 Conn. 172. In Tennessee the right to revive continues until after the whole of the second term after the entry of the death of either party: Crouch v. Happer, 5 Lea, 171. In Oregon one year is given: Mitchell v. Schoonover, 16 Oreg. 211. In Mississippi the representative of a deceased litigant has until the second term after a suggestion of death to come in and make himself a party; but if made before, such order is not void, but the remedy is by appeal: American Case Co. v. Shaughnessy, 59 Miss. 398; in New York, six years: Coit v. Campbell, 82 N. Y. 509; in Alabama, eighteen months from the death of decedent or removal of former representative no matter when suggestion is made: Brown v. Tutwiler, 61 Ala. 372. In District of Columbia a discontinuance is provided for only in case there is either no appearance by the executor or administrator, or no proceeding at all by either party before the tenth day of the second term after the suggestion of death: Keyser v. Fendall, 5 Mackey, 47, 63. In Missouri the representative of the deceased party must appear or be served with notice before the close of the third term of court after the suggestion of such

held, generally, that in courts of plenary jurisdiction a judgment rendered for or against a party after his death, if the action is regularly begun in his lifetime, is erroneous, but not for that reason void;¹ but a judgment in a suit begun and prosecuted against a dead man is void.² Where the party dies *after final [* 676]

Administrator may have execution on a judgment recovered by his intestate;

and in America may generally obtain same remedy as the deceased could have obtained.

Administrator cannot sue upon a judgment obtained by an administrator in another State; but otherwise of executors.

Duty of administrator *d. b. n.* as to pending actions.

judgment obtained by him, and before execution, the personal representative may get execution by reviving the judgment, or execution by *elegit*, or, under the statute of 32 Hen. VIII. c. 5, *scire facias* for a new *elegit*.³ In America, an executor or administrator may generally obtain the same remedy upon a judgment in favor of the testator or intestate during his lifetime as the deceased could have done.⁴ But an administrator in one State cannot sue upon a judgment obtained by an administrator of the same intestate in another State, for want of privity between the administrators.⁵ But otherwise of co-executors in different States of the same will, who are said to be in privity as to the creditors of the testator, bearing to them the same responsibilities as if there were but one executor.⁶ It is the duty of an administrator *de bonis non* to assume the defence of an action against his predecessor on a contract of the deceased,⁷ and to prosecute *suits [* 677] commenced by his predecessor.⁸

party's death: *Rutherford v. Williams*, 62 Mo. 252.

¹ *Mosely v. Manufacturing Co.*, 4 Okla. 492, citing several cases to that effect, and *Freeman on Judgm.*; *Coleman v. McNulty*, 16 Mo. 173.

² *Williams v. Hudson*, 93 Mo. 524.

³ *Wms. Ex.* [898]. The cause of action is merged in the judgment, which passes as assets to the executor or admin-

istrator: *Blake v. Griswold*, 104 N. Y. 613; *Akers v. Akers*, 16 Lea, 7; *Remmler v. Shenuit*, 15 Mo. App. 192, 196; *Lewis v. St. Louis Railroad*, 59 Mo. 495, 503. A reversal of the judgment would, of course, restore the suit to its original character, and the suit be subject to abatement as though no judgment had ever been rendered: *Akers v. Akers*, *supra*. To similar effect, *Kelsey v. Jewett*,

⁴ In New York it is held that an action by an executor or administrator upon a judgment rendered in favor of his testator or intestate during his lifetime is not "between the same parties" within the meaning of the code, and may therefore be brought without leave of court: *Smith v. Britton*, 45 How. Pr. 428. In Missouri an administrator may, upon a judgment recovered by the decedent, have execution in his own name: *Simmons v. Heman*, 17 Mo. App. 444. In North Dakota the execution may issue in the name of the deceased judgment creditor without formally reviving the judgment: *Roller Mills v. Ward*, 6 N. D. 317.

⁵ *Ante*, § 158; *Talmage v. Chapel*, 16 Mass. 71, 73; *Rosenthal v. Renick*, 44 Ill. 202, 207.

⁶ *Hill v. Tucker*, 13 How. (U. S.) 458, 466, *et seq.*; *Goodall v. Tucker*, *Ib.* 469; *ante*, § 158.

⁷ *National Bank v. Stanton*, 116 Mass. 435, 438; *Owen v. Blanchard*, 2 Cr. C. C. 418. So in Arkansas, where the suit abates because of the revocation of letters, it may be revived on the reinstatement of the administrator: *Hill v. Bryant*, 61 Ark. 203.

⁸ *Brown v. Pendergast*, 7 Allen, 427.

§ 324. **Actions to recover or defend the Estate.** — Executors and administrators are bound to prosecute all actions that may become necessary to recover debts owing to the estate, or property of any kind, and to protect the interest of the estate whenever the same is jeopardized. To this end they must act not only with honest intent and perfect integrity, but also with promptness and diligence, and reasonable prudence and foresight. They are required to investigate the circumstances attending the affairs of the estate, lest by indifference and indolence its debtors escape or become insolvent, and the estate suffer. If they are remiss in their duty in this respect, they become liable personally, and on their bond, for whatever loss may ensue.¹ Thus, if an administrator takes a bond of indemnity from persons who wrongfully withhold the

It is the duty of executors and administrators to bring all actions necessary to recover debts or property of any kind due the estate;

and they are liable for all loss to the estate by their remissness.

property of the estate, and neglects to seek redress against [* 678] the wrongdoers, he is guilty * of collusion with them, and liable for the amount lost to the estate by his bad faith.² If a testator is surety for a debt, and his executors, by fraud or negligence, fail to make the debt out of the principal, they make themselves liable to the beneficiaries of the estate for the loss arising in consequence.³ Where one who is both obligee in a bond and admin-

¹ *Schultz v. Pulver*, 3 Pa. 182 (this case held an administrator liable for neglecting to bring suit against a debtor living in another State; it was affirmed in the Court of Appeals, 11 Wend. 363; see *ante*, § 321); *Brazeale v. Brazeale*, 9 Ala. 491, 496; *Brandon v. Judah*, 7 Ind. 545; *Scarborough v. Watkins*, 9 B. Mon. 540, holding that indulgence for two years constitutes culpable negligence; *Cooley v. Vansyckle*, 14 N. J. Eq. 496; *Long's Estate*, 6 Watts, 46; *Charlton's Appeal*, 34 Pa. St. 473; *Shaffer's Appeal*, 46 Pa. St. 131; *Cartwright v. Cartwright*, 4 Hayw. 134; *Southall v. Taylor*, 14 Gratt. 269, 278, *et seq.*; *Perry v. Wooton*, 5 Humph. 524, holding the executor liable for indulging a debtor two years, although there was unbounded confidence in his solvency; *Oglesby v. Howard*, 43 Ala. 144; *Booker v. Armstrong*, 93 Mo. 49, 59; *Moore's Estate*, Tuck. 41; *Banks v. Machen*, 40 Miss. 256, 260; *Stark v. Hunton*, 3 N. J. Eq. 300; *Sanderson's*

Estate, 74 Cal. 199; *Gates v. Whetstone*, 8 S. C. 244, 248; *Harrington v. Keteltas*, 92 N. Y. 40, 45; *Munden v. Bailey*, 70 Ala. 63, 71; *State v. Gregory*, 88 Ind. 110; *Wilson v. Lineberger*, 88 N. C. 416, 422; *Shepard v. Shepard*, 19 Fla. 300. In the case of *James v. Wingo*, 7 Lea, 148, 151, a delay of eight months was held not to constitute *laches*; and in *Missouri*, by a nearly evenly divided court, that a delay of eleven months was excusable, where the debtor was, during the whole time, insolvent, but was considered solvent, had financial credit, and would probably have paid the debt, if pressed by the executor: *Powell v. Hust*, 108 Mo. 507. The administrator cannot be charged for a failure to collect a debt unless it came to his knowledge as such: *Myers v. Myers*, 98 Mo. 262.

² *Holmes v. Bridgman*, 37 Vt. 28, 34, *et seq.*

³ *Tuggle v. Gilbert*, 1 Duv. 340.

34 Hun, 11, 14. Where the judgment was for the defendant, the death of the plaintiff pending the appeal abates the action, and there can be no further proceeding

unless the cause of action survives: *Woehrlin v. Schaffer*, 17 Mo. App. 442; *Corbett v. Twenty-third Street R.*, 114 N. Y. 579.

istrator of the surety therein, applies the assets of the surety's estate to the payment of the bond, and neglects to call on the principal to reimburse the estate until it is too late, he is guilty of gross negligence as administrator, and makes himself liable.¹ So a married woman, becoming administratrix of her husband's estate, is liable for property applied to the interest of her separate estate during his lifetime, not because it is her debt, but because she neglected her duty as a faithful administratrix to see that the estate in her charge as such should be reimbursed out of her separate estate.² And where an administrator permits an attorney to retain in his hands for several years money of the estate collected by him, without any effort to collect it from the attorney, he is chargeable with such money.³ So he is liable for the loss when he employs an unsuitable or incompetent person to collect the debts of the estate, which are lost in consequence;⁴ and so where there is no actual necessity for such employment and loss results.⁵ He should so plead in actions by creditors as to protect the rights of all creditors of the estate, of whose demands he has knowledge,⁶ and it is his plain duty to protect the estate, and interpose every legal defence in his power to prevent encroachment upon it;⁷ so it is also his duty to plead the special Statute of Limitation or Statute of Non-claim,⁸ but not, in all the States, the general Statute of Limitations.⁹ That, in order to obtain credit in his accounting for debts which are not worth their face, the onus is on the administrator, will appear in connection with the subject of accounting.¹⁰

But they are not bound to attempt the collection of bad or doubtful debts, or to prosecute claims of a doubtful character,¹¹ at least

¹ Chambers's Appeal, 11 Pa. St. 436, 442. But it is not the duty of administrators to pursue an unusual or hazardous course in subjecting co-sureties to contribution, and they are not therefore liable, if, in not pursuing such a course, the estate is made to lose the whole amount.

² Gardner v. Gardner, 7 Pa. 112, 117.

³ Abercrombie v. Skinner, 42 Ala. 633, 635. So if he leaves the money of the succession in the hands of a commission merchant: Succession of Stone, 31 La. An. 311, 312.

⁴ Wakeman v. Hazleton, 3 Barb. Ch. 148; Earle v. Earle, 93 N. Y. 104, 112. In considering whether the employment of an attorney who, after collecting the estate's money, becomes insolvent, was negligence on the part of the executor, it seems that stress is laid on the fact that

the same attorney had been employed by the deceased before his death: Webb's Estate, 165 Pa. St. 330.

⁵ McClosky v. Gleason, 56 Vt. 264, 272, *et seq.*, and cases cited.

⁶ Davis v. Smith, 5 Ga. 274; Hutchcraft v. Tilford, 5 Dana, 353, 360.

⁷ Crotty v. Eagle, 35 W. Va. 143, 154.

⁸ Post, § 400.

⁹ Post, § 401.

¹⁰ Post, § 522.

¹¹ Torrence v. Davidson, 92 N. C. 437; Anderson v. Piercy, 20 W. Va. 282, 327; Mitchell v. Trotter, 7 Gratt. 136; Succession of Pool, 14 La. An. 677; Cooke v. Cooke, 29 Md. 538, 551; Bowen v. Montgomery, 48 Ala. 353; Smith v. Colamer, 2 Dem. 147; O'Conner v. Gifford, 117 N. Y. 275. They are not liable, if they act under legal advice, in good faith, forbearing to bring an action which is likely to break up the debtor's business

not unless the parties demanding such prosecution [* 679] will indemnify the estate or the * executor or administrator against the costs.¹ Nor are they liable for a mistake of the law, whereby proceedings in collecting a debt are delayed until the debtor becomes insolvent, if they act in good faith and upon advice of eminent counsel;² nor for failing to bring suit for property until the Statute of Limitation has barred recovery, in a case where both the law and the facts are doubtful, if they act in good faith and without fraud, wilful default, or gross negligence.³ So a due regard to the ultimate security of the debt may require him to indulge the debtor.⁴ And although they make themselves liable by indulging a debtor, yet the legatees, upon whose advice and request the indulgence is granted will not be heard to complain.⁵ Nor are they obliged to maintain an unjust claim in favor of the estate, or to prevent a suit from being fairly tried by insisting on technical advantages;⁶ nor to defend against a just claim; and he may bind the estate by consenting to a judgment, if there is no substantial ground for defence.⁷ But in Indiana the administrator cannot confess judgment

Not bound to prosecute claims when recovery is doubtful; nor liable for a mistake of law;

nor bound to maintain an unjust, nor defend against a just claim.

without producing any fruits: *Neff's Appeal*, 57 Pa. St. 91, 96, *et seq.*; and see *Tanner v. Bennett*, 33 Gratt. 251.

¹ *Hepburn v. Hepburn*, 2 Bradf. 74; *Griswold v. Chandler*, 5 N. H. 492, 494; *Sanborn v. Goodhue*, 28 N. H. 48, 58; *Utley v. Rawlins*, 2 Dev. & B. Eq. 438. But in such case the executor must at least ask for indemnity: *Harrington v. Keteltas*, 92 N. Y. 40, 45.

² *King v. Morrison*, 1 Pa. 188, 196, based upon the principle that executors and administrators, like ordinary trustees, acting in good faith, and without any wilful default or fraud, will not be responsible for the loss which may arise: *Thompson v. Brown*, 4 John. (N. Y.) Ch. 619, 628.

³ *Thomas v. White*, 3 Lit. 177, 184, *et seq.*

⁴ See *Woerner on Guardianship*, § 55, p. 182.

⁵ *Perry v. Wooton*, 5 Humph. 524. Same principle: *Foster v. Stone*, 67 Vt. 336 (holding a beneficiary estopped by his acquiescence from charging an administrator for an unauthorized act).

⁶ *McGuire v. Rogers*, 74 Md. 192. But an executor is not bound to volunteer disclosures which might injure the estate: *Maddox v. Apperson*, 14 Lea, 596, 614.

⁷ *Shelden v. Warner*, 59 Mich. 444, 449. This case was decided upon the concurrence of three judges. *Morse, J.*, in a dissenting opinion, strongly condemns the doctrine that an administrator may admit or confess the liability or indebtedness of the deceased: pp. 453, 454, citing *Clark v. Davis*, 32 Mich. 154 (holding, p. 157, that administrators cannot bind the estate by admitting claims presented for allowance), and *Barry v. Davis*, 33 Mich. 515 (holding that the administrator cannot bind the estate by a stipulation to submit a claim against it for decision in connection with one having a claim against it and another person). But in the recent case of *Johanson v. Hoff*, 63 Minn. 296, 299, the court say: "Probably an executor or administrator might make admissions in a pending suit to which he was a party as such, which would be binding, even to the extent of consenting to a judgment especially in the absence of fraud." Judgment against the estate by default is, in the absence of fraud, binding on the other creditors and legatees: *Morris v. Murphy*, 95 Ga. 307, 313; as well as on subsequent administrators *de bonis non*: *Wyche v. Ross*, 119 N. C. 174.

Power to confess judgment, or permit default.

ment without leave of court;¹ and in an old North Carolina case it was held that a consent judgment against an executor is not conclusive against a legatee.² So in West Virginia an administrator cannot dispense with proof of a demand against the estate.³ The extent to which an executor or administrator may bind the estate by his admissions and promises is discussed more fully hereafter.⁴

§ 325. **Summary Proceedings to recover Assets.**—In addition to the ordinary remedies at law and in equity by means of which executors and administrators may recover the property of an estate, a summary proceeding in the probate court is provided by statute in many States, enabling them, or heirs, legatees, or other parties interested in the estate, to make discovery, and in some States to compel the production and delivery of property suspected to be concealed or embezzled, in a more speedy and less expensive mode than by the ordinary remedies of bill of discovery, detinue, trover, replevin, or other action at law.⁵ In California,⁶ Idaho,⁷

Power to cite parties for concealing or embezzling assets.

* Maine,⁸ Maryland,⁹ Massachusetts,¹⁰ Michi- [* 680]
gan,¹¹ Minnesota,¹² Montana,¹³ Nebraska,¹⁴ Ne-
vada,¹⁵ New Hampshire,¹⁶ New York,¹⁷ Oregon,¹⁸ Ohio,¹⁹

¹ *Hanna v. Dunham*, 10 Ind. App. 611.

² *Lamb v. Gatlin*, 2 Dev. & B. Eq. 37.

³ *Crotty v. Eagle*, 35 W. Va. 143.

⁴ *Post*, § 381.

⁵ "The remedy was cumulative to these, and the only change it intended to introduce from an ordinary trial involving the ownership of property, was to enable the court to compel the person charged with having the property to discover on oath whether he had property in possession"; *per Walker, J.*, in *Wade v. Pritchard*, 69 Ill. 279. See also *Martin v. Martin*, 170 Ill. 18, 27.

⁶ Code Civ. Proc. §§ 1459 *et seq.*

⁷ Rev. St. Id. 1887, §§ 5432-5434. The statute makes the order "primary evidence" in an action by the executor to recover such property.

⁸ *O'Dee v. McCrate*, 7 Me. 467 (holding that the lapse of thirty years since the transaction is no bar to this remedy).

⁹ *Cannon v. Crook*, 32 Md. 482; *Hig-nutt v. Cranor*, 62 Md. 216, 219.

¹⁰ The party may have the assistance of counsel in such proceeding: *Martin v. Clapp*, 99 Mass. 470.

¹¹ *Per Christiancy, J.*, in *Wales v. Newbould*, 9 Mich. 45, 87.

¹² Gen. St. 1891, §§ 5712, 5713.

¹³ Prob. Code, St. 1895, § 2572, providing that a finding against the respondent shall

be *prima facie* evidence in an action by the representative to recover same; and that the recovery must be double the amount.

¹⁴ Cons. St. 1893, §§ 1262-1264.

¹⁵ Gen. St. 1888, § 2786.

¹⁶ The object is a discovery, to the end that measures may be taken in the proper court for its recovery; the probate court is not such a court: *Dodge v. McNeil*, 62 N. H. 168.

¹⁷ Code Civ. Pr., §§ 2706 *et seq.* In this State a verified written answer claiming ownership ousts the surrogate of jurisdiction; but a claim to a portion of the property sought to be recovered will only *pro tanto* bar the petitioner's inquiry: *Public Administrator v. Elias*, 4 Dem. 139. In a proceeding of this kind, all the administrators should join, and when this is not done the proceedings should be dismissed: *Matter of Slingerland*, 36 Hun, 575.

¹⁸ Gen. L. 1887, §§ 1121 *et seq.* There is no provision for compelling the delivery of the property so discovered upon the order of the probate court, the remedy therefor being in a court of general jurisdiction: *Gardner v. Gillihan*, 20 Ore. 598, 601.

¹⁹ Rev. St. § 6053. This does not authorize an action against an executor or administrator: *Meinzer v. Bevington*, 42 Oh. St. 325.

Rhode Island,¹ Vermont,² Washington,³ and Wisconsin,⁴ power is given to probate courts to cite parties suspected of having concealed, embezzled, or converted any goods, chattels, or money, or having in their possession or knowledge any evidences of debt or right of the deceased, and compel such persons to answer under oath. The proceeding in such case is held to be plenary, the object being to perpetuate the evidence against the party charged, to be used upon any action to be brought thereon, and the testimony must be reduced to writing.⁵ In Maryland it is held that either party may require an issue or issues of law to be directed to a court of law.⁶ In many of these States, a like proceeding is authorized against persons to whom the executor or administrator intrusted property of the estate, and who wrongfully withhold them. The appearance of such parties, and their answers to the interrogatories propounded to them, may be enforced by attachment and imprisonment. But in Missouri, Illinois, Utah,⁷ North Dakota,⁸ South Dakota,⁹ Wyoming,¹⁰ and perhaps other States, the power of the probate court extends further: the party found guilty of concealing or embezzling any property belonging to an estate may be compelled by attachment and imprisonment to produce the [* 681] same, and deliver it to the party *entitled.

Or persons withholding property from executors or administrators.

Power to compel delivery of such property.

Not intended to try title.

Hence it is not the proper remedy to enforce the payment of a debt or liability for the conversion of property of the estate, or to try contested rights and title to property between the executor and others.¹¹ In Missouri it was once held

¹ Publ. St. 1882, ch. 185, §§ 18, 19.

² St. 1894, § 2470.

³ Code, Wash. 1896, §§ 5446, 5447.

⁴ Ann. St. 1889, §§ 3825, 3826. The probate court can make no order in relation to the property, unless the respondent admits that he has property of the estate which he is willing shall be held for its benefit; if the court finds that it cannot determine whether such property belongs to the estate, the proceeding should be dismissed: *Saddington v. Hewitt*, 70 Wis. 240; the equitable remedy is not excluded by the statute: *Meyer v. Garthwaite*, 92 Wis. 571.

⁵ See *Meyer v. Garthwaite*, *supra*; *Saddington v. Hewitt*, *supra*; *Gardner v. Gillihan*, *supra*; *Dodge v. McNeil*, *supra*: and generally the above-cited statutes.

⁶ *Cannon v. Crook*, 32 Md. 482.

⁷ Rev. St. Utah, 1898, §§ 3927, 3928.

⁸ Code N. D. 1895, § 6379.

⁹ The statute making the order to deliver the assets to the administrator *prima*

facie evidence of the administrator's right to recover in a subsequent action for the assets, is one conferring reasonable probate powers, and is constitutional; *Bright v. Ecker*, 9 S. D. 449.

¹⁰ Rev. St. 1887, §§ 2045-2047. Trial by jury is provided for.

¹¹ *Gibson v. Cook*, 62 Md. 256, 261; *Gardner v. Gillihan*, 20 Oreg. 598; *Dinsmoor v. Bressler*, 164 Ill. 211, 221; "The particular provisions in question invest the probate courts with authority to compel the attendance of persons charged, in the manner described, either with concealing or embezzling any such effects, force them to make discovery on oath, and, if found unlawfully detaining any such effects, order their delivery to the executor or administrator entitled to receive them, and enforce obedience to the order by attachment. . . . It was a matter of sufficient importance, in point of mischief, to have attracted the attention of the legislature, without supposing

that this remedy applies to cases where the property is openly held under claim of title, the probate court determining the question of title;¹ but in "explaining" this decision in a subsequent trial, it seems to have been held (on a rehearing) that if the defendant's appropriation is not fraudulent, but made in good faith, under claim of title, he should not be compelled to surrender the property. If it is a mere suit to settle the respective rights of the parties to the property, they should resort for relief to jurisdictions other than the probate court.² This view is strongly emphasized by the Court of Appeals, in an opinion by Biggs, J.,³ wherein he adopts the language of Judge Scott in the case of *Moss v. Sandefur*, above quoted,⁴ and is certainly more in accord with the spirit of the law. But in the year 1881 the Statute of Missouri was amended as it now stands, giving jurisdiction to probate courts not only in cases of concealment and embezzlement, but also in cases where the property is "otherwise wrongfully withheld."⁵ But this amendment was recently held by the Court of Appeals not to confer on probate courts jurisdiction to determine controverted questions of title, thus leaving the law substantially as prior to the amendment.⁶

any regard whatsoever was had to the very questionable policy of turning into probate courts, from their accustomed channel, a great stream of litigation touching contested rights to personal chattels, which these courts, from their constitution, are so little calculated to sustain": *per* Scott, J., in *Moss v. Sandefur*, 15 Ark. 381, 386, *et seq.*, affirmed in *Clark v. Shelton*, 16 Ark. 474, 482. "We fail to find anywhere in our constitution or statute any language which gives to a superior [probate] court, in a summary proceeding of the kind invoked here, the right to adjudicate the title to property": *Ex parte Casey*, 71 Cal. 269, 272, holding a refusal, by one claiming title, to deliver up the property to the administrator, under an order of court, not to be a contempt. In North Dakota the party charged may, as against an order to deliver, interpose an affidavit claiming the right of possession: Code, *supra*.

¹ *Eans v. Eans*, 79 Mo. 53, 68.

² *Gordon v. Eans*, 97 Mo. 587. In a separate opinion, Brace, J., dissents from so much of the opinion as sanctions the doctrine that the probate court has jurisdiction to determine the right between the administrator and the defendant to property openly held and claimed under color of right: p. 605. Barclay, J., sus-

tained the jurisdiction of the probate court on the ground of an amendment to the statute after the beginning of the action, extending its operation to property otherwise *wrongfully withheld*; p. 614. Sherwood, J., states: "Our former decisions were plainly wrong, and the only way I know of to correct that wrong is to come out and plainly confess the error:" p. 616.

³ *Stuart's Case*, 67 Mo. App. 61; see to same effect *Hoehn v. Struttman*, 71 Mo. App. 399, 405.

⁴ 15 Ark. 381, 386.

⁵ See opinion of Barclay, J., *supra*, note. See as to the constitutionality of this statute, *infra*.

⁶ The court, *per* Biggs, J., after discussing the cases, arrives at the following conclusion: "We think it reasonably clear that the legislature intended by the amendment to confer on probate courts the authority to inquire into the *bona fides* of defendant's claim of title and if found to be merely colorable to compel a surrender of the property. It is true that the jurisdiction extended that far under the old statute as construed by the Supreme Court in the *Eans* case. But prior to the decision in that case it was a question whether one who openly asserted title could under any circumstances be com-

This summary remedy is not applicable unless the identical property belonging to the estate, and being identified, is still in the possession or under the control of the respondent.¹ If the affidavit alleging concealment or embezzlement do not affirmatively show that the party making it has an interest in the estate, it is defective, and gives the court no jurisdiction of the person complained of; and where the defendant in such case appeals to the Circuit Court, in which there is a trial *de novo*, it is too late to file an amended affidavit by the administrator, who has not before appealed.² But the affidavit may be amended in the probate court.³ In Ohio and Kansas, although the probate court has power to compel the delivery of the property to the executor or administrator, as in Illinois, Missouri, and Arkansas, the testimony of the party examined, as well as that of any other witness, must be reduced to writing; and it is held in Ohio, that unless this is done, and the record show that the defendant admitted the truth of the allegation against him,

Citation must be on motion of some person interested.

Answer must be in writing.

[* 682] the judgment of * the probate court is void.⁴

But in other States the testimony of the witnesses, other than that of the interrogatories to the party accused, which must be in writing, and his answers thereto, which must also be in writing, and which constitute the issues to be tried by the jury, or by the court if no jury is desired, may be *viva voce*. Either party may introduce such evidence as is pertinent to the issue, by any witnesses cognizant of the facts.⁵ The judg-

Issues tried by hearing evidence.

pelled under this statute to deliver it up, and in order to settle the matter the amendment was made : " Hoehn v. Struttmann, 71 Mo. App. 399, 406.

¹ Hook v. Dyer, 47 Mo. 214, 219; Williams v. Conley, 20 Ill. 643; Dameron v. Dameron, 19 Mo. 317; Howell v. Howell, 37 Mo. 124, 137; Stewart v. Glenn, 58 Mo. 481. In Illinois the statute was construed as including property of the estate coming into the hands of the party charged since the death of the decedent; such as money collected on securities of the deceased when the securities themselves were taken during his lifetime: Blair v. Sennett, 134 Ill. 78; but in a later case the court said that the "doctrine of that case should be limited to the facts thereof, and its language should be qualified so as to conform to such facts;" and it was held that the statute was inapplicable to compel the production of proceeds of collections made by an attorney for the administrator: Dinsmoor v. Bressler, 164 Ill. 211.

² Shaw v. Groomer, 60 Mo. 495. But if the defendant appear to the citation without objecting to the affidavit, he waives the defect and cannot object in the appellate court: Wade v. Pritchard, 69 Ill. 286.

³ Blair v. Sennett, 134 Ill. 78.

⁴ The law authorizing a judgment without the right of trial by jury, as in Ohio under this proceeding, is held unconstitutional: Howell v. Fry, 19 Ohio St. 556, 559. "A statute so summary in its nature, providing for a judgment without any pleadings, or due process of law, or the right of trial by jury, ought not by construction to be extended beyond its plain and obvious terms": Meinzer v. Berington, 42 Oh. St. 325, 328.

⁵ Wade v. Pritchard, 69 Ill. 280. But in Missouri, after the preliminary examination of the person cited, all subsequent proceedings must take place at the instance of the executor or administrator; the distributees have no such right: Brotherton v. Spence, 52 Mo. App. 664;

Judgment is final, and appeal may be taken;

de novo.¹

and may be pleaded as *res judicata*;

unless there be want of jurisdiction.

ment rendered by the probate court upon the verdict, or the trial by the court, is final, so that appeal may be taken thereon to the Circuit Court, where the case is tried

No appeal, however, lies from an intermediate question before judgment in the probate court.² It seems that a discharge of the defendant upon such proceeding will constitute a bar to a recovery in another action in respect to the same property;³ but where the judgment is upon a matter in which the probate court has no jurisdiction, as in Arkansas, if the party accused asserts title in himself, the judgment cannot be pleaded in bar to a proceeding in chancery upon the same allegations or charges.⁴ In Missouri, this proceeding is now made applicable against executors and administrators, though formerly held otherwise;⁵ and on conviction the court will compel them to properly inventory the effects or money in their possession.⁶

The constitutionality of these provisions has been assailed on several grounds. It was held in California, that such statute is not penal in its nature, but remedial, though providing redress in the

Summary proceedings held constitutional.

way of imprisonment and damages, as a means of enforcing the civil remedy, and not in conflict with the constitutional provision that no person shall be compelled, in a criminal case, to testify against himself, nor with the right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches.⁷ In

Trial by jury.

Ohio the statute authorizing a judgment in such case without the right of trial by jury is held unconstitutional.⁸ So it is said in Illinois, that if these provisions "could be used to settle contested rights to property as between executors and administrators on the one side and third persons on the other, they would operate as an infringement on the constitutional right of trial by jury, as they contain no provisions for a jury trial."⁹ Whether such a pro-

hence, where the proceeding is against the administrator it is necessarily limited to his own examination under oath, unless a further trial is had by his consent: *Stuart's Estate*, 67 Mo. App. 61, 65.

¹ *Ruff v. Doyle*, 56 Mo. 301; *Blair v. Sennett*, 134 Ill. 78, 84; *Martin v. Martin*, 170 Ill. 18, 26.

² *Kimball v. Kimball*, 19 Vt. 579. A refusal to dismiss on the ground that the petition is defective for want of parties, affects a substantial right, and the order is appealable: *Matter of Slingerland*, 36 Hun, 575. But an order compelling the accused to submit to oral examination, where such is unauthorized, is not appealable: *Palmer v. Circuit Judge*, 90 Mich. 1.

³ *Wade v. Pritchard*, *supra*.

⁴ *Clark v. Shelton*, 16 Ark. 474.

⁵ *Powers v. Blakey*, 16 Mo. 437.

⁶ *Rev. St.* 1889, § 78. And see *Stuart's Estate*, 67 Mo. App. 61. But in Ohio it is held that neither creditors, devisees, legatees, heirs, nor any other person can institute such proceeding against the executor or administrator: *Meinzer v. Bevington*, 42 Oh. St. 325.

⁷ *Levy v. Superior Court*, 105 Cal. 600, relying on former California cases.

⁸ *Howell v. Fry*, 19 Oh. St. 556, 559.

⁹ *Dinsmoor v. Bressler*, 164 Ill. 211, 222. This language was approved in *Martin v. Martin*, 170 Ill. 18, 26.

vision, authorizing a probate court to compel, by attachment, if necessary, the appearance of any person against whom it is alleged that he has "concealed or embezzled, or is otherwise wrongfully withholding" any goods, moneys, &c.,¹ and on conviction to "compel the delivery of the property detained by attachment of his person for contempt," and directing such court to "commit him to jail until he comply with the order of the court," as is provided by the Missouri statute,² is or is not obnoxious to that provision of the Constitution which inhibits imprisonment for debt³ does not appear to have been directly decided. Two cases involving the validity of these provisions were decided after the law in its present shape went into effect, but both had originated before that time. In *Smith v. Gilmore*⁴ the jurisdiction of the probate court was denied; but in *Gordon v. Eans*⁵ the validity of the law was taken for granted, and the case decided under the statute as amended after the inception of the suit, on the ground, stated by Judge Sherwood in a separate opinion, that the result in that case could not be affected by the decision on the question of jurisdiction; and, as announced by Judge Barclay, because the amendment of the law, before the second trial, constituted a sufficient basis for the present assertion of jurisdiction in the trial court. Judge Brace dissents from so much of the opinion as sanctions the doctrine that under the statute⁶ the probate court had jurisdiction to determine the right of the administrator to property openly held and claimed by the widow under color of right. In the subsequent case of *Hoehn v. Struttman*, decided by the court of appeals,⁷ the court denied the jurisdiction of the probate court, notwithstanding the amendment, when claim of title was made in good faith.

The question of constitutionality has not been touched upon.

¹ Laws of Missouri, 1881, p. 32.

² Rev. St. 1889, §§ 74-78, corresponding to the Revision of 1879, as amended by the statute of 1881.

³ Const. 1875, Art. II., § 16.

⁴ 13 Mo. App. 155. The question of jurisdiction had not been raised, but the court held that the probate court had no

jurisdiction in this proceeding, to pass upon the rights of property, even by consent of the parties.

⁵ 97 Mo. 587.

⁶ Referring to the statute before the amendment.

⁷ 71 Mo. App. 399, 405.

OF THE MANAGEMENT OF THE ESTATE.

CHAPTER XXXV.

OF THE DUTIES OF EXECUTORS AND ADMINISTRATORS IN RESPECT OF PERSONAL PROPERTY.

§ 326. **Compounding with Debtors.**—Executors and administrators had not, at common law, the right to compound or compromise with debtors to the estate; and if they released a debt due the testator, or cancelled or delivered to the obligor a bond, or released a cause of action founded on a tort accruing to the testator or executor, or in any manner forgave or indulged any part of the testator's or intestate's demand, or the demand of the executor or administrator, they were chargeable with the whole of such debt or demand, with interest.¹ But now provision is made by statute² for executors to "accept any composition or any security, real or personal, for any debts due to the deceased, and to allow any time for the payment of such debts as they shall think fit, and also to compromise, compound, or submit to arbitration all debts, accounts, claims, and things whatsoever relating to the estate of the deceased, . . . without being responsible for any loss to be occasioned thereby." And even at common law an executor or administrator might show that in compounding or releasing a debt he acted for the benefit of the estate, and thus excuse himself from liability.³ In America, provision is made by statute in most of the States authorizing executors and administrators to * com- [* 684] pound with debtors under sanction of the probate court; and it is held that, even without such authority, an administrator may lawfully compound with a debtor, receiving less than the amount of the debt, if he can show that what he has done is beneficial to the

¹ Wms. Ex. [1799], and English authorities cited.

² 23 & 24 Vict. c. 145, § 30.

³ Wms. Ex. [1800] *et seq.*; *De Diemar v. Van Wagenen*, 7 John. 404, 410.

estate.¹ In such case, if the executor or administrator acts without authority of the court, or where the court is not vested with the power to grant such authority, he does so at his peril, and assumes the burden of proving, not only that he acted in good faith and with ordinary prudence, but that the estate has in no wise been prejudiced thereby.² A distinction is drawn in Washington between claims not in litigation, which the representative of a decedent cannot compromise without approval of the probate court, and lawsuits involving property belonging to the estate, where the legal title is in the adverse party, which he may compromise without first submitting the matter to the court.³ So in Michigan the administrator may compromise a demand in favor of the estate against a third person, but not a claim against the estate, which must be proved.⁴ In Kansas, Indiana, and other States, it is held that an administrator cannot bind the estate by a compromise without the consent and approval of the probate court,⁵ and in Montana the matter was left undecided.⁶ And an order of the probate court authorizing an act by way of compromise, which is not within the power of the executor, is void.⁷ The heirs or distributees can take advantage of his omission to obtain an order of court, authorizing the compromise only before accepting the benefits derived to them therefrom.⁸ But where he fails to show that the compromise resulted to the benefit of the estate, he is personally liable,⁹ unless he had obtained an

Compounding without authority of court is at peril of administrator.

¹ Moulton v. Holmes, 57 Cal. 337, 342; Wyman's Appeal, 13 N. H. 18; Alexander v. Kelso, 3 Baxt. 311; Jacobs v. Jacobs, 99 Mo. 427; Jeffries v. Mut. Ins. Co. 110 U. S. 305, 310, in which the court says: "Even when statutes exist providing for compromises with debtors with the approval of a probate court, it is held that the right to compromise which before existed is not taken away, but may be exercised subject to the burden of showing that the compromise was beneficial to the estate." See discussion of the analogous subject of a guardian's power to compromise claims of his ward, in Woerner on Guardianship, § 56.

² Caldwell v. McVicar, 12 Ark. 746, 753; Wyman's Appeal, *supra*; Potter v. Cummings, 18 Me. 55, 58; Fridge v. Buhler, 6 La. An. 272, 274; Jeffries v. Mut. Ins. Co., *supra*; so a compromise with a person having assets of the estate for the purpose of getting possession of them will be held justified, if a judicious man looking alone to his worldly interests would so act: Kee v. Kee, 2 Gratt. 116;

Woolfork v. Sullivan, 23 Ala. 548, 556; Pusey v. Clemson, 9 Serg. & R. 204, 211; Boyd v. Oglesby, 23 Gratt. 674, 684; Chouteau v. Suydam, 21 N. Y. 179, 184; Chase v. Bradley, 26 Me. 531, 538; Wilks v. Slaughter, 49 Ark. 235; Berry v. Parkes, 3 Sm. & M. 625.

³ Denney v. Parker, 10 Wash. 218. Two of the five judges dissented.

⁴ Grece v. Helm, 91 Mich. 450, 457.

⁵ Aetna Ins. Co. v. Swayze, 30 Kans. 118; Yelton v. R. R., 134 Ind. 414, 420.

⁶ But the intimation is "judging from the general tenor of the probate acts, the legislature seems to have intended to expressly define the duties and powers of executors and administrators:" Mulville v. Ins. Co., 19 Mont. 95, 102, holding that the public administrator had the same right as other representatives to compromise under the statute.

⁷ Shaw v. Nicholay, 30 Mo. 99; Bompart v. Lucas, 21 Mo. 598.

⁸ Delabigarre v. Second Municipality, 3 La. An. 230, 237.

⁹ Fridge v. Buhler, *supra*.

Probate courts are guided by considerations for the interest of the estate in authorizing or refusing a compromise.

order of the court permitting it. In the exercise of its discretion in passing upon a petition or motion for leave to compromise, the probate court will be governed by considerations for the interest of the estate exclusively. Neither the executor nor the court can modify a contract or existing obligation; and the court will never interfere, except where the debtor is insolvent, or some doubt exists as to the validity of the claim, or there is reason to apprehend that payment cannot be coerced.¹ And where the will authorizes an executor to compromise, he will be personally liable for a loss in compromising a claim the collection of which is in nowise doubtful.² Even an order of court properly obtained does not protect the representative, if the necessity of such compromise was occasioned by his own negligence in failing to enforce a good claim before it became doubtful.³ Where money is gained or saved by executors or administrators in compromises, it enures to the benefit of the estate, and not to themselves.⁴

* § 327. **Arbitration.** — It seems never to have been doubted [* 685] that executors and administrators have full authority at com-

Administrators may bind the estate by the award of an arbitrator;

but may render themselves liable thereby.

mon law to submit any matter in dispute, relating to the estate of a deceased person in their hands, to arbitration, and thereby bind himself to the extent of assets.⁵ But while the award is undoubtedly binding upon the parties, as well as upon those having any interest in the estate, it affords no protection to the executor or administrator, although acting in perfect good faith, against liability as for *devastavit*. For if a less sum should be awarded than he would be entitled to recover at law, he may be held to account for the deficiency to the heirs or other persons interested in the effects of the testator or intestate.⁶ The award has no judicial force, operating neither as a judgment nor as the verdict of a jury; no judicial action can be had upon it without pleadings, as in other cases, although the failure to perform it may constitute a cause of action, and its performance furnish a good defence to a subsequent action for the same subject-matter.⁷

¹ Patten's Goods, Tuck. 56; Howell v. Blodgett, 1 Redf. 323.

² Buerhans v. De Saussure, 41 S. C. 457, 494.

³ Fraley v. Thomas, 98 Ga. 375.

⁴ Saeger v. Wilson, 4 W. & S. 501. On this point see cases cited *post*, § 521, p. * 1157, note.

⁵ Coffin v. Cottle, 4 Pick. 454; Chadbourn v. Chadbourn, 9 Allen, 173; Lyle v. Rodgers, 5 Wheat. 394, 406, *et seq.*; Wood v. Tunnichliff, 74 N. Y. 38; Strodes

v. Patton, 1 Brock. 228, 231; Eaton v. Cole, 10 Me. 137; Kendall v. Bates, 35 Me. 357; Alling v. Munson, 2 Conn. 691; Merchants' Bank of Macon v. Rawls, 21 Ga. 334; Wamsley v. Wamsley, 26 W. Va. 45; Powers v. Douglass, 53 Vt. 471, 474.

⁶ Bean v. Farnam, 6 Pick. 269, 272; Nelson v. Cornwell, 11 Gratt. 724, 747, *et seq.*; Wheatley v. Martin, 6 Leigh (Va.), 62, 71; Jones v. Deyer, 16 Ala. 221, 227; Wood v. Tunnichliff, 74 N. Y. 38, 43.

⁷ Childs v. Updyke, 9 Oh. St. 333, 337.

There is, therefore, no inducement for an executor or administrator to submit a controversy concerning a demand, either in favor of or against the estate, to arbitration; he should, in self-defence, settle all such controversies in a court of justice,¹ unless the award, under provision of a statute, receives the force of a judgment, as it does in some States.² In those States in which claims must be submitted for approval to the probate court before they can be lawfully paid,

arbitration unless enforceable under authority of a statute.

awards of arbitrators are of no force whatever against the [* 686] estate.³ The submission * of disputed matters to arbitration

by the voluntary act of the parties, and the award in such cases, have not the force or effect of the reference of litigated claims to referees appointed by the court, or by the parties with the approval of the court; concerning which provision is made by statute, and which will be more fully noticed in treating of the allowance of claims.⁴

§ 327 a. **Protest and Notice respecting Negotiable Paper.**—In general the executor or administrator of a deceased party to negotiable paper stands in the shoes of the deceased for purposes of fixing the rights and liabilities of the other parties.

Personal representative stands in shoes of deceased to give or receive notice of demand or protest.

Thus if the holder of a bill or note die, his executor or administrator must make demand and give notice of dishonor, in order to bind indorsers. But if, at the time of maturity, no representative of the estate has yet been appointed, the indorsers will not be discharged from liability if demand is made of the maker within a reasonable time after the representative's qualification, and notice of dishonor is seasonably given to them thereafter.⁵

If none has been appointed, demand may be made and notice given in reasonable time after appointment.

So while the soundness of the rule requiring presentment for acceptance to the administrator of a deceased drawee of a bill of exchange has been doubted by high authority,⁶ it

¹ Simpson, J., in *Overly v. Overly*, 1 Met. (Ky.) 117, 120. But see the remarks of Thompson, J., in *Peters's Appeal*, 38 Pa. St. 239, 240, indorsing Watson on Awards, p. 47: "In many cases it is the best possible way for an executor or administrator to ascertain whether or not there be any foundation for the demand upon him without disputing it in action; and it is frequently advantageous to both parties that the matter in dispute should be referred."

² *Dickinson v. Dutcher*, Brayt. 104, 106; *Lassiter v. Upchurch*, 107 N. C. 411. See *post*, § 390, where the power and effect of the submission to arbitration of

claims by or against the estate is considered. A statute authorizing the probate court, under certain conditions, to submit matters in controversy arising in the settlement of the estate to arbitration, does not confer jurisdiction of a dispute between the representatives and third persons, as to whether the property exempted to the widow reverts to the estate: *Holdsombeck v. Fancher*, 112 Ala. 469.

³ *Reitzell v. Miller*, 25 Ill. 67, 68; *Yarborough v. Leggett*, 14 Tex. 677, 679.

⁴ *Post*, § 390.

⁵ *White v. Stoddard*, 11 Gray, 258; *Jex v. Tureaud*, 19 La. An. 64.

⁶ *Dan. Neg. Inst.*, § 458.

is held that in order to charge an indorser on a promissory note, demand must be made of the representative of the deceased maker, if he can by reasonable diligence be found,¹ and no exception to the rule is made where the indorser is appointed administrator of the maker's estate.²

So, on the other hand, the personal representative of a deceased indorser, sought to be held liable by the holder of negotiable paper, is the only proper party to be served with notice of dishonor or protest, if by reasonable diligence the fact of the indorser's death and the appointment of such representative can be ascertained;³ and this though the maker becomes the deceased indorser's representative.⁴ But the notice need not necessarily be directed to the representative by his official designation,⁵ and is good though the executor be misdescribed as administrator,⁶ or though the official designation only is given if his name is unknown.⁷ The actual receipt of the notice is the material thing and cures irregularities in the manner of notice,⁸ and the administrator may make binding admissions of receiving notice, or waive the same.⁹

Service of notice on one of several executors of a deceased indorser is sufficient to bind the estate.¹⁰ Upon the death of one partner the notice should be served upon the survivor.¹¹

Where the holder, without being chargeable with negligence, does not know of the indorser's death or who his representative is, notice directed in the deceased's name is sufficient;¹² and likewise if no administrator has as yet been appointed upon whom notice can be served, a notice is good when addressed to the deceased indorser,¹³

¹ *Frayzer v. Dameron*, 6 Mo. App. 153, citing cases *pro* and *con*; *Blake v. McMillen*, 33 Iowa, 150; *Gower v. Moore*, 25 Me. 16. But where the maker is known by the indorser to be dead, at the time of the indorsement, no presentment and notice is required beyond the exhibition and proof of the claim against the estate: *Davis v. Francisco*, 11 Mo. 573, approved in *Pickar v. Harlan*, 75 Mo. 678.

² *Groth v. Gyger*, 31 Pa. St. 271.

³ *Smalley v. Wright*, 40 N. J. L. 471, 475; *Goodnow v. Warren*, 122 Mass. 76, 83.

⁴ *Carolina Bank v. Wallace*, 13 S. C. 347, 353; *Magruder v. Union Bank*, 3 Pet. (U. S.) 87.

⁵ *Beals v. Peck*, 12 Barb. 245.

⁶ *Drexler v. McGlynn*, 99 Cal. 143, 145.

⁷ *Pillow v. Hardeman*, 3 Hum. 538. But otherwise where the name is known:

Smalley v. Wright, 40 N. J. L. 471; and is insufficient if addressed to "the estate" if his name could easily have been learned: *Massachusetts Bank v. Oliver*, 10 Cush. 557.

⁸ *Drexler v. McGlynn*, *supra*; *Cayuga Bank v. Bennett*, 5 Hill, 236, *per* Cowen, J.

⁹ *Duncan v. Watson*, 28 Miss. 187, 207.

¹⁰ *Carolina Bank v. Wallace*, 13 S. C. 347; *Beals v. Peck*, 12 Barb. 245; *Lewis v. Bakewell*, 6 La. An. 359.

¹¹ *Slocomb v. Lizardi*, 21 La. An. 355; *Barlow v. Coggan*, 1 Wash. Ter. 257.

¹² *Barnes v. Reynolds*, 4 How. (Miss.) 114, 119; *Beals v. Peck*, 12 Barb. 245, 252; *Planters Bank v. White*, 2 Hum. 112; *Maspero v. Pedesciaux*, 22 La. An. 227; *Boyd v. Orton*, 16 Wis. 495.

¹³ *Mathewson v. Strafford Bank*, 45 N. H. 104, 106; see also *Merchant's Bank v. Birch*, 17 Johns. 25.

or to his "legal representatives,"¹ at the late residence. And under such circumstances a notice served on one whom the will names as executor is good, although it may be that he will never qualify as such,² but not after he has refused to accept the executorship and a special administrator been appointed;³ nor is this principle applicable to a notice served on one who is not at the time, but later becomes, the administrator,⁴ as he stands in a different position from an executor in this respect.

Notice to one named executor good, though he never qualify; but not to one who has refused to accept; nor an administrator.

That an executor or administrator makes himself personally liable unless expressly stipulating otherwise, and cannot bind the estate by making, indorsing, or accepting negotiable paper, though he purports to act for the estate, and affixes his official designation, is mentioned elsewhere.⁵

§ 328. **Duties in Relation to the Contracts and Trade of the Deceased.** — Executors and administrators are bound, to the extent of the assets coming to their hands, by the contracts of their testators or intestates, including not only debts, but also collateral acts, whether named in the contract or not, or whether it be a simple or record contract; and they must answer in damages for a breach, whether incurred before or after the decedent's death.⁶ Thus, if one agrees to build a house before a given time, and dies before that time, his executors are bound to perform the contract;⁷ and the completion by an administrator of a decedent's contract to build a house attaches to his work all the liabilities of the original contract, so that a sub-contractor is entitled to his lien for materials furnished the intestate.⁸

Breach of contract, whether before or after the contractor's death, renders his estate liable in damages.

¹ *Boyd v. City S. Bank*, 15 Gratt. 501. See *Boyd v. Orton*, *supra*.

² *Drexler v. McGlynn*, 99 Cal. 143; *Shoenberger's Estate*, 28 Pa. St. 459, 466.

³ *Goodnow v. Warren*, 122 Mass. 79.

⁴ *Mathewson v. Strafford Bank*, 45 N. H. 104. See *ante*, §§ 186, 187.

⁵ *Post*, § 356.

⁶ *Smith v. Wilmington Co.*, 83 Ill. 498; *Kernochan v. Murray*, 111 N. Y. 306; *Bell v. Hewitt*, 24 Ind. 280; *Drummond v. Crane*, 159 Mass. 577 (in which the deceased had contracted to take \$750 worth of water per annum for a period of ten years, and died shortly after making the contract); *McCann v. Pennie*, 100 Cal. 547 (holding that the liability of the estate was not affected by the fact that the services for which the contract had been made were to be performed in a foreign country).

⁷ *Quick v. Ludborrow*, 3 Bulst. 29, 30; *Pringle v. McPherson*, 2 Desaus. 524, 532; *Chamberlain v. Dunlop*, 126 N. Y. 45, 52, holding that the estate is liable though the heir or devisee do not permit the executor to build. So where one contracts to build a house and sell the same for a certain price within a year, and dies after the completion of the house but within the year and before the sale, his administrator must complete the sale, or the other party can sell the house and sue the estate for the deficiency: *Janin v. Browne*, 59 Cal. 37, 44.

⁸ *Horton v. Carlisle*, 2 Disn. 184; *Reicke v. Saunders*, 3 Mo. App. 566; *Bambrick v. Association*, 53 Mo. App. 225, 238, allowing a sub-contractor to include in one lien a claim for materials furnished both before and after the testator's death.

As between the personal representative and the ultimate beneficiary of the estate, the former may, as a general rule, exercise his discretion whether to perform or rescind any contract of the deceased imposing an obligation or duty upon him, in the best interest of the estate, subject, in general, to the approval of the court.¹ Where a party has entered into a contract to purchase real estate and dies before it is conveyed to him, and before he has paid for it, his heir or devisee is entitled to have his executor pay for the realty out of the personal estate.² If a contract has been performed in part, and is then rescinded, after the contractor's death, by his executor, the other party may recover for the work already done,³ if he consent to the abrogation; but if he insist on completing the contract, the estate is bound for the whole.⁴

It may be proper to remark, in * this connection, [* 687] that where an administrator has his election either to ratify or disavow the act of his intestate, he cannot, after ratifying, disavow it;⁵ as where money was procured from the intestate by fraud, or by reason of his insanity, the administrator may disavow or ratify the act; but if he ratify the payment of the money he cannot afterward pursue a remedy inconsistent with such ratification.⁶ So the administrator's election to ratify the contract of an insane intestate validates the same for all purposes and binds the heirs.⁷ Outstanding contracts for the improvement of the real estate by the erection of tenements, only partially fulfilled, are a charge on the personal estate; although the contractor has a lien on the land also, his remedy against the administrator is not thereby impaired.⁸

If the executor or administrator decide to enforce or carry out the contract, he is liable at common law for the net losses that may accrue to the estate in consequence thereof, while any profits arising become assets of the estate.⁹ In equity, however, and under the statutes of most American States, the administrator acting in good faith will be protected in the execution of a contract the breach of which would result in damages, although the

¹ Gray v. Hawkins, 8 Oh. St. 449, 455.

² Chamberlain v. Dunlop, 126 N. Y. 45, 52, *per* Peckham, J., and authorities cited.

³ Dougherty v. Stephenson, 20 Pa. St. 210.

⁴ McKeown v. Harvey, 40 Mich. 226.

⁵ Riley v. Albany Bank, 36 Hun, 513, 521. See remarks of Barkes, J., dissenting, upon the effect of the acts of the administrator as amounting to an election.

⁶ Riley v. Albany Bank, *supra*.

⁷ Bullard v. Moor, 158 Mass. 418, 424.

⁸ Taylor v. Taylor, 3 Bradf. 54, 56. Under the Wisconsin statute a laborer's lien upon logs may be good though the lien claim be filed after the debtor's death; but in the action to enforce the lien there can be no personal judgment against the administrator: Viles v. Green, 91 Wis. 217.

⁹ Smith v. Wilmington Co., 83 Ill. 498, 500; Schoul. Ex., § 254.

estate is insolvent, and the loss in carrying out the contract be greater than the damages for the breach would have been.¹

Contracts of a personal nature, depending upon the personal skill or taste of the obligee, such, for instance, as the obligation of an author to prepare a book for publication,² of a master to instruct an apprentice,³ a contract to marry,⁴ or any obligation to be performed by the contracting party in person,⁵ are not binding upon the executor or administrator.⁶ So a contract to sell all the lumber manufactured by one party during five

Estate is not bound by a personal contract.

years, to average a certain number of feet per year, but stipulating no fixed quantity for any year, was declared a personal contract, dissolved by the death of either party,⁷ as was also held in the case of a contract to manufacture a certain patented article and "push the sale" in a certain manner requiring personal skill.⁸ And a contract between a firm and an agent to employ him in their business for a term of years was held discharged by the death of a member of the firm.⁹ And so all contracts based upon existing relations cease to be binding when the relation ceases.¹⁰

The obligation of the personal representative to execute contracts of the deceased extends, as is evident from the statement of the proposition, to such only as were legally binding upon the deceased. He cannot by any act of his own bind the estate by a new debt or obligation; hence any contract which he may enter into with reference to the estate, though clearly intended and expressed to bind it, binds himself individually only as between him and the other contracting party, with the right, on his part, to resort to the

The estate is bound by such contracts only as were binding upon the deceased.

¹ *Roach v. Ames*, 80 Ky. 6, 10; *Smith v. Wilmington*, 83 Ill. 498, 500; *Estate of Getz*, 12 Phila. 143; *Gilman v. Wilber*, 1 Dem. 547, 551; *Meeker v. Vanderveer*, 15 N. J. L. 392.

² *Dictum per* Lyndhurst and Bailey, B. B., in *Marshall v. Broadhurst*, 1 Tyrwh. 348.

³ *Baxter v. Burfield*, 2 Strange, 1266. Whether or not a contract to furnish tuition for an entire year is one that will bind the executor, has been held to be doubtful: *Gilman v. Wilber*, 1 Dem. 547.

⁴ 3 Redf. on Wills, 275.

⁵ *Siler v. Gray*, 86 N. C. 566, 570; *Shultz v. Johnson*, 5 B. Mon. 497, 501.

⁶ *Marvel v. Phillips*, 162 Mass. 399. Unless what remains to be done can be as well performed by the administrator as it could have been by the deceased: *Janin v. Browne*, 59 Cal. 37, 44. Thus where the contract involved only the exercise by the

executors of ordinary business judgment, such as purchasing additional stock of mules, it was held that no active duties were imposed, and that the contract was not rescinded by death: *Lockart v. Forsythe*, 49 Mo. App. 654, the court holding that a power coupled with an interest survives the death of the grantor, and that when the power authorizes the grantee to contract debts and charge the grantor, such a debt, though contracted after grantor's death, may be allowed against the estate.

⁷ *Dickinson v. Calahan*, 19 Pa. St. 227, 231.

⁸ *Smith v. Preston*, 170 Ill. 179.

⁹ *Tasker v. Shepherd*, 6 Hurls. & Norm. 575. The decisive point in this case was, however, in respect of the partnership.

¹⁰ *Bland v. Umstead*, 23 Pa. St. 316; *Quain's Appeal*, 22 Pa. St. 510, 512; *Browne v. McDonald*, 129 Mass. 66.

estate to reimburse himself for any outlays necessary to the administration of the assets.¹

It follows from this principle, that it is not within the ordinary scope of the authority of an executor or administrator to carry on the trade or business of the deceased;² and that one who undertakes to do so with the assets of the estate necessarily assumes the risk of making good all losses that may occur to the estate, while the profits, if any, become assets.³ The executor or administrator is therefore chargeable with the assets coming into his hands, including all profits or returns from the trade or business which he carries on therewith, and is not allowed credit for his losses, even if he acted in perfect good faith.⁴ Protected from loss and from liability at all times, the estate is interested in the business only to the extent of the profits.⁵ An exception to this rule exists, to some extent, in those States in which it is made the duty of executors and administrators to mature growing crops,⁶ or to carry on the *plantation, manufactory, or business of [* 689] the deceased until a sale or other disposition thereof.⁷ In such cases the action of the executor or administrator may be controlled by the court having

Carrying on a trade with assets of the estate makes administrator liable for all losses, while profits go to the estate.

Except where the administrator completes growing crop;

or carries on business while waiting for a sale.

Under order of court.

¹ See *post*, § 356, as to the binding effect of the administrator's contracts on the estate and himself, respectively, and authorities there cited; as to right of reimbursement, *post*, §§ 514 *et seq.*

² This subject is also discussed in connection with partnership estates, *ante*, §§ 123, 124.

³ *Wms. Ex.* [1791]; *Schoul. Ex.* § 325.

⁴ *Hooper v. Hooper*, 29 W. Va. 276, 284; *Lucht v. Behrens*, 28 Oh. St. 231, 235; *Estate of Prescott*, Tuck. 430, 433; *Wood's Estate*, 1 Ashm. 314.

⁵ *Rose's Estate*, 80 Cal. 166, 173, *per* Fox, J. But the circumstances may be such as to show that the business is continued by the administrator not in his official capacity, but that he has passed the assets to himself as legatee, and acts in his individual capacity. Thus it was held in a recent New York case, "where an executor or administrator, proceeding in good faith, he being also residuary legatee, applies to his own use the assets remaining after having paid all the claims under the will and all claims presented in usual course pursuant to

notice, he cannot be held accountable except for the actual value of the assets which formed a part of the testator's estate, nor can he be charged with the profits of a business into which he puts the property of the testator": *Matter of Mullen*, 145 N. Y. 98, 104.

⁶ See *post*, § 514, as to the credits allowable in such cases; *Lawton v. Fish*, 51 Ga. 647, 650; *Worley's Succession*, 40 La. An. 622.

⁷ *Reinstein v. Smith*, 65 Tex. 247, 250, citing numerous Texas cases, at p. 251. This has been construed to include a mercantile business: *Dwyer v. Kalteyer*, 68 Tex. 555, 563; but in case of plantations is limited to the expenses of sowing a crop already begun, or hanging by the roots, at the time of the administrator's appointment: *Succession of Sparrow*, 39 La. An. 696, 702, and numerous Louisiana cases there cited. In Georgia the administrator may, in his discretion, without an order of court, continue the deceased's business one calendar year from his death, but no longer, except at his peril, without the sanction of the court: *King v. Johnson*, 96 Ga. 497.

jurisdiction of the administration, and those whose interests are affected may invoke such control.¹ The parties dealing with the executor or administrator carrying on such trade or business, or maturing a crop, have valid claims against the estate for the value of goods furnished or services rendered.² And so, where an executor or administrator with the will annexed, continues the business of the testator in good faith, in compliance with a direction to that effect in the will, all losses by bad debts, costs of personal property, purchased to replace similar articles worn out or consumed in conducting the business, expenses for repairs, etc., on the real estate used, are properly chargeable against the estate.³ But in such case the estate not invested in business by direction of the will is not liable to subsequent creditors,⁴ unless the testator clearly indicates his intention to bind the general assets;⁵ and while special legatees or creditors of the testator can force the closing of the business after the time appointed by the testator, yet the residuary legatee who continues the business as executrix after this time cannot defeat subsequent creditors.⁶ The executor carrying on the business under the will is personally liable to the persons with whom he deals as such,⁷ but they have a right to indemnify themselves for the payment of debts thereby incurred, and an equitable right arises to the trade creditors to resort to the estate, if their remedy against the executor is unavailable.⁸ Such claims are to be collected as other claims

In such case, parties dealing with the administrator have a valid claim for goods furnished or services rendered.

So where executor or administrator *c. t. a.* carries on trade in pursuance of authority in the will.

the estate.³

Property not invested under such will is not liable to the subsequent creditors; but executor, as legatee, cannot defeat subsequent creditors.

Creditors may hold executor personally liable, and have an equitable claim against the estate.

¹ *Reinstein v. Smith, supra*; *King v. Johnson, supra*.

² *Reinstein v. Smith, supra*, criticising *McMahan v. Harbert*, 35 Tex. 451, 457; *Adrianse v. Crews*, 45 Tex. 181; *Powell v. Powell*, 23 Mo. App. 365, 371.

³ *Accounting of Jones*, 103 N. Y. 621; *Cline's Appeal*, 106 Pa. St. 617, 621.

⁴ *Alzheimer v. Hunter*, 56 Ark. 159; *Brasfield v. French*, 59 Miss. 632, 637; *Jones v. Walker*, 103 U. S. 444; *Morrow v. Morrow*, 2 Tenn. Ch. 449, 556; *Delaware, &c. R. R. v. Gilbert*, 44 Hun, 201, 204, and cases cited.

⁵ *Willis v. Sharp*, 113 N. Y. 586.

⁶ *Brasfield v. French, supra*.

⁷ *Sterrett v. Barker*, 119 Cal. 492, 494.

⁸ *Leible v. Ferry*, 32 N. J. Eq. 791, 795; *Willis v. Sharp*, 43 Hun, 434, s. c. on appeal: 113 N. Y. 586. In a recent English case, where the executors had

carried on the testator's business under a direction in the will, and a question arose as to the respective rights of creditors prior and subsequent to the testator's death, it was held that as against assets existing at his death, the creditors of the testator were entitled in priority to any claims by the executors to indemnity in respect of the trading liabilities; that the trade creditors of the executors were entitled to stand in the place of the executors in enforcing their claim to indemnity, and hence as against assets subsequently acquired by the executors in the course of the business, such trade creditors of the executors had a prior claim to the creditors of the testator; but if the executors were themselves indebted to the estate, their claim, and the claims of their creditors through them, failed to the extent of such indebtedness: *In re Garton*,

against an estate.¹ * Where the executor or administrator [* 690] carries on the business of the deceased in good faith, at the request of the heirs, distributees, or legatees, they will not be heard to object to credits in his account for losses incurred in consequence thereof;² but the onus lies upon the accountant in such case to show such consent upon a full understanding of all the circumstances.³

Where representative carries on business at the request of heirs or legatees, they cannot object to losses.

Upon executors and administrators devolves also the authority and duty to vote the stock held by their testators or intestates. It matters not, in this respect, whether such stock was held in their own right or in trust, nor whether transfer thereof had been made on the company's books.⁴ Since the right to vote follows and cannot be separated from ownership, it also follows that where stock is held by several executors, who differ as to how it should be voted, it cannot be voted at all.⁵ In a proper case the personal representative should pay assessments on the unpaid capital stock.⁶

§ 329. **Preserving the Property; Taxes upon Personalty.**—Executors and administrators are responsible for the preservation of the personal property while it is in their custody. Hence it becomes necessary, in many cases, in order to avoid material loss and injury to the estate, to employ additional labor to take care of horses or other stock requiring attention, to tend and gather crops, to protect property in danger of being lost, and to complete work in an unfinished state, or contracts binding upon the personal representatives. It is always advisable to obtain the order of the probate court in such cases;⁷ but if such labor is required when court is not in session, it is their duty to employ the necessary assistance at once; and all reasonable expenses so accruing constitute a proper charge against the estate, and will be allowed as credits in the administrator's account or settlement.⁸ Provision is

Duty of executor or administrator to employ labor in preserving stock, gathering crop, protect endangered property; &c.

L. R. 40 Chanc. D. 536. In *Willis v. Sharp*, 115 N. Y. 396, the court intimated, that if the business was carried on without the consent of the creditors of the testator, they were entitled to priority out of the estate as it existed at the testator's death, otherwise to share *pro rata*.

¹ *Willis v. Sharp*, 115 N. Y. 396; see also s. c. in 124 N. Y. 406, 411, *et seq.*; but also *Froelich v. Trading Co.*, 120 N. C. 39.

² *Poole v. Munday*, 103 Mass. 174, 177.

³ *Ward v. Tinkham*, 65 Mich. 695.

⁴ *Market Street Co. v. Hellman*, 109 Cal. 571, 590; *Matter of North Shore Co.*, 63 Barb. 556, 571; *Matter of Cape Co.*,

16 Atl. R. 191. Even where the corporation is in another State, the stock standing in decedent's name: *In re Election*, 51 N. J. L. 78.

⁵ *Tunis v. Hestonville Co.*, 149 Pa. St. 70, 83.

⁶ See next section.

⁷ But the failure so to do, if the expenditure is otherwise proper, will not render the same improper: *Smith's Estate*, 118 Cal. 462; nor will expenditures under order of court in all cases be proper, *ib.* p. 466.

⁸ See remarks of Bond, J., in *Bambrick v. Association*, 53 Mo. App. 225, 236. So it was held that it is the admin-

made in the statutes of many of the States touching the duty of executors and administrators in disposing of growing crops on the lands of their testators or intestates. They are generally directed to be sold at either private or public sale;¹ but if deemed advantageous to the estate, the executor or administrator may complete the crop, and use the provender on hand at the time of the death to feed

the stock for that purpose, and purchase and pay for such [* 691] other feed and * requisites in maturing the crop, and employ such labor as may be indispensable, at the cost of the estate.²

An administrator may, without order of court, take a chattel mortgage from an insolvent to indemnify the estate against loss on account of the decedent's suretyship for the mortgagor.³ Administrators should not contribute voluntarily to make up losses of incorporated companies in which the estate owns stocks, if they are of little or no value; but if they are valuable, they should pay assessments to which they are liable, and which constitute a lien on the shares held by them, in order to prevent their forfeiture.⁴ An executor or administrator has an insurable interest in the property of the estate, and is entitled to allowance for the premiums necessary to effect a safe insurance thereof.⁵

istrator's duty to employ a physician to attend upon a slave belonging to the estate during his illness: *Bomford v. Grimes*, 17 Ark. 567; *Belfour v. Raney*, 8 Ark. 479, 482; and to retain hands employed in agricultural pursuits until the crop is gathered: *Percival v. Herbemont*, 1 McMull. 59. Where an executrix carried on a brick-yard after her intestate's death, and sold all the bricks made before and after his death indiscriminately, she was held liable for the proceeds, and entitled to credit for the expenses: *Newton v. Poole*, 12 Leigh, 112, 144. When the property is large and situate in different places, or when it requires a constant and particular kind of care, as, for instance, vessels afloat, the court seised with the succession may allow a reasonable sum to pay the persons employed in such cases: *Goodbear v. Gary*, 1 La. An. 240, 241.

¹ See *post*, as to sale of personal property, §§ 330 *et seq.*

² The administrator should obtain an order, either directing him to sell the crop, or to allow him to cultivate and complete it: *McCormick v. McCormick*, 40 Miss. 760, 764. It was held in South Carolina, that an administrator, keeping

the estate together and carrying on the business of a plantation in the ordinary manner, is liable only for gross negligence, although the income thus obtained is less than would have arisen from letting out the plantation and negroes: *Huson v. Wallace*, 1 Rich. Eq. 1, 16. A similar case is *Clarke v. Jenkins*, 3 Rich. Eq. 318, 330, *et seq.*; *Tate v. Norton*, 94 U. S. 746.

³ *Walling v. Lewis*, 119 Ind. 496.

⁴ *Ripley v. Sampson*, 10 Pick. 371, 373, *et seq.* Under the United States statute (§ 5151) an executor is liable as such for an assessment ordered by a receiver of a national bank on national bank stock owned by the testator, when duly made after his death, for the unpaid portion: *Parker v. Robinson*, 71 Fed. R. (C. C. A.) 256; s. c. 33 U. S. App. 368; but not, so it has been held, where the stock has been transferred to the beneficiary according to the terms of the will: *Blackmore v. Woodward*, 71 Fed. R. (C. C. A.) 321. In this case it was also held, that the transfer made no difference in the liability of the estate, since the beneficial interest would in either case have gone to the legatee.

⁵ *Tuttle v. Robinson*, 33 N. H. 104, 114. But an administrator is not liable

Redeem property mortgaged.

The interest of the estate may demand that the executor or administrator redeem property of the estate which may be mortgaged or pledged, and in such case, if it is his duty to do so, he will be allowed all proper disbursements for that purpose;¹ but obviously he cannot be held accountable for not redeeming property when the estate has no funds available for such purpose.² Nor is he liable for not redeeming, if in the estate's interest he honestly and prudently exercises his best judgment in declining to do so.³

The mention of the duties of the executor or administrator concerning the payment of taxes, repairs, &c., on the real estate and the redemption of real estate sold for non-payment of taxes, is deferred to a later section.⁴ The representative's rights and duties with reference to the payment of taxes on the personal property belonging to the estate are largely dependent on statutory regulations.⁵

Taxes on the personalty assessed prior to the decedent's death usually constitute a liability of the estate which the representative should discharge out of the personal assets,⁶ even though the amount was not definitely ascertained at the time of the death of the testator or intestate.⁷ Claims for such taxes due from and not paid by decedent before his death may be established in the probate court, and by constitute a preferred class of claims.⁸ Such taxes accruing prior to decedent's death cannot be enforced by distress or execution,⁹ though, perhaps, it is otherwise in some States where the tax is assessed to the proper party for taxes accruing after the decedent's death.¹⁰

Since the title to the personalty and right of possession vests in

for refusing to insure, if the premium demanded be unreasonably high; he is required to adopt such precautions against loss by fire as prudent men adopt to protect themselves: *Rubottom v. Morrow*, 24 Ind. 202. See *post*, § 518, as to insurance on real estate.

¹ *Pryor v. Davis*, 109 Ala. 117; see also *Whidden v. Williams*, 98 Ga. 310. See *post*, § 518, and cases there cited allowing credit for discharging encumbrances on the realty. So if in redeeming the personalty the executor uses his own money, he is entitled to be indemnified out of the estate: *ante*, § 307, p. *648, note.

² *Halladay's Estate*, 18 Oreg. 168; *Glines v. Weeks*, 137 Mass. 547, 550.

³ *Steel v. Holladay*, 20 Oreg. 70, 78.

⁴ *Post*, § 518.

⁵ See *Cooley on Tax*. (2d ed.) 376.

⁶ *State v. Tittman*, 103 Mo. 553, 564; *State v. Seaborn*, 139 Mo. 582, 604. Hence the executor or administrator is the proper party to receive notice of intention to charge a deceased person with taxes on property alleged to have been omitted by him from his tax return: *Reynolds v. Brown*, 138 Ind. 434; and see *Gager v. Prout*, 48 Oh. St. 89, 110.

⁷ *Matter of Babcock*, 115 N. Y. 450.

⁸ *Post*, § 367, on priority of claims, where this subject is fully treated.

⁹ *Wilson v. Shearer*, 9 Metc. 504.

¹⁰ *Crosswell on Executors and Administrators*, § 429, citing *Smith v. Bank*, 4 Cush. 1, as authority.

the personal representative, taxes legally accruing thereon after the decedent's death and before distribution is made, are assessed to, and should be paid by, the executor or administrator¹ without presentation or allowance by the probate court;² and when paid, he will be entitled to credit therefor in his account as for expenses of administration.³ For purposes of taxation and payment of taxes, the title and possession of the executor or administrator relates back to the time of the decedent's death,⁴ and that of the administrator *de bonis non* to that of his predecessor, so far as affecting unpaid taxes.⁵ The liability of the representative for failure to pay such taxes is in some States made personal, but in others his liability is official, and he cannot be held liable after the estate has been distributed and he discharged.⁶

Taxes on estate in names of representative payable by him;

as expenses of administration.

Liability personal; official in other States.

The authorities are somewhat divided on the proposition whether the personal property of the decedent should be taxed at the place of the domicil of the decedent, as is held in some States,⁷ or, as seems to be the more general

Estate assessable for taxes at the domicil of decedent,

¹ *People v. Barker*, 150 N. Y. 52; *Nelson v. Becker*, 63 Minn. 61; *Wilson v. White*, 133 Ind. 614, 618; *Hardy v. Yarmouth*, 6 Allen, 277; *Fairfield v. Woodman*, 76 Me. 549.

² *State v. Tittman*, 119 Mo. 661; and see also *Gager v. Prout*, 48 Oh. St. 89, 111; *Bonaparte v. State*, 63 Md. 465; *Findley v. Taylor*, 97 Iowa, 420 (this last case for taxes on realty due and payable before decedent's death).

³ *Post*, § 514, cases cited p. *1144, note.

⁴ *People v. Barker*, 150 N. Y. 52; *Sommers v. Boyd*, 48 Oh. St. 648; particularly of an executor: *Smith v. Bank*, 4 Cush. 1.

⁵ *San Francisco v. Pennie*, 93 Cal. 465, 475; *State v. Tittman*, 119 Mo. 661.

⁶ *Nelson v. Becker*, 63 Minn. 61 (holding that if the amount of taxes has not been definitely fixed when the estate is distributed the administrator is not liable, but that the beneficiaries could be compelled to pay); see also *San Francisco v. Pennie*, 93 Cal. 465; *Carleton v. Ashburnham*, 102 Mass. 348; *Commissioners v. Allen*, 5 Kans. App. 122. That the administrator is personally liable for taxes properly assessed against him in his representative character, which he fails to pay having assets, see: *Williams v. Holden*, 4 Wend. 223; *Austin v. Varian*, 16 N. Y.

App. D. 337. See *State v. Jones*, 39 N. J. L. 650, 652, in which the court says: "It is urged that the executors have settled the estate, and therefore can have no money with which to pay the taxes. That the testator has omitted to provide, or the executors have neglected to retain, the funds for paying taxes on the securities of the estate, is hardly an adequate answer to the claim that taxes should be levied and collected. If the beneficiaries will not themselves advance the taxes, the executors must resort to their lawful means for obtaining what they need." See also *Ritchie, J.*, in *Bonaparte v. State*, 63 Md. 465, 470, 473; *Laws Mo.* 1881, p. 35; *Rev. St. Mo.* 1889, §§ 6761-6763. *Dresden v. Bridge*, 90 Maine, 489 (holding that the executor or administrator was personally liable, but only when assessed against him, and not against "est. of," etc.; *Rev. St. South Carolina*, 1893, § 219).

⁷ *Stephens v. Booneville*, 34 Mo. 323; *Bonaparte v. State*, 63 Md. 465, 473; *Herrick v. Big Rapids*, 53 Mich. 554; *McGregor v. Vaupel*, 24 Iowa, 436 (doubted but not expressly overruled in *Cameron v. Burlington*, *infra*). In Massachusetts the personal estate of the deceased should be assessed where he last dwelt; but if his executor continues the business, though only for the purpose of settling the estate,

or of the representative. rule, in the county where the executor or administrator resides.¹

As between several co-administrators residing in different counties, it was held that the property must be listed for taxation in the county where that one resides who has the actual possession and control of the property.² Where three executors resided in the same township, two within and one without the corporate limits of a village, and the personal property of the estate was mostly kept in a safe "under the joint control" of the three executors, except the moneys and evidences of debt, which were kept at a bank in another county, subject to the check of one of the executors, it was held that one-third of the assets must be returned for taxation as of the place of residence of each executor.³

* § 329 *a*. **Duties in Respect of The Succession Tax.** — [*691 *a*] Under the Federal War-Tax of 1898 (applicable throughout the Union)⁴ as well as under the statutes of many States, the representative must see personally to the payment of the legacy or inheritance tax. The constitutionality of these taxes under State statutes was challenged in many cases and in several instances the respective acts were held void on various grounds.⁵

it is taxable to the executor in the town where the business was carried on: *Cotton v. Boston*, 161 Mass. 8.

¹ *Walla Walla v. Moore*, 16 Wash. 339, 341; *Mayor v. Alexander*, 10 Lea, 475; *State v. Collector*, 39 N. J. L. 79. See also *Cameron v. Burlington*, 56 Iowa, 320, 323. A distinction has been observed in some cases between the situs of tangible and that of intangible property; the former being said to be taxable in the county where situated, and the latter in that of the executor's domicile, and not in that of the deceased: *Sommers v. Boyd*, 48 Oh. St. 648, 661. See also *Johnson v. Oregon*, 2 Oreg. 327, 330; but not where the administration is outside of the State: *Lewis v. Co.*, 60 Pa. St. 325; *In re Jefferson*, 35 Minn. 215; in this case the court, in holding the *choses* of a non-resident to be taxable, says: "If the property on account of which these taxes were unpaid was within this State, the State had jurisdiction to impose them, as it might impose a tax upon tangible personal property permanently situated here, and to enforce the taxes against the property." See also as to taxing property of non-residents: *Buck v. Miller*, 147 Ind. 586; and as to taxation of non-residents under the succession tax, see next section.

² *Brown v. Noble*, 42 Oh. St. 405. See also *Austin v. Varian*, 16 N. Y. App. Div. 337.

³ *State v. Matthews*, 10 Oh. St. 431, 437.

⁴ The law (§ 29) applies to all legacies and distributive shares, of personalty, over \$10,000 in value, except to husband or wife. Real estate is not affected.

⁵ Thus a law imposing a tax of one per cent on all estates settled in the probate courts was declared unconstitutional in New Hampshire, on the ground that the tax is not proportional and cannot be supported as a tax upon property under the Constitution of that State, which, it seems, authorizes only taxes and assessments upon polls and property: *Curry v. Spencer*, 61 N. H. 624, 630. The law was held unconstitutional in Ohio because it discriminated as to the value of the property taxed: *State v. Ferris*, 53 Oh. St. 314, 325. But when amended by the legislature in this respect it was held valid: *Hagerty v. State*, 55 Oh. St. 613, 625. So in Minnesota a statute requiring payment of certain arbitrarily fixed amounts (varying according to their magnitude) as a condition precedent to the settlement of estates, was held unconstitutional because contrary to the requirement of equality in taxation: *State v.*

But the current of authorities has vindicated this species of taxation beyond serious question of its validity when the acts imposing it are drawn without violating technical constitutional requirements.¹

Current of authorities holds it constitutional.

The property upon which the tax may be made payable includes, of course, all such real and personal estate, situate in the State where the administration is had, as passes from the deceased testator or intestate to the beneficiaries, whether under a will or the Statute of Descents and Distributions.²

All property taxable found in the State

Gorman, 40 Minn. 232. In Missouri an act imposing a collateral succession tax to create a fund for maintaining free scholarships in the State University was held void as violating the constitutional provision that "taxes may be levied and collected for public purposes only;" and also because it provided for a tax upon the aggregate value of the whole estate; and because by reason of the difference in the rate of levy on varying values it violated the constitutional requirement that taxes should be uniform upon the same class of subjects: *State v. Switzler*, 143 Mo. 287. (A new inheritance tax bill is pending before the legislature at the time of this writing.) So the "Inheritance Tax Law" of Michigan, which provided for the payment of the tax into the State treasury for the use of the State, and to be applicable to the expenses of the State government, "and to such other purposes as the legislature shall by law direct" was held to be in conflict with the constitutional requirement of a uniform rule of taxation: *Chambe v. Judge*, 100 Mich. 112. In New Jersey the "Act to tax intestates' estates, gifts, legacies, and collateral inheritance in certain cases" was held void as to a tax on real estate, because such purpose was not expressed in the title: *Grossman v. Hancock*, 58 N. J. L. 139.

¹ *In re Inheritance Tax*, 23 Colo. 492. Objections have been urged, considered, and overruled on the ground that such laws are violative of the fundamental principle requiring the burden of taxation to be distributed equally: *Estate of Sherwell*, 125 N. Y. 376, 379; that as a property tax it is not equal and uniform in its operation: *Kochersperger v. Drake*, 167 Ill. 122, 127; *Magoon v. Illinois*, 170 U. S. 283; *Eyre v. Jacob*, 14 Grat. 422, 428; *Matter of Swift*, 137 N. Y. 77;

Pullen v. Wake, 66 N. C. 361, 363; *Peters v. Lynchburg*, 76 Va. 927; *State v. Hamlin*, 86 Me. 495, 507; *Gelsthorpe v. Furnell*, 20 Mont. 299; that it violates the constitutional inhibition of a poll tax, and of a tax on paupers: *Tyson v. State*, 28 Md. 577, 585; that it is a direct tax and as such inhibited to Congress: *Scholey v. Rew*, 23 Wall. 331, 346 (but the tax imposed by Congress on the value of personal property acquired by gift or inheritance shared the fate of the Income Tax Law, which was held to be repugnant to the Constitution of the United States as laying a direct tax upon the power of the States: *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. 429); that it is a tax on a specific article: *Strode v. Commonwealth*, 52 Pa. St. 181, 189; that it operates unequally in discriminating between kindred of different degrees and estates of different values; *Minot v. Winthrop*, 162 Mass. 113, 115; *Hagerty v. State*, 55 Oh. St. 613, 626; ("For purposes of revenue the legislature may divide the rights of succession to the ownership of property into classes, based on the relationship of the parties, and the value of their respective gifts, legacies, or inheritances, and a tax which affects alike all property in a special class is uniform as to that class:" *Kochersperger v. Drake*, 167 Ill. 122; *Magoon v. Illinois*, 170 U. S. 283, 297; *State v. Alston*, 94 Tenn. 674, 682; *Estate of Wilmerding*, 117 Cal. 281); that the tax takes private property for public use without due compensation: *State v. Hamlin*, 86 Me. 495, 501; and that it violates the right to due process of law: *Matter of McPherson*, 104 N. Y. 306, 324.

² But neither annuities nor remainders are held taxable presently in New York: *Matter of Roosevelt*, 143 N. Y. 120, 123. See on these points *infra*.

whether beneficiary resides in State or elsewhere. The tax may be imposed, whether the beneficiary resides in the State or in a foreign jurisdiction;¹ or even against non-residents alone.² The personal property of a deceased resident is subject to appraisement for taxation though it be situated in a foreign jurisdiction,³ if it is not needed to satisfy local indebtedness there;⁴ but real estate, not being drawn to the domicile of the owner for taxation, or any other purpose, the imposition of a tax upon it in another State transcends legislative power and cannot be enforced.⁵ It has been held in Pennsylvania that the real estate in another State devised by the testator with a direction that it be sold, thus converting it into personalty, may be taxed;⁶ a mere sale, however, under a discretionary authority, is not sufficient, even though the executor bring the proceeds of the sale into the taxing State.⁷

Personal property in foreign jurisdiction, but not real estate, unless equitably converted into personalty. The personal property of non-residents is subject to the tax, notwithstanding the maxim that personal property follows the owner's domicile (which, it has been said, does not apply to questions of revenue);⁸ but only if the property have a *situs* in the taxing State apart from its owner; and it has been held, that bonds of the United States can have no such *situs*, hence such bonds belonging to a non-resident decedent's estate are not liable to the Collateral Inheritance Tax.⁹

¹ *State v. Dalrymple*, 70 Md. 294, 301.

² *Mager v. Grima*, 8 How. (U. S.) 490, 493.

³ *Matter of Swift*, 137 N. Y. 77 (Gray, J., dissenting); *Short's Estate*, 16 Pa. St. 63, 66.

⁴ *Commonwealth v. Coleman*, 52 Pa. St. 468.

⁵ *Bittinger's Estate*, 129 Pa. St. 338, 345; *Matter of Swift*, 137 N. Y. 77.

⁶ *Miller v. Commonwealth*, 111 Pa. St. 321; *Williamson's Estate*, 153 Pa. St. 521 (Mitchell, J., dissenting from this proposition); *Palmer's Appeal*, 181 Pa. St. 339, 345; *Miller's Estate*, 182 Pa. St. 157.

⁷ *Drayton's Appeal*, 61 Pa. St. 172.

⁸ *State v. Dalrymple*, 70 Md. 294, 301; *Mager v. Grima*, 8 How. (U. S.) 490, 493; *Alvaney v. Powell*, 2 Jones Eq. 51, 53, *et seq.*; *Matter of Enston*, 113 N. Y. 174 (the majority of the court in this case decide, that the act under consideration did not, before its amendment, tax property in the State passing from a non-resident decedent to collateral relatives or strangers); *Estate of Romaine*, 127 N.

Y. 80, 88; *Small's Estate*, 151 Pa. St. 1, 11; *Matter of Morgan*, 150 N. Y. 35; *Matter of Hondayer*, 150 N. Y. 37.

⁹ *Orcutt's Appeal*, 97 Pa. St. 179, 183; *State v. Brim*, 4 Jones Eq. 300; *Matter of James*, 144 N. Y. 6, 12; *Matter of Phipps*, 143 N. Y. 641, affirming s. c. 77 Hun, 325. Bonds of a domestic corporation, owned by and in possession of a non-resident at his domicile at the time of his death, are not subject to taxation under the Transfer Tax Act: *Matter of Bronson*, 150 N. Y. 1, 7; but stock so owned is: *Ib.*, 8 (O'Brien and Vaun, JJ., dissent on the question as to the bonds, holding them taxable as well as stock); and bonds of foreign as well as domestic corporations (but not United States bonds or certificates of stock of foreign corporations owned by a non-resident decedent, but deposited by him in the taxing State) are subject to taxation under the Transfer Tax Act: *Matter of Whiting*, 150 N. Y. 27 (Gray, J., dissenting). See as to United States bonds under the New York law: *Matter of Sherman*, 153 N. Y. 1.

As to the property of non-resident decedents brought into the State from abroad by virtue of a foreign legacy after the death of the testator, no reason is perceived why an inheritance or legacy tax should be payable thereon.¹

No tax on foreign legacies.

Non-residents, aliens, and foreigners may be exempted from liability for succession tax by treaties between their respective governments and the United States; and a State law conflicting with such a treaty is *pro tanto* void.²

Treaties exempting from tax.

Property, though exempt by the general law from taxation, such as government bonds or similar securities,³ life insurance,⁴ orphan asylums, and other charitable institutions,⁵ are nevertheless liable to the inheritance tax, unless exempted by the statute imposing the tax.⁶ By the exemption of "an estate which may be valued at a less sum than five hundred dollars," it was not intended to exempt all taxable estates to the extent of the sum named, but to limit the estates upon which the tax shall be imposed.⁷ A policy of life insurance on the life of the decedent, payable to his executors, is property owned by him within the meaning of the Collateral Inheritance Act, and subject to appraisal for taxation.⁸ An infant's share of the proceeds of a partition sale of land is not exempt under a statute exempting property "unless it be personal property" of certain value.⁹

General law not exempting from tax.

The child of an adopted child is not exempt under a statute declaring that a legacy to an adopted child shall not be subject to the tax.¹⁰

Legacies given in payment of a legal debt are exempt from the legacy tax;¹¹ but a legacy given in compensation of a gratuitous service for which the legatee has no legal cause

Legacies to pay debts.

¹ *State v. Brevard*, 4 Jones Eq. 141, relying on *Alvany v. Powell*, 2 Jones Eq. 51; *State v. Brim*, *supra*; *Commonwealth v. Duffield*, 12 Pa. St. 277; *Hood's Estate*, 21 Pa. St. 106, and *Pennsylvania cases supra*; *Matter of Phipps*, *supra*.

² *Succession of Rixner*, 48 La. An. 552, with a comprehensive discussion of the respective obligations and rights of citizens and subjects under treaties. See also *Succession of Rabasse*, 49 La. An. 1405.

³ *Strode v. Commonwealth*, 52 Pa. St. 181, 189; *Wallace v. Meyers*, 38 Fed. R. 184; *Carver's Estate*, 25 N. Y. Supp. 991; *Estate of Van Kleeck*, 121 N. Y. 701.

⁴ *Matter of Knoedler*, 140 N. Y. 377, 380.

⁵ *Miller v. Commonwealth*, 27 Grat. 110, 118. See also *Matter of Van Kleeck*, 121 N. Y. 701.

⁶ *Commonwealth v. Henderson*, 172 Pa. St. 135, 139. "Municipal corpora-

tions are not included in the exemptions to" the societies, corporations, and institutions now exempted by law from taxation: *Matter of Hamilton*, 148 N. Y. 310. A legacy for the erection of a town hall and library, and for a fund for the purchase of books for the free use of the inhabitants is a charity, and as such exempt from the tax; *Essex v. Brooks*, 164 Mass. 79, 83. So in New York a "Home for Aged Men" is held a charity and exempt from the tax, though an entrance fee is charged to the beneficiaries: *Matter of Vassar*, 127 N. Y. 1, 10, reversing s. c. 58 Hun, 378.

⁷ *Estate of Sherwell*, 125 N. Y. 376.

⁸ *Matter of Knoedler*, 140 N. Y. 377.

⁹ *Matter of Stiger*, 28 N. Y. Supp. 162.

¹⁰ *Bird's Estate*, 11 N. Y. Supp. 895.

¹¹ *Estate of Quin*, 13 Phila. 340; *Rogers' Estate*, 10 N. Y. Supp. 22; *Underhill's Estate*, 20 N. Y. Supp. 134.

of action, is liable.¹ In Maryland the commissions of an executor who has renounced the same are not amenable to the legacy tax thereon.²

Neither the United States, as a body corporate and politic,³ nor a municipality or corporation, is exempt from the succession tax.⁴

U. S. government and municipalities not exempt.

Executor's duty to pay out of personal property,

By the terms of most of the statutes on this subject, the duty to pay the legacy or inheritance tax is imposed upon executors and administrators, except the tax on real estate in States in which no title or right of possession to the real estate passes to them. In such States they have no right or duty in respect of the real estate, and have not the right to pay the tax thereon out of the personalty.⁵ It is the duty of the executor or administrator to deduct the amount of the tax out of any legacy or distributive share before parting with legacy. he pays out the same; and if the legacy or property be not money, it is his duty to collect the same from the person entitled to the legacy or property, before he delivers it. But he can deduct or collect only from the property in his hands: he can maintain no action against the legatee for the recovery of the tax on personal property.⁶ While the legacy or succession tax subjects the property to a lien, it does not create a personal liability on the part of the legatee; and the person having the property in charge is liable only as pointed out by statute; if demand is provided for, there is no liability until there is neglect or refusal to pay "after demand."⁷

The tax on property other than money is determined by the appraisement of its value. Appraisers appointed under the statute imposing the inheritance tax are required to appraise, not the estate of the decedent, but the estate inherited or created by will, subject to the tax; and, of course, such articles only as have no specific face value, including annuities, life estates, &c. It is not their province to appraise money legacies, or any property not bequeathed or not descending.⁸ They should appraise the value of each legacy or distributive share at the point of the transfer, without making any deduction whatever, and report this to the court, and the legatees, if dissatisfied, may appeal therefrom.⁹ They have no power to declare property

¹ Estate of Gibbons, 16 Phila. 218, Tyson's Appeal, 10 Pa. St. 220; Tuigg's Estate, 15 N. Y. Supp. 548.

² Owings v. State, 22 Md. 116, 119.

³ Matter of Merriam, 141 N. Y. 479, 484; Cullum's Estate, 25 N. Y. Suppl., affirmed in 145 N. Y. 593.

⁴ *In re* Hamilton's Estate, cited from 13 N. Y. Law J. 1384, by Dos Passos in his treatise on Inheritance Tax Law, p. 63.

⁵ Commonwealth v. Coleman, 52 Pa. St. 468.

⁶ Weed's Estate, 32 N. Y. Supp. 777.

⁷ United States v. Pennsylvania Co., 27 Fed. R. 539; United States v. Truck, 27 Fed. R. 541.

⁸ Matter of Jones, 5 Dem. 30; Matter of Astor, 6 Dem. 413, 415.

⁹ Millward's Estate, 27 N. Y. Supp. 286; Matter of Swift, 137 N. Y. 77, 87.

exempt from the tax,¹ but while it is not their province to construe the will, they should, when in doubt, report the facts to the court,² whose duty it is to decide all questions arising under the statute in relation to the tax thereby imposed.³ The judge is really the assessing and taxing officer, and he proceeds without notice to any other State official.⁴ The appraisal of all lands should be in the county where letters testamentary or of administration were granted, and it makes no difference that lands are situated in other counties.⁵

To report to court.

Court the assessing officer.

Property should be assessed at its fair market value, — its cash value, which terms, with reference to the appraisal for taxation, are held to mean the same thing.⁶ Debts of the deceased must be deducted; the tax is assessable only on the clear value, which means the surplus after paying debts and legal charges against the estate.⁷ But no deductions are to be made from the value of the residuary estate of the amount of the tax to be assessed, either upon prior legacies, or upon its value; the appraisers are to report what is the value of the interest passing to the legatee under the will, without any deduction for any purpose, or under any testamentary direction.⁸ It is held, in New York, that the appraisers have no authority to deduct debts, funeral expenses, or expenses of administration in reporting the value of the estate, but that such deductions, if any, are to be made by the court.⁹ Counsel fees paid out in litigation among persons claiming as distributees of the estate are not to be deducted.¹⁰

Property to be assessed at fair market value.

Deducting debts and charges.

Deductions to be made by court.

A difficulty is sometimes experienced where a testator devises or bequeaths property to one for years or life, and to others in remainder. It becomes necessary in such case to ascertain the value of the estate for life or years. The importance of this subject is incidentally enhanced in States in which estates of less than a stated value are exempted from the tax imposed upon estates exceeding that amount. Thus it was held, under a statute imposing the tax on all property to certain persons, "provided, that an estate which may be valued at a less sum than five hundred dollars shall not be subject to such duty

Limitation of exemption applied to legacy or distributive share.

¹ Matter of Vanderbilt, 10 N. Y. Supp. 239, 241.

² Hendrick's Estate, 3 N. Y. Supp. 281.

³ Estate of Ullmann, 137 N. Y. 403, 407. See on this point, *infra*.

⁴ Estate of Wolfe, 137 N. Y. 205, 211. As to notice of appointment of appraisers, see *infra*.

⁵ Stinger v. Commonwealth, 26 Pa. St. 429, 431; Keenan's Estate, 5 N. Y. Supp. 200.

⁶ Matter of Astor, 6 Dem. 402, 411;

Leavitt's Estate, 4 N. Y. Supp. 179, 180; Bird's Estate, 11 N. Y. Supp. 894.

⁷ Estate of Cooper, 127 Pa. St. 435, 440; Orcutt's Appeal, 97 Pa. St. 179, 185; Commonwealth v. Coleman, 52 Pa. St. 468, 473; Matter of Euston, 113 N. Y. 174, 182.

⁸ Matter of Swift, 137 N. Y. 77, 87; s. c. 19 N. Y. Supp. 292.

⁹ Millward's Estate, 27 N. Y. Supp. 286.

¹⁰ Live's Appeal, 155 Pa. St. 378.

or tax," that the value of the devise or legacy determined the liability to the tax, and not the value of the whole estate;¹ while under a statute explaining the meaning of the word "estate" to be that of the testator, passing or transferred to those not specifically exempt, and not as the property or interest passing to individual legatees, the tax was held properly imposed on the devisee of a life estate of less value than the amount exempted, where the aggregate transfers by the will exceed that amount.²

Where the future estate vests at the time of the testator's death, the value of the intermediate estate is ascertainable at once, and may be computed, if a life estate, by the life or mortality tables in use by the courts.³ But where the tax is payable when the legatee or distributee becomes "beneficially entitled in possession or expectancy," as it is under the statutes of most States, these words are construed to mean when the time arrives at which the beneficiary has the title, or is entitled to the possession thereof, or when a contingent interest vests, or when a defeasible interest becomes indefeasible.⁴ In the language of Judge Finch,⁵ "the State will get its tax when the legatees get their property." So it was held, under the Act of Congress prior to the year 1870, that where a remainder is dependent upon a life estate in the land, it does not take effect as an estate in possession until the life estate is determined, the tax is improperly assessed against the remainderman before the close of the life estate.⁶ Under the statute of Pennsylvania directing the appraiser "to put a fair valuation on the real estate," and "to assess and fix the then cash value of all annuities and life estates growing out of the same, upon which annuities and life estates the collateral inheritance tax shall be immediately payable out of the estate at said valuation," the tax was held payable at once, — the life estates and estates in remainder each liable for its own tax, immediately upon the death of the decedent under penalty of twelve per cent on default of payment.⁷ Under later amendments of the statute, relieving tenants in remainder from liability for the tax until they come into actual possession by the termination of the intervening estate, the tax was held payable on a valuation of the estate at the time of such payment,

Life estate to be appraised according to mortality tables.

Future contingent estates when contingency happens.

Tax payable on death of decedent.

Tax not payable until property passes.

¹ *Matter of Howe*, 112 N. Y. 100. "The tax is upon the individual," says Ruger, J., "and can only be imposed when the particular interest devised exceeds in value the amount of the limitation provided by the statute": *Matter of Cager*, 111 N. Y. 343, 347.

² *Matter of Hoffman*, 143 N. Y. 327.

³ *Grover's Estate*, 34 N. Y. Supp. 474.

⁴ *Talmadge v. Seaman*, 92 Hun, 242; *Matter of Sloan*, 154 N. Y. 109.

⁵ *Matter of Hoffman*, 143 N. Y. 327.

⁶ *Wright v. Blakeslee*, 101 U. St. 174, 178; *Clapp v. Mason*, 94 U. S. 589; *Mason v. Sargent*, 104 U. S. 689.

⁷ *Commonwealth v. Smith*, 20 Pa. St. 100; *Commonwealth v. Eckert*, 53 Pa. St. 102.

after deducting the debts owing by the decedent at the time of his death.¹ So it is held that where the widow has power to appropriate the residuum to her own use during life, with a disposition over, the inheritance tax payable thereon, if any, cannot be ascertained until her death.² So in New York contingent estates given by a will may be appraised and taxed on the happening of the contingency upon which they are limited.³

Notice must be given of the appointment of appraisers, so that the parties interested may be represented in the proceeding. A statute directing the surrogate to immediately give notice thereof by mail to all parties known to be interested therein has been held sufficient to satisfy the constitutional requirement of notice,⁴ and it is held that it is the surrogate's duty to notify all persons interested in the imposition of the tax, including the legatees, district attorney, and comptroller.⁵ The surrogate, in the proceeding to assess a decedent's estate for the imposition of the inheritance tax, is an assessing and taxing officer, and represents the State for those purposes,⁶ and as such must necessarily decide, in a judicial capacity, important questions of law.⁷ But the adjudication is conclusive and binding upon the question of taxation only.⁸

Notice of appointment of appraisers.

Surrogate the taxing officer.

Annuities constitute estates, in the sense of the statutes taxing legacies and successions⁹ which are to be appraised at their fair market value.¹⁰ Where the annuity is to persons for life who are exempt from the Collateral Inheritance Tax, with contingent remainders over to persons not exempt, the appraiser should report the market value of such contingent interest at the date of the decedent's death, leaving the taxation to future action.¹¹ In Massachusetts the value of annuities are to be determined by the so-called actuaries' combined experience tables and four per cent compound interest, and the tax on such annuity is payable out of the first instalment due thereon.¹² Legacies payable out of income are said to be annuities,¹³ but a legacy payable in annual instalments until the fund be exhausted is not treated as an annuity, but as a legacy taxable as each instalment matured.¹⁴

¹ Estate of Cooper, 127 Pa. St. 435.

⁸ *Amberst College v. Ritch*, 151 N. Y.

² *Nieman's Estate*, 131 Pa. St. 346, 350;

282, 343.

Millward's Estate, 27 N. Y. Supp. 286.

⁹ *Thomson's Estate*, 5 Week N. Cas.

³ *Matter of Stewart*, 131 N. Y. 274,

14, 19.

279; *Matter of Roosevelt*, 143 N. Y. 120;

¹⁰ *Leavitt's Estate*, 4 N. Y. Supp. 179.

Matter of Hoffman, 143 N. Y. 327, 333, *et seq.*

¹¹ *Clark's Estate*, 5 N. Y. Supp. 190.

¹² *Minot v. Winthrop*, 162 Mass. 113,

⁴ *Matter of McPherson*, 104 N. Y. 306, 321.

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⁵ *Vanderbilt's Estate*, 10 N. Y. Supp. 239.

¹³ *Dos Passos Inh. Tax Law*, ch. vi. § 56, p. 266, citing *Williamson's Estate*, 143 Pa. St. 150.

⁶ *Estate of Wolfe*, 137 N. Y. 205, 211.

¹⁴ *Crompton's Estate*, 29 Week. Notes

⁷ *Estate of Ullmann*, 137 N. Y. 403, 407.

Cas. 36.

The inheritance tax cannot be defeated by a conveyance or transfer of property during the lifetime of the owner, to take effect after his death;¹ and where such is the effect of a conveyance it makes no difference what may have been the purpose or intention thereof.² The fraud will not invalidate a conveyance in trust, although executed to defeat the Collateral Inheritance Tax; but the fund will be liable to taxation in the hands of the *cestui que trust*.³

Gifts *causa mortis* are subject to the inheritance tax,⁴ but not gifts *inter vivos*.⁵

The tax, when not postponed to a later time by reason of some contingency in the vesting or transfer of the property, is payable at the time of the decedent's death, or within a certain time thereafter designated by the statute; and if so postponed, it is payable at the time it accrues. For the non-payment of the tax a penalty is in many States imposed, and in addition thereto interest, usually six per cent per annum from the time it accrued until it is paid.⁶ When the tax is erroneously imposed, and paid under protest, it may be recovered by action against the collector.⁷

Although the statute imposing the tax may contain no provision limiting the time within which the commonwealth may sue for the tax, yet it is held in Pennsylvania that the expiration of twenty years from the time it accrues will raise the conclusive presumption of payment in favor of the purchasers of property originally liable for the tax.⁸

§ 330. **Sale of Perishable Property.** — The personal property of an estate which is of a perishable nature, liable to loss, waste, or depreciation, should be sold as soon after taking charge of the same as reasonable diligence and compliance with the statutory requirements will render feasible. The statutes of all the States, with the exception of only one or two, enjoin the early sale of perishable property as a duty upon executors and administrators; in some of them the directions are very elaborate and minute, in all of them sufficiently full to enable executors and administrators to proceed without incurring any risk or liability on the score of ignorance of the law. In general, an order of the probate court for the sale is requisite, based upon a motion or petition of the executor; but such petition is not required to set

¹ Reisch v. Commonwealth, 106 Pa. St. 521; Line's Estate, 155 Pa. St. 378; Johnson's Estate, 19 N. Y. Supp. 963; Du Bois' Appeal, 15 Atl. 641 (121 Pa. St. 368).

² Reisch v. Commonwealth, *supra*, p. 527.

³ Tritt v. Crotzer, 13 Pa. St. 451.

⁴ Edwards' Estate, 32 N. Y. Supp. 901; affirmed in 146 N. Y. 380.

⁵ Dos Passos Inh. T. L., ch. vi. § 59, p. 338.

⁶ Prout's Estate, 6 N. Y. Supp. 457. See also Estate of Stewart, 131 N. Y. 274, 284; Matter of Fayerweather, 143 N. Y. 114, 119; Commonwealth v. Smith, 20 Pa. St. 100, 104; Avery's Estate, 34 Pa. St. 204.

⁷ Wright v. Blakeslee, 101 U. St. 174.

⁸ Mellon's Appeal, 114 Pa. St. 564, 573.

forth the jurisdictional facts in accurate or technical language.¹ If the administrator neglect to obtain such order in due time, he will

be personally liable for any expenses growing out of the [* 692] delay,² as well as for the loss of the property, * or its depreciation in value.³ There is no precise rule as to the period at which the value of the property is to be charged; it will depend upon the circumstances of each case, and the evidence affecting it.⁴ The executor or administrator should exercise a reasonable discretion. But it seems that where a particular period for the sale of such property is fixed by statute, as it is in many States,⁵ the liability is to be fixed by the value of the property at the expiration of this time, and he should be charged with such amount, regardless of the actual amount subsequently received, unless it was in excess thereof.⁶ If the administrator acts in good faith for the best interest, in his opinion, of the estate, without violating the direct provision of the statute or order of the court having jurisdiction, and permits property to remain unsold which is not likely to depreciate in value, he will not be held responsible for an unforeseen loss arising.⁷

Sale should be as early as circumstances permit,

and within the time required by statute, or executor is liable for the value of the property at such time.

§ 331. **Transfer of Property by the Executor or Administrator.** — Since the legal title to all personal property descends to the executor or administrator, a sale or conveyance by him passes a good title to the vendee, and to the assignee and transferee of negotiable notes.⁸ Thus it has been held that the administrator may exchange a note secured on real

Transfer of property by executor or administrator

¹ *Harris v. Parker*, 41 Ala. 604, 614. But if the petition does not allege or show the existence of a legal cause for the sale, the order of sale based thereon is void for the want of jurisdiction in the court: *Hall v. Chapman*, 35 Ala. 553, 557. And see *post*, § 331.

² *Goodbear v. Gary*, 1 La. An. 240, 241; *Hogan v. Thompson*, 2 La. An. 538.

³ *Griswold v. Chandler*, 5 N. H. 492, 493; *Dawes v. Winship*, reported in a note to *Brazier v. Clark*, 5 Pick. 96, 97.

⁴ *Wms. Ex.* [1816].

⁵ In *Kansas*, within three months after date of the bond: *Gen. St.* 1888, § 2852. In *Missouri* after appraisement: *Rev. St.* 1889, § 111. In *New Hampshire*, within six months: *Publ. St.* 1891, ch. 189, § 5. In *Ohio*, within three months: *Bates' Ann. St.* 1897, § 6074. In *Oregon*, the order must be applied for immediately upon, or at the term next after, filing the inventory: *Code*, 1887, § 1142. In other States, — for instance, in *Colorado*, *Gen.*

L. 1883, § 3566; *Georgia*, *Code*, 1882, § 2554; *Illinois*, *Rev. St.* 1885, p. 229, ¶ 91; *Indiana*, *Rev. St.* 1888, § 2275, — the requirement is to sell, or obtain an order to sell, "as soon as convenient," "at as early a day as possible," "immediately," etc.

⁶ *Hughes v. Empson*, 22 Beav. 181, 183, *et seq.* In this case the Master of the Rolls thought that two months would have been a reasonable time, but allowed twelve months, because the executor might fairly have considered that a reasonable time.

⁷ *Dugan v. Hollins*, 11 Md. 41, 79, *et seq.*; *Bosio's Estate*, 2 Ashm. 437, 438, holding an administrator harmless, who had waited four months, in expectation of a better opportunity for sale, without selling an ostrich, which then died; *Watkins v. Stewart*, 78 Va. 111; *Pierson v. Gillenwaters*, 99 Tenn. 446, 451.

⁸ As to the power of alienation by executors or administrators, see *ante*, § 175.

confers valid title on transferee, unless he has notice

estate and release the lien on the realty for a coupon bond;¹ sell at private sale, and assign to the purchaser, the interest of his intestate in a note secured by mortgage, held by the latter as a pledge for an indebtedness which the pledgor and mortgagee owed him;² also, that the assignment of a mortgage by the administrator to a third party, and by the latter back to the administrator is not void, but voidable only at the election of the next of kin;³ and that he may pass a good title to a purchaser buying for value and in good faith notes given to the administrator for unpaid purchase-money of real estate bought at the administrator's sale, although the sale had been for a fraudulent purpose.⁴ It follows from this doctrine of the common law, that if the executor misapply the assets he commits a *devastavit*, and creditors, heirs, and legatees must look to him personally and his sureties for indemnity, and the transferee takes a good title.⁵

of fraudulent or dishonest purpose.

But if a purchaser has notice of * a dishonest [* 693] purpose on the part of the administrator to mis-apply the funds or property of the estate, the vendee is liable to make restitution to the persons entitled to the estate.⁶ Nor

¹ And if done in good faith, the transaction will bind the administrator and those whom he represents: *Stribling v. Coal Co.*, 31 W. Va. 82, 90.

² *Drake v. Cloonan*, 99 Mich. 121.

³ It is good as against the mortgagor in an action by the administrator in his individual capacity: *Read v. Knell*, 143 N. Y. 484.

⁴ *Jelke v. Goldsmith*, 52 Oh. St. 499.

⁵ *Hadley v. Kendrick*, 10 Lea, 525; *Overfield v. Bullitt*, 1 Mo. 749; *Gray v. Armistead*, 6 Ired. Eq. 74; *Bradshaw v. Simpson*, 6 Ired. Eq. 243, 246; *Tyrell v. Morris*, 1 Dev. & B. Eq. 559; *Cleveland v. Harrison*, 15 Wis. 670, 674; *Williams v. Ely*, 13 Wis. 1, 6; *Munteith v. Rahn*, 14 Wis. 216; *Beecher v. Buckingham*, 18 Conn. 110, 120, *et seq.*; *Bank of Missouri v. White*, 23 Mo. 342; *Price v. Nesbit*, 1 Hill (S. C.), Ch. 445, 461; *Pulliam v. Byrd*, 2 Strobb. Eq. 134, 142; *Knight v. Yarborough*, 4 Rand. 566, 576; *Morrill v. Carr*, 2 La. An. 807, 808, distinguishing between the common law as in force in Arkansas, and the law of Louisiana; *Lappin v. Mumford*, 14 Kans. 9; *Brockenbrough v. Turner*, 78 Va. 438.

The same rule holds good with regard to the transfer of negotiable notes of the decedent: *Hough v. Bailey*, 32 Conn. 288; *Makepeace v. Moore*, 10 Ill. 474,

477; *Walker v. Craig*, 18 Ill. 116, 123; *Speelman v. Culbertson*, 15 Ind. 441; *Wilson v. Doster*, 7 Ired. Eq. 231, 233; *Rogers v. Zook*, 86 Ind. 237, 242; *Marshall Co. v. Hanna*, 57 Iowa, 372, 375. Where executors wrongfully transfer property belonging to the estate to one who knows the same to be trust property, they are merely performing a duty in seeking to recover it back, in the execution of which a court of equity may properly assist. They are not in such case in *pari delicto*: *Zimmerman v. Kinkle*, 108 N. Y. 282, 287; *Deobold v. Oppermann*, 111 N. Y. 531, 538. The rule applicable to trustees is also applicable to executors and administrators, that property converted into different property, or sold, and the proceeds thus misapplied, can be followed in their hands whenever it can be traced through its transformations, and will be subject, when found in its new form, to the rights of the beneficiary: see *Pierce v. Holzer*, 65 Mich. 263, and *Holden v. Piper*, 5 Col. App. 71, cited *ante*, § 174, p. * 387.

⁶ *Smith v. Ayer*, 101 U. S. 320, 327; *Hadley v. Kendrick*, *supra*; *Gray v. Armistead*, *supra*; *Cox v. Bank*, 119 N. C. 302. Receiving a note in payment of the administrator's own debt is sufficient notice: *Bradshaw v. Simpson*, *supra*; *Dodson v. Simpson*, 2 Rand. 294, 297, *et seq.*;

can the administrator make a valid sale or pledge of the assets as security for or in payment of his own debts.¹

But this common-law doctrine is inapplicable in many of the American States by reason of the provisions in the statutes of most of them, according to which [* 694] neither * executors nor administrators are permitted to sell property, unless directed in the will, without an order of court; in some of them, the statute itself declares all sales made without such order to be void.² And it has been held in some of the States, that the power of the probate court to order the sale of personal property of decedents' estates, being derived solely from the statute, is specific and limited, and that therefore an order of sale based upon a petition which does not allege or show the existence of a legal cause for the sale is a nullity, as the court has no jurisdiction to make such order.³ In several States the statutes declaring that the executor or

Common-law rule not applicable in States requiring sale of property to be ordered by court;

and the order of sale is sometimes held void if not supported by allegation of statutory cause.

Graff v. Castleman, 5 Rand. 195; Sacia v. Berthoud, 17 Barb. 15. The law is stated by Savage, C. J., in Colt v. Lasnier, 9 Cow. 320, 342, to be, "That any person receiving from an executor the assets of his testator, knowing that this disposition of them is a violation of his duty, is to be adjudged as conniving with the executor; and that such person is responsible for the property thus received, either as a purchaser or as a pledgee. The payment by the executor of his own private debt with the assets of his testator is considered clearly a *devastavit*;" Eastham v. Landon, 17 Wash. 48; Moore v. American Co., 115 N. Y. 65, 79; Scott v. Searles, 7 Sm. & M. 498, 505; Latham v. Moore, 6 Jones Eq. 167, 169; Smart v. Watterhouse, 6 Humph. 158; Rogers v. Zook, 86 Ind. 237, 243, and cases cited; Carter v. National Bank, 71 Me. 448; Brockenbrough v. Turner, 78 Va. 438; Parham v. Stith, 56 Miss. 465, 472. The same result follows where the administrator contracts to allow his sureties—in order to induce them to become his bondsmen—to deposit with them the proceeds of the estate, to be retained and used in their business until the administrator be discharged, though for the purpose of protecting such sureties, and though interest was paid by them: Deobold v. Oppermann, 111 N. Y. 531. But it is no fraud to appropriate a note to the executor's own debt, when the

estate is indebted to him: Ward v. Turner, 7 Ired. Eq. 73, 75.

¹ Nugent v. Laduke, 87 Ind. 482. Marshall's Estate, 138 Pa. St. 285; Boeger v. Langenberg, 42 Mo. App. 7, 13. And it is immaterial whether he himself sells the assets for such purpose, or permits the sheriff to sell them: Williamson v. Branch Bank of Mobile, 7 Ala. 906, 917. But an executor or administrator may pledge the assets for the general purposes of administration, and hence where the pledgee has no notice that he intends to misapply the assets, the pledge will be valid: Carter v. National Bank, 71 Me. 448, and authorities cited; Wood's Appeal, 92 Pa. St. 379. To constitute notice the apparent facts must be such as to put the lender upon such inquiry as would suggest itself to an ordinarily prudent person: Gottberg v. Bank, 131 N. Y. 595. But the pledge must be made in the usual course of administration, the pledgee relying upon the official character of the executor: Moore v. American Co., 115 N. Y. 65. See note, *supra*, for additional authorities.

² In Maryland: Publ. Gen. L. 1888, art. 93, § 276; Nevada: Gen. St. 1885, § 2817; Oregon: Gen. L. 1887, § 1141; South Carolina: Rev. St. 1893, § 2105; Texas: Rev. St. 1888, §§ 2058, 2059.

³ Hall v. Chapman, 35 Ala. 553, 557. But Walker, J., remarked, that, if the

administrator must procure an order of court to sell personalty are construed to affect only visible, tangible personalty, and that the executor's or administrator's rights concerning the alienation of choses in action are still as at common law.¹ On the other hand, an order of court is necessary in California to validate the sale of choses in action as well as other personalty.² So in New Hampshire³ and Louisiana;⁴ and in Arkansas, unless authorized by the will, the statute expressly providing that choses in action must be sold by order of court at public auction.⁵ In Indiana sales must be made in the manner provided by statute; in the absence of an order of court the sale must be public.⁶ In Mississippi, administrators are not permitted to sell personal property except when it becomes necessary to pay debts and for purposes of distribution; if not for either of these purposes, the sale is void;⁷ and if the probate court order a sale (for the purpose of distribution) without notice to the legatees, such sale is void, and the purchaser takes no title.⁸ So, in Louisiana, a commission to sell property of minors, * issued [* 695] by the clerk, will not supply the place of the necessary order for sale; nor will it be inferred from such a commission that a decree of sale existed, although recited therein.⁹ Nor can the probate court order a sale of the property through a commissioner; an executor or administrator alone can pass the title.¹⁰ An executor, who without an order of sale by the probate court sells corporate stock belonging to the estate is liable for the loss then resulting to

question were a new one, he would be inclined to hold that in reference to the control which probate courts exercise over the sale of personal property they are courts of general and not of limited and special jurisdiction. But he considered himself bound by the former adjudications on this point, reciting *Wyatt v. Rambo*, 29 Ala. 510, *Hatcher v. Clifton*, 33 Ala. 301, *Ikellheimer v. Chapman*, 32 Ala. 676, and *King v. Kent*, 29 Ala. 542. To the same effect, see *Joslin v. Coughlin*, *infra*.

¹ *Weider v. Osborn*, 20 Oreg. 307, 310; *Waring v. Lewis*, 53 Ala. 615, *per* Brickell, J., p. 630; *Chapman v. City*, 30 S. C. 549; *Rhame v. Lewis*, 13 Rich. Eq. 269, 298.

² *Wickersham v. Johnstone*, 104 Cal. 407; *Rainin v. Newman*, 114 Cal. 635, 660.

³ *French v. Currier*, 47 N. H. 88, 97. But the administrator may take the whole of the personal estate at its appraised value, in which case he becomes the owner in his own right and may dispose of it at pleasure.

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⁴ *Burbank v. Payne*, 17 La. An. 15. But see *Kaiser's Succession*, 48 La. An. 973.

⁵ Hence the administrator's private assignment of a judgment belonging to the estate is void: *Winningham v. Holloway*, 51 Ark. 385.

⁶ *Citizens' R. Co. v. Robbins*, 124 Ind. 449.

⁷ *Baines v. McGee*, 1 Sm. & M. 208, 218.

⁸ *Joslin v. Coughlin*, 26 Miss. 134, 139, *et seq.* But the order to sell when necessary for the payment of debts is made upon the *ex parte* application of the executor, no notice to distributees being necessary; and the order of the probate court must be presumed to be correct until the contrary appears. Hence an order to sell, not stating for what purpose, will be presumed to be for the payment of debts, and good without notice: *Hutchins v. Brooks*, 31 Miss. 430, 432; *Smith v. Chew*, 35 Miss. 153.

⁹ *Robert v. Brown*, 14 La. An. 597.

¹⁰ *Rose v. Newman*, 26 Tex. 131, 133.

the estate, but is not accountable as trustee for profits subsequently made by the repurchase and sale of such stock.¹

§ 332. **Method and Notice of Sale.**—Sales of the personal property of the estates of decedents are, in the American States, generally required to be public, to the highest bidder, unless, for good cause shown, the court authorize a private sale. In some of the States private sales were interdicted entirely. So in Alabama;² but now, according to the Code of 1876, the probate court may, upon petition of the administrator and proof that it will be for the best interest of the estate, authorize the sale of crops and stocks of merchandise of merchants dying without leaving a partner surviving, at private sale, at not less than the appraised value of the property.³ It is held that, when the jurisdiction to order a sale has attached, the order is not void because it directs a private sale, as prayed, nor is the sale in pursuance thereof void.⁴ And if a sale is made, without authority, and the property delivered to the purchaser, he may maintain an action against one who tortiously takes it from his possession;⁵ and the administrator, being *in pari delicto*, is estopped from denying the validity of the sale.⁶ In Louisiana private sales were held to pass no title to the purchaser, although they were had upon order [* 696] of the probate court.⁷ So the statute * of North Carolina requires the sale of personal property to be at public auction;⁸ but it is held to be directory only, and not to affect the power of sale vested in the executor by the common law.⁹ In most States, however, an order to sell at private sale may be obtained from the probate court

Ordinarily, the sale should be to the highest bidder at public sale.

Order authorizing private sale may be obtained from court.

¹ *Hiller v. Ladd*, 85 Fed. R. 703, 716.

² *Bogan v. Camp*, 30 Ala. 276, 278, citing *Dearman v. Dearman*, 4 Ala. 521; *Fambro v. Gantt*, 12 Ala. 298; *Wier v. Davis*, 4 Ala. 442; *Elliott v. Branch Bank at Mobile*, 20 Ala. 345; *Ventress v. Smith*, 10 Pet. 161, 172.

³ §§ 2441, 2442. So by Code of 1886, § 2099.

⁴ *Harris v. Parker*, 41 Ala. 604.

⁵ *Traylor v. Marshall*, 11 Ala. 458.

⁶ *Hopper v. Steele*, 18 Ala. 828, 831. *Dargan, C. J.*, calls attention to the inconsistency of the Alabama decisions on this point, holding that no title passed to a purchaser at private sale, although the administrator is estopped from recovering the property back, and at the same time unable to coerce payment, and liable to be charged with the value, citing the cases *supra*, and also *Kavanaugh v. Thompson*, 16 Ala. 817; he dissents from

the majority, and holds such sale to be voidable, but not void: p. 834.

⁷ "Executors could only sell at public auction after due advertisement of the property, and the purchaser at a forced sale did not acquire a good title unless the formalities prescribed by law for the alienation of property were observed": *per Davis, J.*, in *Gaines v. De La Croix*, 6 Wall. 719, 720. But see *Kaiser's Succession*, 48 La. An. 973, where the executors were held justified in selling at private sale in the interest of the estate, apparently without an order of court.

⁸ An administrator selling at private sale does so at the risk of having to pay the difference between the full value of the property at public sale, and what he obtains: *Cannon v. Jenkins*, 1 Dev. Eq. 422, 426; *Dickson v. Crawley*, 112 N. C. 629, 632, *per Shephard, C. J.*

⁹ *Wynns v. Alexander*, 2 Dev. & B. Eq. 58; *McDaniel v. Johns*, 8 Jones L. 414.

upon application and proof that the interest of the estate would be thereby enhanced or protected. In several of the States where the administrator is directed to sell, without obtaining an order to that effect, at public sale, if he wish to sell at private sale he must apply to the court for permission.¹ A sale under a void order of the probate court, however, is held absolutely void in Alabama² and Louisiana;³ and a purchaser discovering an irregularity in the administrator's sale should promptly offer to return the property, for neither the irregularity of the sale nor the loss of the property before suit is a defence to an action for the price, if the property has not been returned.⁴ Where an executor or administrator collusively sells the goods of the estate at a lower rate than he might have obtained for them, it is *devastavit*, although the sale was by the sheriff, under execution obtained against the administrator.⁵

The statutes require full notice to be given of all public sales, generally prescribing the time and manner thereof, the minimum of time varying between ten days and four weeks, and the mode being publication in some newspaper, or posting the notice in a number of public places, or both; and in several States both the time and manner of the notice are to be determined by the order of the court. In California, the notice must be by posting, unless the court direct publication in a * newspaper.⁶ In Missouri, the want of sufficient [* 697] notice renders the sale voidable, but not assailable in a collateral proceeding.⁷ In South Carolina the administrator has been allowed to postpone the day of sale fixed in the order, without liability, for loss,⁸ and also to ship goods to a foreign market, if done in good faith for the interest of the estate.⁹

§ 333. **Terms and Method of Payment.** — The terms of sale, when not fixed by statute, are generally left to the discretion of the administrator, or made part of the order directing the sale. In most cases the statute fixes a maximum beyond which credit is not allowed to be given, generally twelve months.

¹ So in Florida, Illinois, Indiana, Kansas, Kentucky, Missouri, Ohio, and Pennsylvania. So in Mississippi; but an order to sell "in the usual course of business" is void, and the administrator selling thereunder commits waste: *Tell Furniture Co. v. Stiles*, 60 Miss. 849.

² And in such case no action lies against the purchaser to recover the agreed price: *Beene v. Collenberger*, 38 Ala. 647, relying upon *Pistole v. Street*, 5 Porter, 64, and numerous earlier Alabama cases, some of which are cited *supra*.

³ And the purchaser is not compelled to comply with his bid: *Succession of*

Michael, 20 La. An. 233; *White v. Christopherson*, 9 La. An. 232.

⁴ Good faith must be observed, whether in consummation or rescission of a contract: *Joslin v. Coughlin*, 30 Miss. 502; *Bohannon v. Madison*, 31 Miss. 348.

⁵ *Skrine v. Simmons*, 11 Ga. 401, 407.

⁶ The sale is invalid if notice was by publication not directed by the court: *Halleck v. Moss*, 17 Cal. 339, 343, *et seq.*

⁷ *McNair v. Hunt*, 5 Mo. 301, 308.

⁸ *Lamb v. Lamb*, 1 Speer Eq. 289, 301.

⁹ *Bryan v. Mulligan*, 2 Hill (S. C.), Ch. 361, 364.

erally twelve months. But in Georgia no limit is imposed;¹ in Kentucky credit is to be not less than three and not more than twelve months;² in Kansas, not less than three nor more than nine months;³ in North Carolina⁴ and Texas,⁵ not exceeding six months; and in Connecticut sales are to be for cash.⁶ An administrator has no right to alter the terms of an order of sale; but if he does, the irregularity is cured if the court approve the sale, upon a report reciting the terms upon which the sale was had.⁷

Security for the purchase-money must be taken by the executor or administrator in making sales on credit. The statutes mostly require "good security," to be determined by the executor or administrator at his own risk; in some States notes are required to be taken, or notes or bonds, with one or more sureties. If the administrator neglect to take such security as the statute requires or the order of court prescribes, he becomes liable to the estate on his bond for the amount of such purchase-money, whether he recovers from the purchaser or not.⁸ And so if he neglect to make demand of, [* 698] * or bring action against, the sureties.⁹ But the omission to take security does not vitiate the sale.¹⁰ If the security taken was good, and in accordance with the statute or order of the court at the time it was taken, a subsequent failure or insolvency of the sureties will not render the administrator liable, but the loss will fall on the estate.¹¹ And the rule requiring him to take security is not so rigidly enforced as to make him liable, where he sold upon a few days' time, considered according to the general usage of the country a cash sale, and the purchaser failed before making payment.¹²

¹ Code, § 2556.

² Gen. St. 1887, p. 600, § 17.

³ Comp. L. 1885, ch. 37, § 72.

⁴ Code, 1883, § 1410.

⁵ Rev. St. 1888, § 2065.

⁶ Gen. St. 1888, § 599; *Foster v. Thomas*, 21 Conn. 285, 289.

⁷ *Jacob's Appeal*, 23 Pa. St. 477, 479.

⁸ *Shepard v. Shepard*, 19 Fla. 300, 319; *Betts v. Blackwell*, 2 Stew. & P. 373; *Vreeland v. Vreeland*, 13 N. J. L. 512; *Hasbrouck v. Hasbrouck*, 27 N. Y. 182, 185; *Steger v. Bush*, Sm. & M. Ch. 172, 188; *Stukes v. Collins*, 4 Desaus. 207; *Pray v. Fleming*, 2 Hill (S. C.), Ch. 97, 98; *Dillabaugh's Estate*, 4 Watts, 177; *Davis v. Yerby*, Sm. & M. Ch. 508 (if he did so in bad faith); *Bowen v. Shay*, 105 Ill. 132. Where he accepts notes of insolvent principal and sureties, he is held for principal and interest, on his bond, but is entitled to have the notes turned

over to him: *Lindley v. Wells*, 116 Ind. 235.

⁹ *Johnston's Estate*, 9 W. & S. 107; *Southall v. Taylor*, 14 Gratt. 269, 273. But a delay of one term after the maturity of the security is not such negligence as will make the administrator liable: *Gwynn v. Dorsey*, 4 Gill & J. 453, 460. Nor a delay of one month: *Davis v. Marcum*, 4 Jones Eq. 189, 191.

¹⁰ *Lay v. Lawson*, 23 Ala. 377, 389. But in Indiana, where an order to sell stock at private sale required good security, and the sale was made on the purchaser's individual note, on ten years' credit, the statute permitting but twelve months, the sale was held void and to pass no title: *Citizen's R. Co. v. Robbins*, 128 Ind. 449.

¹¹ So provided in the statutes of some of the States, and held in *Gordon v. Gibbs*, 3 Sm. & M. 473; *Davis v. Marcum*, *supra*.

¹² *Taveau v. Ball*, 1 McCord Ch. 456, 464.

The price for which property of an estate is sold is not due to the administrator in his individual capacity, but to the estate.¹ The object of the sale is to convert the property of the estate into cash for the purposes of administration, and when so converted it constitutes assets of the estate in place of the property sold. Hence a creditor of the estate cannot deduct from the price of the property sold to him by the administrator the amount of his demand against the estate,² unless his claim has been adjudicated, and the amount to which he is entitled from the estate ascertained, in which case the smaller sum may be deducted from the larger.³ When an administrator has sold on credit, he may nevertheless receive payment at once, since to convert into cash is the paramount object of the sale.⁴ If he takes a note payable to himself, he is liable for the amount thereof to the estate, as for *devastavit*, but the contract is valid between the parties, and the maker can not set off * against it a claim purchased by [* 699] him against the estate.⁵ And if the administrator, without sanction of the court, receive, in satisfaction of a debt due the estate, an assignment of a claim against a third person, he becomes liable for the debt personally.⁶ So, if he receive land in payment, those who are entitled to the estate may elect to hold him liable for the debt, or take the land;⁷ and if he take bonds, he becomes personally liable for the amount of the sale.⁸

It was held at one period, that Confederate money, being the written obligation of rebels, issued by them to enable them to carry on the war against their government, never had legal existence or value, and could not be recognized as receivable in extinguishment of a debt; hence administrators were held liable in the currency of the United States for the nominal amount

Purchase-money does not go to the administrator in his individual capacity.

Creditor cannot deduct his demand from the purchase-money for property bought by him.

Purchase on credit may be paid for in cash.

Note given to the administrator personally discharges the purchaser, and makes the administrator liable.

Payment in Confederate money

¹ Hence, where an administratrix sold property at a price in excess of its appraised value, but charged herself with the appraised value only, taking the purchaser's note for the full amount of the sale, the debt due by the purchaser is applicable to the satisfaction of a judgment against the estate: *Montmollin v. Gaunt*, 5 Dana, 405, 407.

² *Pendarvis v. Wall*, 14 La. An. 449; *Chandler v. Schoonover*, 14 Ind. 324.

³ *Rix v. Nevins*, 26 Vt. 384, 389. This is simply on the equitable principle of set-off, and is expressly allowed by statute in some of the States. The subject of set-off is treated *post*, § 398.

⁴ Although the amount was to be secured and to bear interest: *Gwynn v. Dorsey*, 4 Gill & J. 453, 462.

⁵ *Biscoe v. Moore*, 12 Ark. 77.

⁶ *Bass v. Chambliss*, 9 La. An. 376. So if he accept a discharge of his debt due to a debtor of the estate, he becomes liable to the estate thereby: *Alvord v. Marsh*, 12 Allen, 603.

⁷ *Weir v. Tate*, 4 Ired. Eq. 264, 271.

⁸ *Hoke v. Hoke*, 12 W. Va. 427, 479, relying on *Estill v. McClintick*, 11 W. Va. 399. So if he take the debtor's bill of exchange: *Parham v. Stith*, 56 Miss. 465, 473.

received by them in Confederate money.¹ But this view soon gave way to the more rational principle, that payment in the currency established by the *de facto* government is lawful, and will be recognized after the overthrow of such government;² hence an administrator, having received such money for property of the estate sold by him, is accountable for the actual value, not the face value, of the depreciated currency in the currency of a later period.³

held lawful;

and administrator is liable for its actual, not its face, value.

It is so held in Alabama,⁴ Arkansas,⁵ Georgia,⁶ Louisiana,⁷ [* 700] Mississippi,⁸ North Carolina,⁹ * South Carolina,¹⁰ Tennessee,¹¹ and Virginia.¹² Upon the same principle, payment to an administrator in the Treasury notes of the United States is lawful, and he is liable to the heirs for nothing more than he received.¹³ If the sale is upon credit, the administrator is liable for the scaled value of the money for which it sold, at the time of the sale, and not at the expiration of the time of credit.¹⁴ The general principle requires the scaling of depreciating currency to be made as of the time, not when the money was received, but when it was, or ought to have been, paid out.¹⁵

Value of money scaled as of time of sale.

§ 334. **Purchase of Personalty by the Executor or Administrator himself.** — It is an ancient and very familiar doctrine, that the sale by an executor or administrator of property of the estate to himself, either directly or indirectly, whether at private sale or public auction, no matter how honest, open, and fair, may be avoided at the option of the beneficial owner, or *cestui que trust*.¹⁶ It is said to stand "upon our great moral obligation to refrain from

Sale may be avoided by the beneficial owner if executor or administrator is both vendor and vendee.

¹ Succession of Lagarde, 20 La. An. 148, referring to Cockburn v. Wilson, 20 La. An. 39; Shaw v. Coble, 63 N. C. 377, 378; Trammel v. Philleo, 33 Tex. 395, 410; Kleberg v. Bonds, 31 Tex. 611.

² Glasgow v. Lipse, 117 U. S. 327; Kerns v. Wallace, 64 N. C. 187, holding that a sale for Confederate money was *prima facie* valid, and the administrator not liable for the consequent loss. To similar effect, Cobb v. Taylor, 64 N. C. 193; State v. Hanner, 64 N. C. 668, 670, holding an administrator not chargeable by creditors for Confederate money which he had distributed to the heirs after creditors refused to receive the same.

³ Glenn v. Glenn, 41 Ala. 571, 588, referring to Watson v. Stone, 40 Ala. 451, Neilson v. Cook, 40 Ala. 498, and Dockery v. McDowell, 40 Ala. 476, for discussion of the principle upon which the decision rests.

⁴ Ivey v. Coleman, 42 Ala. 409; Cum-

tings v. Bradley, 57 Ala. 224, 238; Anderson v. Wynne, 62 Ala. 329.

⁵ Jones v. Graham, 36 Ark. 383, 397.

⁶ Campbell v. Miller, 38 Ga. 304.

⁷ Succession of Herron, 32 La. An. 835; Succession of Womack, 29 La. An. 577.

⁸ Williams v. Campbell, 46 Miss. 57, 62.

⁹ Currie v. McNeill, 83 N. C. 176.

¹⁰ Koon v. Munro, 11 S. C. 139, 147; Hyatt v. McBurney, 18 S. C. 199, 216.

¹¹ Rockhold v. Blevins, 6 Baxt. 115, 130.

¹² Staples v. Staples, 24 Gratt. 225, 234; Wayland v. Crank, 79 Va. 602, 609.

¹³ Jackson v. Chase, 98 Mass. 286.

¹⁴ Depriest v. Patterson, 92 N. C. 399.

¹⁵ Granberry v. Granberry, 1 Wash. 246, 249; Drumgoole v. Smith, 78 Va. 665, 668.

¹⁶ So stated in Michoud v. Girod, 4 How. (U. S.) 503, 556, and in Davoue v. Fanning, 2 John. Ch. 252, 256.

placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. . . . The disability to purchase is a consequence of that relation between the vendor and purchaser which imposes on the one a duty to protect the interests of the other, from the faithful discharge of which duty his own personal interest may withdraw him. In this conflict of interest the law wisely interposes.”¹ “However innocent the purchase may be in the given case, *it is poisonous in its consequences*. The *cestui que trust* is not bound to prove, nor is the court bound to judge, that the trustee has made a bargain advantageous to himself. The fact may be so, and yet the party not have it in his power directly and clearly to show it. There may be fraud, and the party not able to prove it. It is to guard against this uncertainty and *hazard* of abuse, and to remove the trustee from temptation, that the rule does and will permit the *cestui que trust* to come, at his *own option, and without showing actual injury, and insist [*701] upon having the experiment of another sale. This is a remedy which goes deep, and touches the very root of the evil.”² The doctrine *as thus laid down is rigidly [*702]

¹ Wayne, J., rendering the opinion of the Supreme Court of the United States in the case of *Michoud v. Girod*, *supra*, p. *555 of opinion.

² Chancellor Kent in *Davoue v. Fanning*, 2 John. Ch. 252, 260, *et seq.* But neither the array of English authorities cited by Chancellor Kent, nor the emphatic indorsement of the doctrine by the Supreme Court of the United States and the authorities there cited, showing the same to be in consonance with the civil law and codes of European countries, quite vindicate it against all misgivings as to its applicability to executors and administrators. The very depth to which the remedy goes, as emphasized by Chancellor Kent, suggests the doubt in its practical wisdom. In uprooting the evil, valuable safeguards to the substantial interests of the parties sought to be protected are destroyed with it. By removing the possibility of a fraudulent acquisition on the part of the executor or administrator the power to protect the interests of beneficial owners by securing to them the value of their property is likewise swept away. Frequent instances are within the experience of judges of probate and practitioners in probate courts, that the only possibility of rescuing from the otherwise total sacrifice and wreck of the estate a remnant

for the widow and orphans is to let the widow (if she be, as she generally is, the administratrix) buy in and keep the property, accounting for the price it brought at the public or private sale. So embarrassing does this deeply cutting doctrine operate in some instances, that where, upon the death of a husband and father, the widow desires to keep the family together, and preserve as much of the home and property belonging to them as is consistent with full justice to the creditors (and which often amounts to a sufficiency for the decent support of the family), the widow is reduced to the necessity of either renouncing her right to administer, or risking the sacrifice of the property, because the law will not permit her as administratrix to compete at the sale with strangers or creditors.

In South Carolina the right of an administrator to purchase at his own sale is vindicated by the judiciary. In the case of *Stallings v. Foreman*, 2 Hill, Ch. (S. C.) 401, 405, O’Neill, J., reviews the common-law rule and the course of decisions in the State of South Carolina (reciting *Drayton v. Drayton*, 1 Desaus. 557, 567; *McGuire v. McGowen*, 4 Desaus. 486; *Perry v. Dixon*, in a note, 4 Desaus. 504, the majority supporting the common-law rule, and two judges dissenting; *Edmonds v.*

enforced in the United States,¹ with the exception of South Carolina;² Virginia,³ formerly, also constituted an exception, but later Virginia cases intimate acquiescence in the general rule.⁴ So in Alabama,⁵ the doctrine prevailed for a time, that the equitable rule did not apply to executors or administrators; but the departure from the general rule of law is criticised and regretted, though followed, in *McCartney v. Calhoun*.⁶ In an old case in Connecticut it was intimated that an administrator might buy in at his own sale for the benefit of creditors and heirs.⁷ So in North Carolina.⁸ In New Hampshire the administrator may bid openly and fairly at his own

Crenshaw, 1 McC. Ch. Rep. 252; Trimnier v. Trail, 2 Bail. 480, 484), reaching the conclusion that executors and administrators ought not to be put on the footing of mere trustees, and calling attention to their right, at common law, to acquire the property by paying or accounting for its true value. He says, "The reason of the rule — the prevention of secret frauds in the purchases of trustees to sell — does not apply to sales made by executors and administrators. . . . It would often compel executors to decline to qualify as such; and would prevent the widow or children of an intestate from claiming the right of administration guaranteed to them by law. For if they assume any of these characters (*i. e.* executors or administrators) under the rule stated, they cannot buy any of the personal property of the deceased, which may be sold under the will or the order of the ordinary. The right to buy at such sales is often of essential importance to persons named as executors, the widow, and the children; and hence, if as executors or administrators they could not buy, they would be compelled to forego the executorship or administration. This would be making a mere rule of equity intended to subserve justice work a positive legal wrong, and carry out and enforce the grossest injustice" (pp. 408, 409, the whole court concurring). The statute (passed in 1839, and still in force) provides in this State that executors and administrators may buy at sales of their decedents, on giving bond for the purchase-money, but are liable for the actual value of the property: *Finch v. Finch*, 28 S. C. 164, 169; *Cunningham v. Cauthen*, 37 S. C. 123, 138.

¹ *Miles v. Wheeler*, 43 Ill. 123, 125, *et seq.*; *Martin v. Wyncoop*, 12 Ind. 266; VOL. II. — 6

Ryden v. Jones, 1 Hawks, 497, 499; *Ford v. Blount*, 3 Ired. L. 516; *Coppels' Estate*, 4 Phila. 378; *Green v. Sargeant*, 23 Vt. 466, 476; *Froneberger v. Lewis*, 79 N. C. 426; *Tayloe v. Tayloe*, 108 N. C. 69; *Smith v. Drake*, 23 N. J. Eq. 302; *Wright v. Campbell*, 27 Ark. 637, 645; *Layton v. Hogue*, 5 Oreg. 93, 95; *Sheldon v. Rice*, 30 Mich. 296, 300, *et seq.* (citing *Farnam v. Brooks*, 9 Pick. 212; *Saeger v. Wilson*, 4 W. & S. 501; *Rogers v. Rogers*, 3 Wend. 503; *Torrey v. Bank of Orleans*, 9 Paige, 649; *Terwilliger v. Brown*, 44 N. Y. 237; *Dwight v. Blackmar*, 2 Mich. 330); *Lytle v. Beveridge*, 58 N. Y. 592, 606; *Anderson v. Green*, 46 Ga. 361, 385; *McGowan v. McGowan*, 48 Miss. 553, 566, *et seq.*; *White v. Christopherson*, 9 La. An. 232; *Ely v. Horine*, 5 Dana, 398, 404; *Young v. Wickliffe*, 7 Dana, 447, 451; *Stewart's Appeal*, 110 Pa. St. 410.

² *Stallings v. Foreman*, 2 Hill (S. C.), Ch. 401, 405. See *supra*, p. *701, note, referring to the statute at present in force.

³ *McKey v. Young*, 4 Hen. & Munf. 430. Says the Chancellor: "I believe that this opinion will be found to accord with the universal understanding of the people of this country; for there is nothing more common than for an executor to be a purchaser at his own sale of his testator's estate, and most commonly to the advantage of the legatees" (p. 431).

⁴ *Staples v. Staples*, 24 Gratt. 225, 236; *Wayland v. Crank*, 79 Va. 602, 608.

⁵ *Brannan v. Oliver*, 2 Stew. 47; *McLane v. Spence*, 6 Ala. 894.

⁶ 17 Ala. 301.

⁷ *Sheldon v. Woodbridge*, 2 Root, 473, 475.

⁸ *Lyon v. Lyon*, 8 Ired. Eq. 201.

But the administrator may subsequently acquire the property from a *bona fide* purchaser.

sale, but is liable for the full or appraised value of the property purchased.¹ But the rule that an administrator cannot buy indirectly or acquire the property sold by him as administrator by the interposition of a third party does not extend to a subsequent *bona fide* purchase by him from one who himself purchased in good faith at the administrator's sale.²

It is a well-established principle, that an executor or administrator is, like all trustees, inhibited from speculating for his own gain with the estate intrusted to his custody or management; hence, if he buys in any claims in favor of the estate, he will be allowed only what he actually pays for them, and interest;³ but he may, acting in good faith, buy in at a discount, for the benefit of the

Beneficiaries acquiescing in the sale cannot afterward object.

estate, the claims of creditors and legatees.⁴ Where the heirs or other persons in interest knowingly permit a purchase by the administrator of himself, or acquiesce therein after they have knowledge thereof, it is held, in

some States, that they cannot thereafter complain of or avoid such sale;⁵ * but in others such knowledge without [* 703]

Such sales are void by statute of some States, but generally voidable, and purchaser

objection does not estop them.⁶ In some States the purchase by the administrator is void under their statutes;⁷ but generally such sales are not void, but voidable;⁸ and it has been a long and well-settled principle, that a purchaser for a valuable consideration,

¹ *Griswold v. Chandler*, 5 N. H. 492, 498.

² *Otis v. Kennedy*, 107 Mich. 312, 321; *Scott v. Burch*, 6 Harr. & J. 67, 81; *Staples v. Staples*, *supra*; *Wayland v. Crank*, 79 Va. 602, 608. And see cases cited *post*, § 487, p. * 1086, where this subject is discussed as to real estate.

³ See cases cited *post*, § 521, p. * 1157.

⁴ *Lovett v. Morey*, 66 N. H. 273.

⁵ *Fuller v. Little*, 59 Ga. 338, 340 (citing, as holding the same doctrine, *Fleming v. Foran*, 12 Ga. 594; *Mercer v. Newsom*, 23 Ga. 151, and *Flanders v. Flanders*, 23 Ga. 249); *Boerum v. Schenck*, 41 N. Y. 182, 190; *Williams v. Marshall*, 4 Gill & J. 376, 379; *Todd v. Moore*, 1 Leigh, 457, 460; *Lyon v. Lyon*, 8 Ired. Eq. 201, 206.

⁶ *Potter v. Smith*, 36 Ind. 231, 240 (referring to *Boerum v. Schenck*, *supra*, which, however, goes only to the extent of declaring that acceptance of the proceeds of such sale under protest, and with the express reservation of the right to controvert the validity of the sale, constitutes no estoppel; and even this was held an estoppel by *Grover and Daniels, JJ.*, dis-

senting from the majority). In *Smith v. Drake*, *supra*, it was held that the expiration of seventeen years after the oldest and five years after the youngest son came of age was not too late to set aside such sale.

⁷ *McCrubb v. Bray*, 36 Wis. 333; *Jones v. Hanna*, 81 Cal. 507. But even in States where the statute declares such sales "void" this is held to mean "voidable": see authorities cited *post*, § 487, pp. ** 1086-1087.

⁸ *Grim's Appeal*, 105 Pa. St. 375; *Mercer v. Newsom*, *supra*; *Harrington v. Brown*, 5 Pick. 519, 521; *Williams v. Marshall*, 4 G. & J. 376; *Jackson v. Walsh*, 14 John. 407, 415; *Litchfield v. Cudworth*, 15 Pick. 23, 31; *Hance v. McKnight*, 11 N. J. L. 385, 392; *Dunlap v. Mitchell*, 10 Ohio, 117. Hence, in an action by an administrator in his individual capacity to foreclose a mortgage which had been sold by him as administrator to a third party, and at once been reconveyed to him as an individual, the mortgagor cannot contest his title: *Read v. Knell*, 143 N. Y. 484.

without notice, has a good title, though he purchase of one who had obtained the conveyance by fraud.¹

for a valuable consideration takes a good title from the fraudulent purchaser.

This subject must be again considered in connection with the sale of real estate by executors and administrators.²

§ 335. **Record and Report of the Sale.**—It is, in most States, made the duty of executors and administrators to employ a sworn clerk to keep an account of sales, with a list of the articles sold, their price, and the names of the purchasers, which they must report to and file in the court of probate within a given time. In some States they are also required to employ an auctioneer to cry the articles.³

All sales of personal property should be reported to the court.

It is, in general, a wise precaution to report all private as well as public sales to the court, whether made under the order of the court, or by virtue of statutory provision, or by direction of the will, or in pursuance of the common-law right to do so, and whether such report is required to be made by statute or not. The report is valuable as informing the court and parties in interest of the progress of the administration; the approval of the transaction by the court may sometimes afford a protection to the administrator, and in any event affords evidence which may be decisive in an action, and often prevent litigation altogether. The report should be confined

[* 704] to the matter of sale alone; for if * it embody other matters its approval may mislead as to its effect upon them, the judgment being final with regard to the sale only.⁴

§ 336. **Duties in Respect of the Investment and Custody of Funds.**—The probate court has no power to deprive an administrator of the custody of the assets by an order directing him where and how he shall keep them.⁵ But executors and administrators should preserve the property of the estates intrusted to them separate and apart from their own, to give it an ear-mark, so that it may always be known and readily

Property of the estate must be kept apart from the exec-

¹ Jackson v. Walsh, *supra*; Blood v. Hayman, 13 Met. 231, 236.

² Post, § 487.

³ As in Arkansas: Dig. of St. 1894, § 96.

⁴ Williams v. Campbell, 46 Miss. 57, 62. A decree confirming the sale of personalty by the probate court is final: Bland v. Muncester, 24 Miss. 62; and can be set aside for fraud in the chancery court only: Smith v. Chew, 35 Miss. 153. The probate court may set aside a sale which has never been confirmed, at any time before final settlement, even after the lapse of twenty-one years; and until the probate court has acted upon such sale a

chancery court has no jurisdiction to set it aside: Hart v. Hart, 39 Miss. 221, 224. But the probate court cannot set aside its decree upon a report of sale after the term at which it was rendered: Williams v. Campbell, *supra*, citing numerous Mississippi cases to the same effect. In Indiana, and other States where the order of court to sell at private sale does not require a confirmation of the sale, the title passes to the purchaser at once upon his compliance with the terms of sale: Citizens' R. Co. v. Robbins, 128 Ind. 449, 457.

⁵ In re Welch, 110 Cal. 605; De Greayer v. Super. Ct., 117 Cal. 640.

utor's or administrator's private property.

perfect good faith. Thus, if he loan money of the estate together with money of his own, and only a portion of the whole is recovered, the amount collected must be first applied to discharge the amount due

Depositing in bank together with his own money constitutes conversion to the executor's own use,

and he is liable, although it was lost without his fault.

and although deposited with the intention to keep it there to repay the amount of trust funds used by him.⁵ Nor should the executor or administrator employ the assets of the estate in

Employment of the assets in the executor's own business is a clear breach of trust.

traced.¹ The violation of this duty is a breach of trust, which often entails pernicious consequences upon the executor or administrator, although acting in perfect good faith. Thus, if he loan money of the estate together with money of his own, and only a portion of the whole is recovered, the amount collected must be first applied to discharge the amount due the estate, no matter what the proportion between the amounts loaned may be.² If he deposit the money in bank, together with money of his own, so that he may draw against the common fund in his own name, or in any manner mingle it with his own, this amounts to a conversion of the estate's money to his own use;³ the loss of the fund under such circumstances by failure of the bank or otherwise must be borne by him, even if he had no other funds in such bank, and informed the officers at the time that the funds were held in trust,⁴

his own business, or in speculations on his own account. This * would constitute a clear breach [* 705] of trust, and is in some States made felony by statute.⁶ That in many States the highest legal rate

of interest is exacted for the money so converted will appear from a discussion of the subject in connection with the accounting by administrators;⁷ and it is optional with the beneficiaries of the estate whether to hold him liable for such interest, or for the profits realized by him in the business or speculation.⁸ For property tortiously converted, he is liable at its highest value.⁹ An executor or administrator, like a guardian or other trustee, is not allowed to reap any gain, profit, or advantage from the use of the trust fund.¹⁰

¹ Hagthorp v. Hook, 1 G. & J. 270, 274; Holmes, J., in Marvel v. Babbitt, 143 Mass. 226, 227.

² Kirkman v. Benham, 28 Ala. 501, 506.

³ Union Bank v. Smith, 4 Cr. C. C. 509, 511; Ivey v. Coleman, 42 Ala. 409, 415.

⁴ Harward v. Robinson, 14 Ill. App. 560; Summers v. Reynolds, 95 N. C. 404; Williams v. Williams, 55 Wis. 300; *In re Arguello*, 97 Cal. 196; Horner's Estate, 66 Mo. App. 531; Corya v. Corya, 119 Ind. 593 (these latter two cases were on certificates of deposit; if he deposits in the estate's name he is not liable: *infra*, page * 711).

⁵ Dittmar v. Bogle, 53 Ala. 169, 170.

⁶ So in Missouri: Laws, 1887, pp. 161, 162; New York: Laws, 1877, ch. 208; Massachusetts: Pub. St., ch. 203, § 46.

⁷ *Post*, § 511.

⁸ Norris's Appeal, 71 Pa. St. 106, 124; Estate of Brown, 8 Phila. 197; Habermann's Appeal, 101 Pa. St. 329; Cannon v. Apperson, 14 Lea, 553, 581; Utica Ins. Co. v. Lynch, 11 Pai. 520, 523; McElroy v. Thompson, 42 Ala. 656; Dowling v. Feeley, 72 Ga. 557.

⁹ Irby v. Kitchell, 42 Ala. 438, 443.

¹⁰ Young's Estate, 97 Iowa, 218, 221, quoting from Schieffelin v. Stewart, 1 Johns. Ch. 620. See also cases cited *post*, § 521, and Woerner on Guardianship, §§ 60, 63.

Funds in the hands of executors or administrators, which are not immediately or within a short period applicable to the payment of debts or expenses of administration, should be invested so as to produce interest for the estate.¹ Provisions requiring such investment are found in the statutes of many States;² and even in the absence thereof it is the duty of executors and administrators, as of all trustees having funds in custody which are not payable to the beneficiaries until after the expiration of a considerable time, to make them productive by investment on safe security.³ Where the statute directs the method of investment, it is obvious that a compliance with its provisions will protect the executor or administrator against any liability, although the fund may be lost.⁴ On the other hand, if the statute is not complied with, the executor or administrator is liable to the estate for any loss, no matter how honestly he may have intended, or how vigilant his conduct may have been.⁵ The statutes are, in some instances, highly penal, and are rigidly enforced. Thus, executors and administrators are required, in Louisiana, to deposit all moneys held by them for the estate [*706] in one of the chartered banks of the State, under penalty of twenty per cent interest per annum, and removal from office.⁶

Funds should be put at interest on safe securities.

If the statutory method of investment is not observed, the executor is liable for any loss.

Statutory provisions to invest.

In England, it is provided by statute that investments may be made by executors and administrators on real securities in any part of the kingdom, or in the stock of the Bank of England or of Ireland, or in East India stock, unless otherwise directed by will, provided the investment be reasonable and proper.⁷ Also, that when the court has made a gen-

English rule concerning investment of trust funds

¹ *Post*, § 511.

² *Moore v. Felkel*, 7 Fla. 4, 61; *Ex parte Shipley*, 4 Md. 493; *Garesché v. Priest*, 9 Mo. App. 270; *Livermore v. Wortman*, 25 Hun, 341; *Matter of Gilman*, 41 Hun, 561, citing *Wood v. Brown*, 34 N. Y. 337; *Pub. St. Mass.*, ch. 156, § 32; *Rev. St. Ohio*, 1880, § 6413; *Pennsylvania v. Bright*, *Purd. Dig.* 1883, p. 527, §§ 101 *et seq.* See a list of the statutes in *Woerner on Guardianship*, § 64.

³ *Perkins v. Hollister*, 59 Vt. 348. The liability of executors and administrators for interest is discussed, *post*, § 511.

⁴ *Tucker v. Tucker*, 33 N. J. Eq. 235, 237.

⁵ *Garesché v. Priest*, 9 Mo. App. 270, affirmed in 78 Mo. 126. *Baer's Appeal*, 127 Pa. St. 360, 369, referring to *Frankenfield's Appeal* in a note. See also in

connection herewith, *Woerner on Guardianship*, § 66.

⁶ It was held under this statute, that neither the failure of all chartered banks, nor their refusal to pay interest on deposits, constituted a defence against the penalty for its violation: *Succession of Christy*, 6 La. An. 427; but see *Succession of Cresswell*, 8 La. An. 122, *Succession of Rice*, 14 La. An. 317, and *Succession of Baum*, 9 La. An. 412, in which cases the court refused to add to the severity of the statute by construction. It seems that the percentage was reduced by later statutes from twenty to ten: *Townsend's Succession*, 37 La. An. 405; and that the enforcement of the penalty is within the sound discretion of the court *à quo*: *Succession of Barrett*, 43 La. An. 61.

⁷ 22 & 23 Vict. c. 35, § 32.

eral order as to the investment of cash under its control, executors and administrators may invest in the same securities.¹ It would seem that the reason underlying the English rule (adhered to in chancery before the adoption of the above statutory provision) is, at least since the war, fully applicable in America, however inapplicable it may have been in earlier times.² The bonds of the federal government, as well as those of the several States, counties, and cities, furnish ample opportunities for investments under conditions making them as safe as human ingenuity and foresight can devise. Investments in federal or State bonds, or in the bonds of local municipalities, are relatively as safe in the United States as the securities indicated by the English statutes and the English rule in chancery. A similar policy seems desirable, therefore, in the United States, not in the interest of the federal or State governments, or municipalities, by securing for their bonds a greater demand,³ but as a relief to executors, administrators, guardians, and curators, who could thus, by complying with the law, relieve themselves of a hazardous responsibility, at the same time securing to the trust funds in their hands the greatest possible productivity * compatible with the utmost [* 707] security. The statutory requirement to invest idle funds in the hands of trustees in securities therein pointed out would to a great extent counteract the temptation to embark them in hazardous speculations or investments promising greater gains, at the cost of greater risk to the capital.⁴

In the absence of statutory provision touching the method of investment, executors and administrators are bound to employ, in the investment of the funds of the estate, such prudence and diligence as in general prudent men of discretion and intelligence employ in their own affairs.⁵ He must act strictly within the line of his duty, whether

¹ 23 & 24 Vict. c. 38, § 11.

² "There are no public securities in this country which would answer the requisitions of an English court of equity," says Shaw, C. J., in *Lovell v. Minot*, 20 Pick. 116, 119, from which he concludes that the rule requiring investments in public securities is wholly untenable in this country; *Kinmonth v. Brigham*, 5 Allen, 270, 277.

³ Mr. Schouler, in his work on *Executors and Administrators*, indicates that "the policy so strongly inculcated in British jurisprudence of using accumulated wealth transmitted from the dead to the living, to strengthen the hands of government, by causing its investment

in the national soil and the public debt, finds less favor in America": Schoul. Ex., § 324.

⁴ "Here," says Schouler, meaning in America, "individual fortunes, so far as they remain undispersed and are left to accumulate, aid rather in stimulating private enterprises, near and remote, and in reclaiming the wilderness, and peopling and developing new States; while the nation itself makes no general directions for investment, and cannot interfere": Schoul. Ex., § 324.

⁵ *McCabe v. Fowler*, 84 N. Y. 314, 318; *Mickel v. Brown*, 4 Baxt. 468; *Dabney's Appeal*, 120 Pa. St. 344. See *infra*, p. * 708.

indicated by the statute, or by the instruction of the court, if there be any such given by a court having jurisdiction, or by the provisions of a will; for any loss arising out of any deviation therefrom, although in perfect good faith and with the best intention, he is liable.¹ Thus, where it is his duty to take security for money loaned, and he omits to take security, he is personally liable for any loss by the insolvency of the borrower.² If he retains money which he should pay out, he is personally responsible if it be lost, though without other fault on his part;³ and so if he lends out the money where he ought to have used it in the payment of debts.⁴ If he omits to observe the direction of the will touching the investment of the money, he will be liable for such interest as the investment directed in the will would have produced.⁵ It has been held that, where [*708] *the will directs a legacy to be put at interest, the purchase by the executor of bank stock is not in compliance therewith.⁶ But where executors are directed to keep funds invested, they may, when a profitable investment offers itself larger in amount than the available assets of the estate, supplement them with funds obtained from other parties.⁷ Where the will exempts trustees from liability "for any loss or damage that may happen to the estate except the same shall occur or take place from their own wilful defaults, misconduct, or neglect," they are not liable for losses by reason of improvident or careless investments, but only for wilful and intentional disregard of the rules of prudence.⁸

But acting in good faith within the requirements of the law, executors and administrators will be treated by the courts with liberality and tenderness; they will not be held responsible for losses in the absence of wilful misconduct or fraud, especially when acting under advice of counsel.⁹ The

prudent man employs in his own affairs.

If he omit to take security, where the statute requires it, he is liable for the loss.

So if he retains money which he ought to pay out,

or if he lends out money which ought to be used in payment of debts.

He is liable for the interest, if he invest contrary to testator's direction.

Acting in good faith within the statutory requirements,

¹ *Per* Rogers, J., in *Calhoun's Estate*, 6 Watts, 185, 188; *Key v. Hughes*, 32 W. Va. 184; *Peacock v. Harris*, 85 N. C. 146 (holding an executor liable who, being directed by the will to sell realty and invest the proceeds, sold it, and paid the proceeds to the testamentary guardian of the beneficiary, which guardian subsequently became insolvent). A power to sell will not confer the right to exchange personalty, unless as a step toward a sale: *Columbus Ins. Co. v. Humphries*, 64 Miss. 258, 277.

² *Per* Kent, Ch., in *Smith v. Smith*, 4 John. Ch. 281, 284.

³ *Wood v. Myrick*, 17 Minn. 408; *Guthrie v. Wheeler*, 51 Conn. 207. See also *Black v. Hurlbut*, 73 Wis. 126.

⁴ *State v. Johnson*, 7 Blackf. 529; *Ihmsen's Appeals*, 43 Pa. St. 431.

⁵ *Shepard v. Patterson*, 3 Dem. 183; *Perrine v. Petty*, 34 N. J. Eq. 193; *Barney v. Saunders*, 16 How. (U. S.) 535, 544.

⁶ *Gilbert v. Welsch*, 75 Ind. 557, 562.

⁷ *Barry v. Lambert*, 98 N. Y. 300.

⁸ *Crabb v. Young*, 92 N. Y. 56.

⁹ *Thompson v. Brown*, 4 John. Ch. 619, 629; *Calhoun's Estate*, *supra*; *Watkins v. Stewart*, 78 Va. 111, 114; *Merritt v. Merritt*, 62 Mo. 150, 157; *Perrine v.*

executors are not held liable for any loss in the absence of wilful misconduct or fraud.

in their own affairs, his acts or omissions in good faith will not render him liable for losses arising in consequence, especially during a period of doubts and difficulties.² He is not to be held liable as an insurer of the estate.³

Executors and administrators are liable for all losses arising to the estate out of their acts in bad faith or negligence.⁴

It is negligence rendering the executor liable to lend money without security;

or on insufficient security.

In lending on real estate mortgage, title must be valid, and the value of the land sufficient.

Criterion of value is the estimate of men of ordinary prudence;

not more than one-half or two-thirds of value

It is negligence to loan money of the estate without taking security, although done in perfectly good faith, and though lent to a borrower who was amply solvent

* at the time of the loan;⁵ so where the [* 709] security taken is insufficient.⁶ Personal security

is held insufficient;⁷ and even in lending money on

mortgage of real estate, a degree of care is necessary, which, if omitted, will render the executor liable personally. He is bound to use ordinary care to ascertain that the title of the mortgage is valid,⁸ and that the property at the time of the loan is such as will be an

adequate security for the repayment of the loan and interest when

it shall be called in. The criterion of value in such case is the estimate of men of ordinary prudence, who would deem it safe to make a loan of like amount of their own money on the same property; and the only safe practical rule has been held to be not to lend more than from one-half to two-thirds of the value of

Vreeland, 33 N. J. Eq. 102, affirmed *Ib.* 596.

¹ *Cooper v. Cooper*, 77 Va. 198; *Corrington v. Corrington*, 15 Ill. App. 393, following *Whitney v. Peddicord*, 63 Ill. 249, 251; *Woodruff v. Lounsberry*, 40 N. J. Eq. 545, 548; *Jack's Appeal*, 94 Pa. St. 367.

² *Le Grand v. Fitch*, 79 Va. 635, 638; *Torrence v. Davidson*, 92 N. C. 437; *Perry v. Smoot*, 23 Gratt. 241; *Pope v. Mathews*, 18 S. C. 444; *Loomis v. Armstrong*, 63 Mich. 355; *Dundas v. Chrisman*, 25 Neb. 495.

³ *Patterson v. Wadsworth*, 89 N. C. 407, 410, approving the statement of this proposition by Nash, J., in *Deberry v. Ivey*, 2 Jones Eq. 370, and citing *Nelson v. Hall*, 5 Jones Eq. 32; *McCabe v. Fowler*, 84 N. Y. 314; *Fudge v. Durn*, 51 Mo. 264; *Lehman v. Robertson*, 84 Ala. 489, 491.

⁴ *Haight v. Brisbin*, 100 N. Y. 219, 222.

⁵ *Probate Judge v. Mathes*, 60 N. H. 433, citing cases.

⁶ *Sherman v. Lanier*, 39 N. J. Eq. 249. See *Woerner on Guardianship*, § 63.

⁷ *Lefever v. Hasbrouck*, 2 Dem. 567; *Bogart v. Van Velsor*, 4 Edw. Ch. 718, 722.

⁸ Thus, a first mortgage on lands worth at the time one-third more than the amount loaned was held to excuse the executor from a loss happening by the subsequent depreciation in value; while an investment on a second mortgage, exceeding with the first mortgage two-thirds of the value of the premises, was held to render him liable: *Wilson v. Staats*, 33 N. J. Eq. 524, 526.

the mortgaged property,¹ estimated at what it would bring at a forced sale.² Nor should a loan on real estate be made on other than a first deed of trust or first mortgage.³ It has also been held negligence to invest funds in municipal bonds, or bank stocks, or stocks of private corporations, at least if made without an order of court.⁴ Government bonds and real estate securities are held to be the only safe investments recognized by courts.⁵

of the premises should be loaned thereon.

Investment in municipal bonds or stocks of private corporations negligence.

The investment of lawful money belonging to an estate in bonds of the late Confederacy has been held illegal, as being directly in aid of the rebellion; political necessity requiring such transactions to be excepted from the ordinary rule recognizing the validity of all transactions, judgments, and decrees which took place in conformity with existing laws in the Confederate States, between the citizens thereof, during the late war. Hence the decree of a

Investment of lawful money in Confederate bonds held a nullity, and executor is liable for money so invested.

probate court approving the investment, and directing [* 710] * the payment of distributive shares of legatees in such bonds, is an absolute nullity, and affords no protection to the

executor in the courts of the United States;⁶ the act of a State legislature authorizing such investments is void, as being unconstitutional.⁷ But the conversion of Confederate money into Confederate bonds, no hostile intention appearing, is held to create no liability in the administrator,⁸ on the ground that no harm came thereby.⁹

Act of State legislature authorizing such investment void.

Where investments made by a testator or intestate come into the hands of the executor or administrator, he is required, in determining whether to sell such stock, to act in good faith, and exercise a sound discretion. Although by the light of subsequent events the course determined on may appear unwise, he cannot be held liable for any losses or depreciation of the stock, unless it be found that he acted carelessly or in bad faith.¹⁰ If the testator has given no

Investments made by the testator may be continued in the sound discretion of the executor.

¹ Bogart v. Van Velsor, *supra*.

² Perrine v. Petty, 34 N. J. Eq. 193, 197.

³ Woerner on Guardianship, § 63.

⁴ Tucker v. Tucker, 33 N. J. Eq. 235, 237; Garesché v. Priest, 78 Mo. 126; Mattocks v. Moulton, 84 Me. 545.

⁵ Ormiston v. Olcott, 84 N. Y. 339, 343; Tucker v. Tucker, *supra*.

⁶ Horn v. Lockhart, 17 Wall. 570, 579; Lamar v. Micou, 112 U. S. 452, 476; Glasgow v. Lipse, 117 U. S. 327, 334; Sharpe v. Rockwood, 78 Va. 24, 32, following Crickard v. Crickard, 25 Gratt. 410, 424; Opie v. Castleman, 32 Fed. Rep. 511.

⁷ Houston v. Deloach, 43 Ala. 364

Powell v. Boon, 43 Ala. 459, 468. As to the similar rules governing the liability of guardians for investment in Confederate funds, see Woerner on Guardianship, § 65.

⁸ See Baldy v. Hunter, 171 U. S. 388, distinguishing Lamar v. Micou, *supra*.

⁹ State v. Engelhard, 70 N. C. 377, 381; Patton v. Farmer, 87 N. C. 337, 341; Covington v. Lattimore, 88 N. C. 407, 410; Lingle v. Cook, 32 Gratt. 262, 275.

¹⁰ Bowker v. Pierce, 130 Mass. 262; Marsden v. Kent, L. R. 5 Ch. D. 598; Stewart's Appeal, 110 Pa. St. 410, 424.

directions in the will, the ordinary rules of prudence and diligence apply, and the fact that he has invested his property in particular stocks, shares of corporations, mortgages, or other securities, will go far to justify his executor in continuing them.¹ So where stock is directed to be converted, he may exercise his discretion within a reasonable time, depending upon the circumstances of each case, and will not be held liable for the depreciation of the stock within that time, if he act with ordinary prudence and diligence.² But he is liable for the loss by disposing of stock or bonds for less than the market value at the time.³

Liability for selling below the market price.

Investment on security of property beyond the State justified in rare cases only.

Money deposited in name of estate is at the risk of the estate.

The general drift of authority and considerations relating to the safety of trust funds seem to indicate that an executor or * testamentary trustee should not [* 711] invest the funds in his custody in mortgages upon real estate situate outside of the State, except in rare and exceptional cases, under unusual and peculiar circumstances.⁴ Mortgages taken upon lands of the estate sold, although situate in another State, are among the exceptions.⁵

It has already been mentioned, that where an executor or administrator deposits money in bank in his own name, he thereby makes himself responsible for all losses by the failure of the bank.⁶ Yet trust funds should not be kept in the administrator's house,⁷ unless the circumstances are such as to make it as safe there as anywhere.⁸ If deposited in a bank to the credit of the estate, for a reasonable time, not as a loan, but for safe keeping,⁹ he will not be liable for a subsequent

¹ Perry on Trusts, § 465; *Harvard v. Amory*, 9 Pick. 446, 462; so provided by statute in New Jersey: *Parker v. Glover*, 42 N. J. Eq. 559, 562; and Connecticut: *St. 1888*, § 496; *Hanbest's Appeal*, 92 Pa. St. 482; *Peckham v. Newton*, 15 R. I. 321. But the administrator should not use the assets of the estate in attempting thereby to save a speculative and hazardous venture in which the decedent had embarked, and, (having acted without an order of court) if loss ensues, he is liable therefor to those who have not consented to such investment: *Shinn's Estate*, 166 Pa. St. 121, 130. As to when the representative should pay assessments on stock, see § 329, p. * 691.

² *In re Weston*, 91 N. Y. 502, 508; *Marsden v. Kent*, *supra*.

³ *Spaulding v. Wakefield*, 53 Vt. 660.

⁴ *Ormiston v. Olcott*, 84 N. Y. 339, 343.

⁵ *Denton v. Sanford*, 103 N. Y. 607, 613.

⁶ *Supra*, § 336, p. * 704.

⁷ *Cornwell v. Deck*, 8 Hun, 122; *Whart. on Negl.*, § 519.

⁸ *Fudge v. Durn*, 51 Mo. 264, 266; *Lehman v. Robertson*, 84 Ala. 489.

⁹ The deposit for a time certain upon a certificate bearing interest is distinguished from a deposit subject to the check of the depositor from the day it was made; the former is a loan to the bank, beyond the control of the administrator, and as such an unauthorized loan, for which the administrator is liable on his bond in case of loss by the insolvency of the bank; the latter a deposit for the estate, subject to be withdrawn at any time, and placed in bank for safe keeping, although it may bear interest, for which the administrator would not be liable, if the bank stood in good repute at the time

loss occasioned by the failure of the bank, provided that at the time of the deposit it is in good reputation, and nothing occurs to indicate such weakness or insolvency as would induce a prudent person to withdraw the funds.¹

Executor
liable only for
carelessness.

Money may be lawfully loaned to a devisee on the security of his interest in the estate.² Where an administrator invests assets of an estate in land, and takes the deed to himself as administrator, he may be guilty of *devastavit*, but may nevertheless convey the land free of claims of the distributees.³ The mere fact, however, of taking security in his own name does not, in the absence of fraud and improper purpose, constitute *devastavit*.⁴

Money may
be loaned to a
devisee on se-
curity of his
interest.

of the deposit: Baer's Appeal, 127 Pa. St. 360, 368, incorporating, to same effect, Frankenfield's Appeal in a note on p. 369; Eshleman v. Bolenius, 144 Pa. St. 269; Law's Estate, 144 Pa. St. 499.

¹ Norwood v. Harness, 98 Ind. 134, 140, citing numerous authorities; Jacobus v. Jacobus, 37 N. J. Eq. 17, the reporter appending a note containing an exhaustive

list of cases; Cox v. Roome, 38 N. J. Eq. 259; Twitty v. Houser, 7 S. C. 153, 164; Kohler's Estate, 15 Wash. 613; Moore v. Eure, 101 N. C. 11.

² Delafield v. Schuchard, 2 Dem. 435, 438.

³ Richardson v. McLemore, 60 Miss. 315.

⁴ Lyme v. Badger, 92 N. C. 706.

* CHAPTER XXXVI.

[* 712]

OF THE MANAGEMENT OF THE REAL ESTATE.

§ 337. **States in which Real Estate goes to the Executor or Administrator.** — There has been frequent occasion to remark, that,
 At common law real estate passes at once to the heir or devisee. at common law and under the statutes of most of the States of our Union, the real estate of a deceased person descends directly to the heir or devisee, without passing through the custody of the executor or administrator.¹

But the personal representative by statutory provision is entitled to the possession and control, for the purposes and during the term of the administration, of the real as well as the personal property of the decedent, and to the rents and profits thereof, in Alabama,² Arizona,³ Arkansas,⁴ California,⁵ Colorado,⁶ Connecticut,⁷ Florida (under former statutes not in force since revision of 1892),⁸ Georgia,⁹ Idaho,¹⁰ Michigan,¹¹ Minnesota,¹² Montana,¹³ Nebraska,¹⁴ Nevada,¹⁵ North Dakota,¹⁶ Oklahoma,¹⁷ Oregon,¹⁸ South Dakota,¹⁹ Texas,²⁰ Utah,²¹ Vermont,²² Washington,²³ and Wisconsin;²⁴ and perhaps, to some extent, in one or two other States.²⁵

¹ *Ante*, § 15 and § 276; *post*, § 338.

² Code, 1896, § 154. See cases cited *infra*. The original enactment was held not to be retroactive: *Philips v. Gray*, 1 Ala. 226.

³ Rev. St. Ariz. 1887, § 1087.

⁴ Dig. Ark. 1894, § 80.

⁵ Cal. Code, Civ. Pr., §§ 1581, 1583.

⁶ Col. Ann. St. 1891, § 4691.

⁷ Conn. Gen. St. 1887, § 577. See *Staples' Appeal*, 52 Conn. 421. If not specifically devised: *Remington v. Am. Bible Soc.*, 44 Conn. 512, 516.

⁸ Dig. Fla. 1881, p. 85, §§ 37, 38. The provisions in Rev. St. 1892 made a material change in this respect, and provide that the real estate shall descend to the heir or devisee and remains in his possession until the executor or administrator shall take possession under the order of court for payment of debts; § 1917.

⁹ Ga. Code, 1895, §§ 3357, 3358; *Mayor v. Brown*, 99 Ga. 766, 772; but see *Holt v. Anderson*, 98 Ga. 220.

¹⁰ Terr. Rev. St. 1887, § 5550.

¹¹ Mich. How. St. 1882, § 5875. The administrator's power over the realty was temporarily withdrawn in 1871: *Campau v. Campau*, 25 Mich. 127.

¹² Minn. Rev. St. 1891, §§ 5702, 5704.

¹³ Code, Mont. 1895, p. 964, § 2730.

¹⁴ Neb. St. 1893, § 1261.

¹⁵ Nev. Rev. St. 1885, §§ 2863, 2864.

¹⁶ N. Dak. Code, 1895, §§ 6372, 6376.

¹⁷ Ok. St. 1890, § 6892.

¹⁸ Hill's Code, Oreg. 1887, §§ 1120, 1192; see *Butler v. Smith*, 20 Oreg. 126, 131, and other Oregon cases mentioned *infra*.

¹⁹ Dak. Ter. Comp. L. 1887, §§ 5772, 5773, 5860; see *Kelsey v. Welch*, 8 S. Dak. 255, 262.

²⁰ Tex. Rev. St. 1895, §§ 1869, 1983, 2105.

²¹ Utah Comp. L. 1888, § 4107.

²² Vt. St. 1894, §§ 2450, 2446, 2398, 2411.

²³ Wash. Code, 1896, §§ 5434, 5449, *et seq.*

²⁴ Wis. St. 1889, § 3823.

²⁵ Mississippi: Code, 1892, § 1930, directing that the executor or administrator pay all taxes that may be due on real or personal property.

[* 713] * These States, in which by statute the realty goes to the personal representative, may be divided into two general groups, the first comprising those States in which the rights of the executor or administrator concerning the real estate are recognized to the full logical extent, the common-law rule being almost wholly abrogated, and the other (which includes the larger number) comprising those in which the legislatures, and particularly the courts, have proceeded with hesitation in cutting away from the common law, and which therefore occupy a middle ground, as will appear from the judicial interpretations hereinafter referred to.

In the former class may be placed California,¹ Florida (while the former statute was in force),² Georgia (before the Code, but not since),³ Montana,⁴ Texas,⁵ Washington,⁶ probably Idaho, and perhaps Arizona, Oklahoma, and one or two others.⁷ In these States the right to the possession of the real estate until the administration is closed, or rather until distribution made, is solely with the representative, whether the estate be solvent or not, and he may without joining the heirs or devisees bring ejectment⁸ and unlawful detainer⁹ against third per-

States giving full control over realty to the representative,

¹ *Washington v. Black*, 83 Cal. 290 (holding that the accounting for rents and profits collected by the representative must be determined on final settlement, and that for a failure to account for them therein there is no personal liability thereafter at the suit of the devisees).

² See the Florida cases cited *infra*. The law was changed in the revision of 1892, § 1917 taking away the representative's control of the realty, except when acting under order of court for payment of debts, thus placing Florida back among the States adhering to the common law.

³ In *Cofer v. Flanagan*, 1 Ga. 538, 540, Nisbet, J., says: "Our law has abolished utterly the distinction between personal and real estate as it obtains in England; indeed, it has changed the whole British doctrine as to the descent of real estate. . . . The effect of these statutes is to give to the administrator the same power over the real estate that he has over the personalty, and for the same purpose; to wit: first, payment of debts, and secondly, distribution." But the later decisions in this State show that the personal representative's authority over the realty is now so limited as to take it out of the group of States first above named. *Holt v. Anderson*, 98 Ga. 220, 223.

⁴ See Montana cases cited in the following notes.

⁵ *Lawson v. Kelley*, 82 Tex. 475, reviewing the Texas cases and showing that the common-law rule never existed in that State. In *Thompson v. Duncan*, 1 Tex. 485, 488, Lipscomb, J., says: "The difference in the rule of the common law between land and personal property never had any existence in this country," &c. See also Texas cases cited in the notes below.

⁶ See Washington cases cited *infra*. By the laws of 1895, p. 197, it was provided (apparently to meet prior decisions) that the title and rights of the heirs and devisees, as well as their right to sue, &c., shall be good and valid against all persons except the executor and administrator; but this provision restricting the representative's power does not seem to have been carried into the revision of 1896 above cited.

⁷ In which no judicial interpretations have been found.

⁸ *Oury v. Duffield*, 1 Ariz. 509; *Sanchez v. Hart*, 17 Fla. 507; *Lamar v. Sheffield*, 66 Ga. 710, 711; *Sorrell v. Ham*, 9 Ga. 55; *Black v. Story*, 7 Mont. 238; *In re Higgins' Estate*, 15 Mont. 474; *Bogges v. Brownson*, 59 Tex. 417 (trespass to try title); in Texas since 1870 the heirs must be joined in possessory actions: Rev. St. 1888, § 1202.

⁹ *Knowls v. Murphy*, 107 Cal. 107.

sons, or even against the heirs or devisees.¹ Nor can the latter (unless the statute provide otherwise, as it does in most of them) maintain an action to quiet title or in ejectment against third parties before distribution and during the administration,² though there be a vacancy in the office of executor or administrator,³ but they may when no administration has been taken out;⁴ and in foreclosing a mortgage against an administrator the heirs of the deceased mortgagor need not be made parties,⁵ while, on the other hand, the administrator is an indispensable party.⁶ In these States the representative is in privity with and represents the owner of the realty; hence judgment in ejectment for or against him has been held an estoppel for or against the heir or devisee;⁷ and so in other suits affecting the title to the realty the heir is concluded by the judgment against the administrator.⁸ For the same reason where the executor or administrator neglects to bring an action until it is barred by the Statute of Limitations, the devisee or heir is also barred, even though he was a minor and under disability when the cause of action accrued to the representative;⁹ the remedy in such case is against the representative on his

¹ Page v. Tucker, 54 Cal. 124 (ejectment against heir and devisee).

² Hazelton v. Bogardus, 8 Wash. 102 (quiet title); Dunn v. Peterson, 4 Wash. 170 (ejectment); Doyle v. Wade, 23 Fla. 90 (ejectment); Harper v. Strutz, 53 Cal. 655 (ejectment and to quiet title); Meeks v. Hahn, 20 Cal. 620 (ejectment), cited with approval in *In re Higgins*, 15 Mont. 474, 486; Curtis v. Sutter, 15 Cal. 259 (holding that an action to quiet title should be brought by the administrator and not the heir). The statute of California now permits the heir to recover possession against all but the personal representative: Spotts v. Hanley, 85 Cal. 155, 167. In Texas, as an exception to the general rule that the heirs cannot sue, it is held, that "in cases of wilful neglect, refusal of duty, or fraudulent combination on the part of the executor or administrator, the heirs have the right to sue to protect their interests": Bonner, J., in Gunter v. Fox, 51 Tex. 383, 388; so held in Patton v. Gregory, 21 Tex. 513.

³ Chapman v. Hollister, 42 Cal. 462 (ejectment during temporary vacancy denied); see also Blair v. Cisneros, 10 Tex. 34, 46.

⁴ Updegraff v. Trask, 18 Cal. 458; Code, Ga. 1895, § 3357.

⁵ Bailey v. Muehe, 65 Cal. 345; Hearfield v. Bridge, 44 U. S. App. 574; Merritt v. Daffin, 24 Fla. 320 (holding the heir to be concluded by the result against the administrator, on the ground that the latter is representative of his interests, p. 331 of the opinion).

⁶ Harwood v. Marye, 8 Cal. 580; per Raney, J., in Bush v. Adams, 22 Fla. 177, 189. In South Dakota the administrator should be a party, but the heirs "are proper, if not necessary, parties," also: Kelsey v. Welch, 8 So. Dak. 255, 263.

⁷ Spotts v. Hanley, 85 Cal. 155.

⁸ Lawson v. Kelley, 82 Tex. 457; Gunter v. Fox, 51 Tex. 383; see also Merritt v. Daffin, 24 Fla. 320, 331.

⁹ McLeran v. Benton, 73 Cal. 329, 343; Meeks v. Olpherts, 100 U. S. 564 (these cases ignore Crosby v. Dowd, 61 Cal. 557, 598, which seems to have held a contrary doctrine). This principle is obviously inapplicable where the assumed administrator acts without authority: Staples v. Connor, 79 Cal. 14. But in Georgia it is held, that if the realty is not required for payment of debts or distribution, the failure of the representative to bring suit does not prejudice the rights of the minor heir, so as to bar him by limitation: Scott v. Newson, 27 Ga. 125, 132.

bond.¹ But the title itself, subject to the possessory rights of the representative, vests at once in the heir or devisee, even in these,² as well as in the other States; so, also, it may be observed that in most of the States named in which the realty goes to the representative, the homestead is exempted from the operation of the statutes conferring authority over the real estate on the representative; and it is provided that the court may direct the executor or administrator to turn over the realty to the heir or devisee after a certain time has elapsed, if not needed for the purposes of administration.

The States in which the realty goes to the personal representative, and which are not included in the list last named, constitute the other and larger group, in which the representative's powers over the realty are more restricted. In these States the title not only vests in the heir or devisee, but the statutes are construed as giving him the right to assert it with all its common-law rights and incidents until the personal representative effectually exerts the power reposed in him by statute.³ Hence, until the executor or administrator assert his possessory right, the heirs or devisees may sue for rent,⁴ or in ejectment,⁵ or maintain action for injuries to the realty after the decedent's death,⁶ and, con- [*714] versely, the executor or administrator * cannot do so.⁷ The personal representative does not represent the heir,⁸ and during such time limitation runs against the heir in favor of third parties in possession.⁹ But

Title to realty descends to the heir in all States.

States in which the executor or administrator has a qualified right over the real estate.

This right is 'permissive, not imperative,

and until such power is asserted the common-law rights of heirs not affected.

He does not represent the owner of the realty.

¹ See *McLeran v. Benton*, *supra*; *Meeks v. Olpherts*, *supra*.

² *Beckett v. Selover*, 7 Cal. 215, 238; *Spotts v. Hanley*, 85 Cal. 155; *Merritt v. Daffin*, 24 Fla. 329, 330; *Christofferson v. Pfennig*, 16 Wash. 491 (overruling *Balch v. Smith*, 4 Wash. 497, on this point); hence it was held that the administrator is not liable for permitting the heirs to collect the rent, no objection being interposed by the co-heirs; and they can sell the realty subject to decedent's debts: *Johnson v. Johnson*, 5 S. E. R. (Ga.) 629; *Cross v. Johnson*, 82 Ga. 67.

³ *Streeter v. Paton*, 7 Mich. 341, 351; *Masterson v. Girard*, 10 Ala. 60; *State v. Probate Court*, 25 Minn. 22; *Jones v. Billstein*, 28 Wis. 221; *Territory v. Bramble*, 2 Dak. 189; *Clark v. Bundy*, 29 Oreg. 190; *Woods v. Legg*, 91 Ala. 511. (In Alabama, if the personal representative makes his claim for the control of the lands before

the expiration of the time to prove debts (18 months) the heir is powerless to resist; but if after that period, his claim is only *prima facie* justified and may be overcome by showing that there is no necessity therefor: *Banks v. Speers*, 97 Ala. 560, 569). The possession of the administrator is not adverse to the heirs: *Comer v. Hart*, 79 Ala. 389, 395; *Hart v. Kendall*, 82 Ala. 144, 149.

⁴ *Masterson v. Girard*, *supra*; and are not accountable to the administrator therefor: *Howard v. Patrick*, 38 Mich. 795, 802.

⁵ *Marsh v. Board of Supervisors*, 38 Wis. 250; *Gossage v. Crown Point Co.*, 14 Nev. 153.

⁶ *Calhoun v. Fletcher*, 63 Ala. 574.

⁷ *Calhoun v. Fletcher*, *supra*; *Noon v. Finnegan*, 29 Minn. 418; *Carpenter v. Fopper*, 94 Wis. 146.

⁸ *Carpenter v. Fopper*, *supra*.

⁹ *Clark v. Bunty*, 29 Oreg. 190.

Otherwise when the administrator asserts his possessory right.

when he has properly asserted his right to the possession, he may maintain possessory actions in his own name,¹ even against the heirs or devisees,² or recover the rents, income, or profits,³ or for any injury to the land or anything severed from it,⁴ or for injuries committed before he took possession and after decedent's death,⁵ or maintain an action to enjoin third persons from committing waste.⁶

The power of the personal representative in respect of the real estate in these States is, however, a mere statutory power,⁷ given

Right to the realty only a qualified one.

only for the benefit of creditors, and properly to be exercised only when the exigencies of the estate require;⁸ hence it is said that, where there are no debts or legacies to be paid, or where it appears that the personalty is sufficient for that purpose,⁹ there is no valid reason why the executor or administrator should have the possession of the real estate, and where in such case the property has passed into the possession of the devisees, he has no longer any right thereto.¹⁰ The right to the possession ceases when the estate is settled; hence a lease for a longer period than that during which the administration continues is voidable at the election of the heirs.¹¹ In Colorado it was said of the statute

¹ *Ante*, § 293, p. * 622; *Barlage v. Detroit Railway*, 54 Mich. 564, 569 (under a statute similar to the present one); *Wilmarth v. Reed*, 83 Mich. 44; *McCullough v. Wise*, 57 Ala. 623; *Watson v. Prestwood*, 79 Ala. 416; *Carnall v. Wilson*, 21 Ark. 62, 64; *Dundas v. Carson*, 27 Neb. 634; and in Alabama, although the estate be solvent: *Russell v. Erwin*, 41 Ala. 292, 302.

² *Calhoun v. Fletcher*, 63 Ala. 574, 580.

³ *Manifee v. Manifee*, 8 Ark. 8, 48.

⁴ *Leatherwood v. Sullivan*, 81 Ala. 458, 463.

⁵ *Noon v. Finnegan*, 32 Minn. 81.

⁶ *Sullivan v. Rabb*, 86 Ala. 433.

⁷ *Humphreys v. Taylor*, 5 Oreg. 260.

It must be exercised in the manner pointed out by statute; hence in Alabama the land must be rented at public outcry: *Martin v. Williams*, 18 Ala. 190, 194; *Chighizola v. Le Baron*, 21 Ala. 406, 411.

⁸ *Campau v. Campau*, 25 Mich. 127, 130. When the administrator sells the realty, there being no occasion therefor, and without asserting his rights by proper action, the sale is void, and the proceeds are not assets for which his sureties can be held liable: *Woods v. Legg*, 91 Ala. 507, 513. The administrator should therefore not litigate the title, but leave that

to the heirs, the real parties interested: *King v. Boyd*, 4 Oreg. 326; and see also *Jones v. Graham*, 80 Wis. 6; and in such case the heirs are indispensable parties: *Chowning v. Stanfield*, 49 Ark. 87, 91; *Hill v. Townley*, 45 Minn. 167.

⁹ *McManany v. Sheridan*, 81 Wis. 538, 542.

¹⁰ *Flood v. Pilgrim*, 32 Wis. 376, 379. When no necessity therefore exists, the personal representative cannot disturb the possession of the heirs or devisees: *Stovall v. Clay*, 108 Ala. 105; *Cox v. Engleston*, 30 Vt. 258; *Holt v. Anderson*, 98 Ga. 220; and where, under such circumstances, the administrator enters upon the land of the heir and forcibly takes possession of wheat growing thereon at the time of the testator's death, which the heir is thrashing, he is liable to the heir for the property so taken: *Rough v. Womer*, 76 Mich. 375.

¹¹ *Smith v. Park*, 31 Minn. 70. "Any lease for a term definite being subject to be terminated by final distribution of the estate, and the discharge of the administrator": *Doolan v. McCurley*, 66 Cal. 476, 477. In Michigan, the executor may lease from year to year; a lease by him is binding on the heir, and, if for two years, will have the effect of a lease from year to year: *Grady v. Warrell*, 105 Mich. 310.

conferring authority on the personal representative that it "would seem to limit his authority to such real estate of the decedent as is productive of rents, issues, and profits, and to the bringing of such actions as may be necessary for the recovery of such income."¹ In Arkansas neither personal nor real property can be sold without an order of the probate court;² and it seems to be held in this State that the administrator or executor can only take possession of the realty, rents, and profits for the purpose of administration and paying debts, and that when there is no necessity of this he has no right to control, or interest in, the realty.³ Obviously, a sale of the realty by the administrator, except in the method pointed out by statute, under order of the court, is void.⁴ And it may be announced as a general proposition that the same rights and liabilities are conferred and imposed upon executors and administrators in respect of the real estate when the same is lawfully in their charge and custody (whether by statute or otherwise) as appertains to the personal property.⁵

Rights and duties are same as apply to personalty.

[* 715] * § 338. **Interest of the Executor or Administrator in Real Estate.** — Except in the States mentioned in the preceding

section, the executor or administrator is not entitled nor bound to take charge of, nor in any wise to interfere with or protect, the real estate of his testator or intestate, until he is ordered to do so by the probate court, for the purpose of selling or leasing it to enable him to pay debts or legacies. If the personal property is insufficient for such purpose, the real estate becomes assets, by force of statutes in all the States, in the hands of the personal representative. Hence his interest in the real estate before the contingency has arisen which makes it assets in his hands is that of a naked power to sell upon the happening of the contingency;⁶ the title and its defence, the rents and profits, the possession and all the rights and duties following from ownership, belong to the heirs and devisees until they are divested by decree or order of the probate court.⁷ It follows, that in the absence of an order

Executors and administrators have no interest in real estate, except a power to sell or lease for the payment of debts.

¹ McKee v. Howe, 17 Colo. 538, 544.

² Tate v. Norton, 94 U. S. 746.

³ Stewart v. Smiley, 46 Ark. 373; Chowning v. Stanfield, 49 Ark. 87, 91.

⁴ Kline v. Moulton, 11 Mich. 370, 381; Woods v. Legg, 91 Ala. 507. The subject of the sale of real estate to pay debts is fully discussed, §§ 463 *et seq.*

⁵ Post, §§ 344, 513, 518.

⁶ State v. Hiron, 1 Houst. 252, 256; Noe v. Montray, 170 Ill. 169, 174; Le Moyne v. Quimby, 70 Ill. 399, 403; Floyd v. Herring, 64 N. C. 409, 411; Fike v. Green, 64 N. C. 665, 667; Vaughn v. De-

loatch, 65 N. C. 378; Laidley v. Kline, 8 W. Va. 218, 228; O'Hanlin v. Den, 20 N. J. L. 31, 34. (Hence the plea of *plene administravit* is held good in New Jersey and Rhode Island, where the personalty, but not the real estate, has been exhausted, until an order for the sale of real estate has been obtained: Haines v. Price, 20 N. J. L. 480, 486; Potter v. Dolan, 19 R. I. 514.) Chambers v. Wright, 40 Mo. 482; Hartnett v. Fegan, 3 Mo. App. 1, 3; Harding v. Le Moyne, 114 Ill. 65, 74.

⁷ Thorp v. Miller, 137 Mo. 231, 239; Aubuchon v. Lory, 23 Mo. 99; Hall v.

of the probate court to take charge of the real estate, neither an executor nor an administrator can be called to account by creditors for the value, rents, or profits of real estate, unless power be given in the will to sell, lease, or otherwise take charge of it.

The liability of executors and administrators in respect of the real estate of the deceased testator or intestate will be referred to again, and their liability for collecting rents and profits, as well as what disbursements respecting the realty they may lawfully make, is more fully treated in connection with the subject of accounting.¹

* § 339. **Power over Real Estate conferred by Will.**—It [* 716] has already been shown, that a testator may confer upon

Testator may vest title in executor, or give him power to dispose of real estate. his executor or executors the control over his real estate to the same extent to which the law invests them with power over the personalty, either by vesting in them the title by devise, or a naked power to do what he directs for the purpose of carrying out his will; and that

where the purpose to accomplish which such power is granted falls within the scope of the official duties imposed by the law upon executors or administrators, the power is annexed to the office, and follows it, so that whoever administers the estate is also bound to execute such power, whether it be the executor or executors nominated in the will, or any smaller number of them, or an administrator with the will annexed.² If the testator has not

If the custodian of power is not clearly indicated, the executor or administrator *c. t. o.* takes it when the proceeds are distributable in the course of administration. clearly indicated the person charged with the execution of the power, and the question arises whether the person administering is authorized to execute the same, it will be generally sufficient to ascertain whether the proceeds of a sale, or other fruit of the exercise of the power, are distributable by the executor or administrator: in such case the power is in him by implication,³ and will go to any personal representative upon whom the adminis-

Bank, 145 Mo. 418, 423-424; Smith v. McConnell, 17 Ill. 135, 142; Phelps v.

Funkhouser, 39 Ill. 401, 405; Keeler v. Trueman, 15 Col. 143; Wood v. Bryant, 68 Miss. 198; Lane v. Thompson, 43 N. H. 320, 325; Hillman v. Stephens, 16 N. Y. 278, 282; Gladson v. Whitney, 9 Iowa, 267; Withers' Appeal, 14 Serg. & R. 185; Romaine v. Hendrickson, 24 N. J. Eq. 231, 236; Draper v. Barnes, 12 R. I. 156; Filmore v. Reithman, 6 Col. 120, 130.

¹ *Post*, § 513, discussing liability for rents; and § 518, treating of disbursements respecting the realty; also § 344, as to the duties and liabilities concerning the real estate.

² *Ante*, § 276; Jackson v. Burtis, 14 John. 391, 398; Jackson v. Given, 16 John. 167.

³ Wms. Ex. [655], citing Sugden or Powers, 238 (6th ed.); 2 Preston on Abstracts, 264; Curtis v. Fulbrook, 8 Hare 278; Tylden v. Hyde, 2 Sim. & Stu. 238; Forbes v. Peacock, 11 Sim. 152; 12 Sim 528; 11 M. & W. 630; Gosling v. Carter 1 Coll. 644; Robinson v. Lowater, 17 Beav 592; 5 DeG. M. & G. 272; Wrigly v Sykes, 2 Jur. 78. For American authorities, see *infra*, p. * 718 and notes.

tration may devolve.¹ "To enable the executors to sell," says Sir John Leach, "the power must either be expressly given to them, or necessarily to be implied from the produce being to pass through their hands in the execution of their office, as in payment of debts or legacies."² But where the power is not clearly vested in the person administering, and the purpose of the power is to accomplish something beyond the scope of the powers or functions of executors or administrators under the law, it cannot be exercised by the executor or administrator. The common-law rule

But if the purpose of the power be collateral to the administration, it does not go to the executor or administrator.

does not permit the exercise of a naked power [* 717] by one of several to whom it is granted; * they must all join in the act.³ Hence if one of several

Naked power cannot be exercised by one of several donees.

donees of a power die before executing it, or refuse to act, the power must fail. In such cases, if a trust exists, equity will interpose to prevent the consequences of such extinguishment of the power,⁴ and cases are not wanting to support the validity of the exercise of a power, given to executors, by a single survivor.⁵

Equity alone can relieve, if one of the trustees die, or refuse to act.

The American system of administration, differing largely from the common law in respect of the subjection of real estate to the payment of debts of deceased persons and legacies directed to be paid under wills, has led to numerous decisions on the subject under consideration, under the statutes of the different States, conflicting sometimes with the common law, and not always harmonious with each other. It has been said that the American adjudications on this subject are not always reducible to any general and recognized course of construction.⁶ But the inconsistency is not one of principle: the augmentation of the powers of probate courts in this country, enabling them, for the purpose of paying the debts and legacies of deceased persons and regulating the devolution of their property, to deal with the real assets of estates as readily as with the personalty, has tended greatly

American system.

¹ Wms. Ex. [655].

² Bentham v. Wiltshire, 4 Mad. 44.

³ So that, where a testator devises his lands to A. for life, and directs that after his death the estate shall be sold by the executors, naming them, as by B. and C. his executors, or by B. and C. not named as executors, if one of them die during A.'s lifetime the other cannot sell, because the words of the testator cannot be satisfied: Wms. Ex. [954], citing Co. Litt. 113 a, and Sugd. on Powers, 141 (6th ed.). And such is also the rule under the English and American statutes: see *post*, § 341, p. * 724.

⁴ Wms. Ex. [956]; *Druid Park v. Oettinger*, 53 Md. 46; *Compton v. McMahan*, 19 Mo. App. 494, 510.

⁵ The distinction was early drawn between a power to executors *ultra* their official capacity, and one given to executors, or to persons *nominatim* in that character, who take the power as annexed to them *ratione officii*; as the office survives, so, by parity of reasoning, the authority should also survive: Hargrave, note to Co. Lit. 113 a.

⁶ 3 Redf. on Wills, 137, pl. 3.

to lessen the difficulty of distinguishing between powers constituting a personal trust and those annexed to the office of executor or ad-

Where it becomes necessary to sell real estate to pay debts or legacies, power to do so is either in the executor under the will, or will be granted by the probate court.

ministrator, and the differences in the adjudications seem to affect only details. As a general rule, whenever it becomes necessary to convert the real estate of a decedent into money, in order to raise funds for the payment of debts or legacies, it becomes the duty of the personal representative to act in this respect: under power in the will, if such be given; or under * order of the probate court, if not, or if [* 718] the power granted be inadequate, or if the ex-

ecutor or administrator neglect to act under it.¹ The rule, that the power to sell land does not exist in the executor unless he is directed to do so by the will, either expressly or by implication, is fully recognized;² but it is not controverted in any of the States, that if the executor is directed by the will or bound by the law to see to the application of the proceeds of the sale,³—or if the proceeds, in the disposition of them, are mixed up and blended with the personalty, which it is the duty of the executor to dispose of and pay over, — the power of sale is conferred on him by implication,⁴ because without the exercise of such power he could not execute the will.⁵ Thus, where the object of the power is to mix together realty

¹ The effect of a power to sell real estate to pay the testator's debts, and its effect upon the jurisdiction of the probate court to order the sale independent of such power in the will, is touched upon in connection with the sale of real estate to pay debts: *post*, § 464, p. * 1023.

² *Lippincott v. Lippincott*, 19 N. J. Eq. 121; *Booream v. Wells*, 19 N. J. Eq. 87, 96; *Hoyt v. Day*, 32 Oh. St. 101, 109; *Clark v. Hornthal*, 47 Miss. 434, 474; *Hamilton v. Clarke*, 3 Mackey, 428, 436; *Brumfield v. Drook*, 101 Ind. 190, 196. And the same is true with reference to a power to purchase real estate, which may be involved in a power to invest: *Wilson v. Mason*, 158 Ill. 304, 312. When the duties imposed are active, and render the possession of the estate convenient and reasonably necessary, the executors will be deemed trustees for the performance of their duties, as though declared to be so by the most explicit language: *Ward v. Ward*, 105 N. Y. 68; *Patton v. Herring*, 9 Tex. Civ. App. 640; *Hale v. Hale*, 146 Ill. 227; the executor will take by implication such an estate or power as will enable him to execute the trusts or perform the duties devolved upon him: *Lindley v. O'Reilly*,

50 N. J. L. 636; see on this point *ante*, § 276, p. * 593.

³ *Lippincott v. Lippincott*, *supra*; *Davis v. Hoover*, 112 Ind. 423, 427; *Officer v. Board of Missions*, 47 Hun, 352; *Hale v. Hale*, 137 Mass. 168, 170; *Marrett v. Babb*, 91 Ky. 88; *a fortiori*, the power vests in an administrator *de bonis non*, if so provided in the will: *Fish v. Coster*, 28 Hun, 64, 66. Or in the executors, if so stated in the will, although the executors be also appointed trustees: *Keplinger v. Maccubbin*, 58 Md. 203, 208.

⁴ *Lippincott v. Lippincott*, *supra*; *Hollman v. Tigges*, 42 N. J. Eq. 127; *Bogert v. Hertell*, 4 Hill (N. Y.), 492, 500; *Council v. Averett*, 95 N. C. 131; *Ogle v. Reynolds*, 75 Md. 145, 150. See a review of the New York cases on the construction of the New York statute giving administrators with the will annexed the same rights and powers, and subjecting them to the same duties as if they had been named executors in such will, by Finch, J., in *Mott v. Ackermann*, 92 N. Y. 539, 552.

⁵ In the one case the power is naked; in the other coupled with an interest; for the interest need not be a personal or beneficial interest; the possession of the

and personalty in a common fund, out of which the various purposes of the will are to be satisfied, including that of the payment of debts, the power is annexed to the office of executors, and will survive to any of a greater number named as donees of the power and executors;¹ and the power will be extinguished with the cessation of the office.² A direction to convert the whole *estate into money, after the death of the executrix, without specifying in terms the person who shall do this, vests the power by implication in the administrator *de bonis non* with the will annexed.³ So, where power is given by will to executors to sell real estate with a view to distribute proceeds among legatees, the power belongs to them *virtute officii*, and may be exercised by an administrator *cum testamento annexo*,⁴ or by a survivor or the only one of several executors.⁵ Where the will imposes upon executors the duty of selling real estate, without discretion, the power follows the office;⁶ otherwise the will must fail, if the executors, or any of them, should die or refuse to act. In such case, the direction to sell the real estate for the purposes of administration amounts to a conversion of the land, and the proceeds become legal assets for which the executor as such, and not as a trustee, is liable,⁷ since an executor is always a trustee of the personal estate for those who are interested under a will.⁸

§ 340. **Power given in a Will not following the Office of the Executor.**—The statement of the rule commented on in the preceding section involves, as a correlative thereto, that where the power of the executor to sell is not coupled

Power in the executor to sell not

legal estate in trust, or a right in the subject over which the power is exercised, creates the interest: *Osgood v. Franklin*, 2 John. Ch. 1, 21; *Peter v. Beverly*, 10 Peters, 532, 564; *Davoue v. Fanning*, 2 John. Ch. 252, 254; *Robertson v. Gaines*, 2 Humph. 367, 378; *Bradford v. Monks*, 132 Mass. 405 (applying the principle to trustees); *Bell v. Humphrey*, 8 W. Va. 1, 21; *West v. Fitz*, 109 Ill. 425. See *Hale v. Hale*, 125 Ill. 399, 405.

¹ *De Saussire v. Lyons*, 9 S. C. 492, 496; *Mott v. Ackerman*, 92 N. Y. 539, 552; *Taylor v. Galleway*, 1 Ohio, 232; *Wood v. Sparks*, 1 Dev. & Bat. L. 389; *Dick v. Harley*, 48 S. C. 516; *Taylor v. Adams*, 2 Serg. & R. 534; *Putnam v. Fisher*, 30, Me. 523; *Lockart v. Northington*, 1 Sneed, 318.

² *Littleton v. Addington*, 59 Mo. 275, 278.

³ *Ante*, § 276; *Putnam v. Story*, 132 Mass. 205, 212, citing *Chandler v. Rider*, 102 Mass. 268, and *Blake v. Dexter*, 12

Cush. 559. The same principle is announced in *Collier v. Grimesey*, 36 Oh. St. 17, 22.

⁴ *Lantz v. Boyer*, 81 Pa. St. 325; see dissenting opinion of Mr. Justice James, in *Hamilton v. Clarke*, 3 Mackey, 428, 441; *Davis v. Hoover*, 112 Ind. 423; *Venable v. Mercantile Co.*, 74 Md. 187; *Schroeder v. Wilcox*, 39 Neb. 136, and numerous cases cited there; *Green v. Russell*, 103 Mich. 638.

⁵ *Denton v. Clark*, 36 N. J. Eq. 534, 537, citing *Weimar v. Fath*, 43 N. J. L. 1; *Jennings v. Teague*, 14 S. C. 229, 238.

⁶ *Farrar v. McCue*, 89 N. Y. 139, 144; *Clark v. Denton*, 36 N. J. Eq. 419, 423.

⁷ *Post*, § 342; *Hood v. Hood*, 85 N. Y. 561, 571; *Commonwealth v. Forney*, 3 Watts & S. 353, 356; *Corrington v. Corrington*, 16 N. East. R. (Ill.) 252; *Corrington's Estate*, 124 Ill. 363.

⁸ *Wager v. Wager*, 89 N. Y. 161.

coupled with an interest, nor peremptory, is personal.

An administrator with the will annexed has no authority, without the order of the probate court, to sell lands devised to an executor to be sold, or directed to be sold by an executor, unless such sale be necessary in the administration of the estate.² A trust confided * to [* 720] an executor for a purpose collateral to that of the mere administration of the estate — as, for instance, to manage the property and invest the proceeds for accumulation, or to maintain the widow and children, or to turn the land into money for the convenience

of partition, or to exercise any discretionary power confided to the executor for his personal fitness and fidelity — is personal to such appointee, and cannot be exercised by any other person.³ Where such a discretion is vested in executors, and they die before exercising it, the gift fails;⁴ and so where the object of a power cannot be accomplished, or is reached without resort to such power, the right to exercise such power *ipso facto* ceases.⁵ Upon this principle a power to sell real estate to raise funds for the payment of debts or legacies cannot be exercised after the debts and legacies are paid;⁶ and a power to do any

¹ Beadle v. Beadle, 2 McCrary, 586, 594; Denn v. King, 1 N. J. L. 432; Clark v. Hornthal, 47 Miss. 434, 474; Cooke v. Platt, 98 N. Y. 35, 38; Frisby v. Withers, 61 Tex. 134, 138; Stoutenburgh v. Moore, 37 N. J. Eq. 63, 71; Hodgin v. Toler, 70 Iowa, 21, 24; Bennett v. Chapin, 77 Mich. 526.

² Nicoll v. Scott, 99 Ill. 529, 537, citing Hall v. Irwin, 7 Ill. 176, which goes further than the rule in the text, denying the power of an administrator with the will annexed to execute, under any circumstances, a power to sell real estate conferred upon the executor: p. 187. The New York cases relied on by Koerner, J., in giving the opinion of the court (Conklin v. Egerton, 21 Wend. 430, and Judson v. Gibbons, 5 Wend. 224) are criticised by two dissenting colleagues of Justice Koerner, and have since been overruled in New York. (See Mott v. Ackerman, 92 N. Y. p. 552.) Justice Koerner, to meet the principle announced in 21 Hen. VIII. c. 4, emphasizes the passage of this statute "a number of years before lands were

made directly devisable by will," and suggests that Blackstone and Toller, when they speak of the powers of an administrator *cum testamento annexo*, refer only to personal estate; but a glance at the preamble of the statute will show the fallacy of such view.

³ Ross v. Barclay, 18 Pa. St. 179, 183; Bell's Appeal, 66 Pa. St. 498, 503; Lanning v. Sisters of St. Francis, 35 N. J. Eq. 392, 399; Belcher v. Branch, 11 R. I. 226, 229; Naundorf v. Schumann, 41 N. J. Eq. 14; Re Rickenbaugh, 42 Mo. App. 328; as to what words will or will not confer such discretion, see Giberson v. Giberson, 43 N. J. Eq. 116, and a long list of cases appended by the reporter.

⁴ Jones v. Fulghum, 3 Tenn. Ch. 193, 205; Dunn's Estate, 13 Phila. 395; Fountain v. Ravenel, 17 How. (U. S.) 369, 385.

⁵ Denton v. Clark, 36 N. J. Eq. 534, 536, citing Moores v. Moores, 41 N. J. L. 440, 445, and Brearley v. Brearley, 9 N. J. Eq. 21.

⁶ Brearley v. Brearley, *supra*; Smith v. Henning, 10 W. Va. 596, 637, *et seq.*;

act subsequent to the payment of debts and legacies is exercised, not as executor, because his duties as such are then closed, but as the donee of a power in trust.¹ So it is held that a power to two executors to sell real estate, *if necessary to the support of the widow* (she being co-executrix), cannot be exercised by her alone, in her own favor, after the death of the other executor;² that where the sole object of the power to sell is for the support of the widow, if necessary, the power is exercisable only during her lifetime, and a sale under the power after her death passes no title to the executor's vendee;³ and that where the power is to sell "as the proper and convenient settlement of the estate may require," the executor is empowered to sell for the payment of debts, legacies, and administration expenses, but not for the purposes of making partition and distribution.⁴ It was also held that an executor cannot delegate the discretionary powers conferred upon him by the will, but that he can delegate such powers as do not involve the exercise of discretion, and that the mere execution of deeds in accordance with terms satisfactory to the executor is not the exercise of a discretionary power.⁵

It is also to be observed that the conveyance of a power to [* 721] the *executor of the will does not necessarily annex such power to the office; it may be that the word "executor" is *descriptio personæ*, simply employed to designate the donee of such power in trust, instead of repeating his name; and if such appear to be the testator's intention, — where, for instance, the power given is founded in the personal confidence of the testator in the person whom he nominates as executor and trustee, — the administrator with the will annexed will not succeed to the same.⁶ Hence, one named as executor and trustee may qualify as executor and refuse the trust, or accept the trust and renounce as executor;⁷ but where the trust is annexed

Conveyance of a power to the executor does not necessarily annex it to the office.

Duties and rights of trustee and executor independent, though

Chamberlain v. Taylor, 36 Hun, 24. It was held, that where the power is to sell for the payment of debts only, the purchaser must show the existence of debts at the time of the sale. *McCown v. Tirrell*, 9 Tex. Civ. App. 66; but see Supreme Court opinion: *Terrell v. McCown*, 91 Tex. 231, 254. As to the effect of a power to sell to pay debts, see *post*, § 464.

¹ *Calkins v. Smith*, 41 Mich. 409, 412.

² *Ferre v. American Board*, 53 Vt. 162, 170.

³ *Fidler v. Lash*, 125 Pa. St. 87.

⁴ *Allen v. Dean*, 148 Mass. 594.

⁵ *Terrell v. McCown*, 91 Tex. 231, 244.

⁶ *Scholl v. Olmstead*, 84 Ga. 693, 697; *Mitchell v. Spence*, 62 Ala. 450, 452; *Anderson v. McGowan*, 42 Ala. 280, 285; *Tarver v. Haines*, 55 Ala. 503, 506; *Simpson v. Cook*, 24 Minn. 180, 187; *Clark v. Tainter*, 7 Cush. 567, 570; *Hodgin v. Toler*, 70 Iowa, 21, 23.

⁷ *Anderson v. Earle*, 9 S. C. 460; see *Greenland v. Waddell*, 116 N. Y. 234, 243, and *Crawford v. Forshaw*, L. R. 43 Ch. Div. 643, 646. So it was held that where an executor was also by the same instrument given powers which could be exercised only as trustee, he may, by the proper court, be removed as trustee and retained as executor: *Widmayer v. Wid-*

united in one person. to the office of executor, the executor, if he qualifies as such, thereby accepts the trust.¹ If the same person be both trustee and executor, the probate court has control over him in his executorial capacity,² but has no jurisdiction to execute the trust, which must be done in chancery.³

§ 341. Statutes regulating the Power over Real Estate conferred by Will. — Most States now make provision by statute for the exercise of the powers conferred in a will over real estate by administrators *cum testamento annexo*, or by one or more of several executors who qualify and act, in the event that the original donee or donees of such power cannot or will not exercise it. The English statute on this subject provided that, where part of the executors authorized by will to sell lands refuse the office, and the residue of them do accept the care and charge of the will, then the bargains and sales of those acting shall be as good in law as if joined in by all the appointees of the power.⁴ Although literally applicable only to cases where executors have a power to sell, yet it was construed to extend to cases where the lands are devised to executors to be sold;⁵ and is held to include copyholds.⁶ It does not authorize a conveyance by a less number than all, unless those who have not joined refuse to act as executors;⁷ but where one executor *refuses or has renounced, the others may convey *722] to him, and such conveyance is good at law, though impeachable in equity.⁸ So a power to appoint a trustee conferred upon three executors is well executed by two, if the third have renounced probate.⁹

The American statutes mostly extend the power to the survivor or survivors of several executors who have qualified, of whom one or more may die, resign, or be removed; as well as to one or more who may qualify of a larger number to whom the power is given, of whom one or

mayer, 76 Hun, 251; Quackenboss v. Southwick, 41 N. Y. 117.

¹ Earle v. Earle, 93 N. Y. 104, 110; Mitchell v. Thomson, 7 Mackey, 130, 136.

² Creamer v. Holbrook, 99 Ala. 52.

³ As to the extent of the jurisdiction of probate courts over testamentary trusts, see *ante*, § 151, p. * 346.

⁴ 21 Hen. VIII. c. 4. This statute, enacted before the Statute of Wills (32 Hen. VIII.) is in terms applicable only to lands held by others to the use of the testator. See *ante*, § 340, but also *infra*, note 7; Bonifant v. Greenfield, Cro. Eliz. 80. See note appended to Bailey's Case, 1 Atl. 131, 135, containing reference to numerous authorities on this point.

⁵ Wms. Ex. [952], citing Co. Lit. 113 a.

⁶ Peppercorn v. Wayman, 5 DeG. & Sm. 230, 235.

⁷ Hence a conveyance by three of five executors (the other two appearing to have concurred in, but not to have properly executed the conveyance) will carry only three-fifths of the property: Denne v. Judge, 11 East, 288.

⁸ Mackintosh v. Barber, 1 Bing. 50, 57. It has been decided in Massachusetts, that such sales are held to be against public policy, and will not be aided in equity: Shelton v. Homer, 5 Met. (Mass.) 462, 466.

⁹ Earl Granville v. McNeile, 7 Hare, 156.

more may refuse to act; and to the administrator with the will annexed. Such is, substantially, the law in Alabama,¹ Colorado,² Connecticut,³ Delaware,⁴ Idaho,⁵ Indiana,⁶ Michigan,⁷ Minnesota,⁸ Montana,⁹ Nebraska,¹⁰ New Jersey,¹¹ North Carolina,¹² North Dakota,¹³ Ohio,¹⁴ Pennsylvania,¹⁵ Rhode Island,¹⁶ South Carolina,¹⁷ Utah,¹⁸ and Washington.¹⁹ Under such a statute the distinction between a naked power (*i. e.*, a power incapable of other than joint execution) and one capable of execution by the qualifying, acting, or surviving executors, is emphasized in Alabama; and it is held that, if it appear from the whole will that the testator intended to confer a discretionary power, it can be exercised only by the joint act of all the appointees,²⁰ and not by an administrator with the will annexed.²¹ But directions to the executor to keep the estate together for ten years, cultivating the lands

survivors of several donees having qualified, or by an administrator *c. t. a.*

But if it is the intention of the testator to confer a discretionary power, it can be exercised only by joint act of all appointees.

¹ Code, 1896, § 1060.

² Mills' Ann. St. 1891, §§ 4748, 4749.

³ Gen. St. 1888, § 554.

⁴ Laws, 1874, p. 560, § 17; providing, however, that no express direction in the will be contravened.

⁵ Rev. St. 1887, §§ 5346, 5347, 5399, 5400.

⁶ Ann. St. 1894, § 2516.

⁷ How. St. 1882, § 5843. See Vernor *v. Coville*, 54 Mich. 281.

⁸ Gen. St. 1891, § 5674.

⁹ Code, 1895, §§ 2406, 2407.

¹⁰ Comp. St. 1887, ch. 23, § 173; Schroeder *v. Wilcox*, 39 Neb. 136.

¹¹ Gen. St. 1896, p. 1428, § 17. Giber-son *v. Giberson*, 43 N. J. Eq. 116.

¹² Code, 1883, § 1493. See Smith *v. McCrary*, 3 Ired. Eq. 204, 208, citing Foster *v. Craige*, 2 Dev. & B. Eq. 209. See also Gay *v. Grant*, 101 N. C. 206, 219; Creech *v. Granger*, 106 N. C. 213.

¹³ Rev. Code, 1835, § 6310.

¹⁴ Bates' Ann. St. 1897, § 5980.

¹⁵ Pepper & L. Dig. 1896, p. 1484, § 120. This statute contains very minute provisions touching the duties and rights of persons administering estates to sell real estate under powers granted in wills. See Houck *v. Houck*, 5 Pa. St. 273; Keefer *v. Schwartz*, 47 Pa. St. 503, 509; Meredith's Estate, 1 Pars. Sel. C. 433; Waters *v. Margerum*, 60 Pa. St. 39; Evans *v. Chew*, 71 Pa. St. 47, 52. It is held in Pennsylvania that the remedy against an executrix who unduly delays to ex-

ercise a discretionary power to sell real estate, so that a creditor is injured by the delay, is exclusively in the Orphan's Court: Erie Savings Co. *v. Vincent*, 105 Pa. St. 315, 322, citing earlier cases to same effect. The direction in a will to the acting executors to "appoint another in the place of" one dying or declining to serve, does not exclude the operation of the statute authorizing surviving executors to sell real estate: Philadelphia Trust Co. *v. Lippincott*, 106 Pa. St. 295, 300.

¹⁶ Gen. Laws, 1896, p. 711, §§ 14, 29. See Bailey *v. Brown*, 9 R. I. 79.

¹⁷ Rev. St. 1893, §§ 2100, 2101.

¹⁸ Rev. St. 1898, §§ 3910, 3911.

¹⁹ Code, 1896, §§ 5370, 5371, 5417.

²⁰ Although the statute in terms includes as well cases of devise to the executors with directions to sell, as of a naked power of sale: Robinson *v. Allison*, 74 Ala. 254, 258. It was held in this case that the sale by the only one who qualified of several executors was void, although the will directed the land "to be conveyed to the purchaser by any executrix and executors, or such of them as may be in office as such," because it was inferable from the will that the testator distinguished between the sale — as to which a discretion was confided to all — and the conveyance to be executed by such as might be in office.

²¹ Hinson *v. Williamson*, 74 Ala. 180, 193.

by the labor of slaves, then to sell the property not specifically bequeathed, and divide the proceeds among the several legatees, are held not to impose a personal trust upon the executor, but executorial duties which may be performed by an administrator with the will annexed.¹ In Pennsylvania it is held that a power to sell for the purpose of distributing the proceeds amongst persons named in the will is a power belonging to the executor *virtute officii*, whether the power is discretionary or the direction absolute;² but in Delaware the statute is held not to authorize an administrator *cum testamento annexo* to execute a power to sell, unless it be for the mere purpose of conversion into money and distribution as part of the personalty.³ And see, as to Michigan, the dissenting opinion of Cooley, C. J., in *Vernor v. Coville*, discussing the same question.⁴ In Connecticut the statute is construed as conferring on the administrator with the will annexed all the powers of the executor, unless they are not essential to the settlement of the estate, or indicate a special confidence in the individual.⁵

The same powers are conferred upon the like persons by the statutes of Arkansas,⁶ Florida,⁷ Mississippi,⁸ Missouri,⁹ Virginia,¹⁰ West Virginia,¹¹ and Wyoming,¹² if no other person be appointed in the will for that purpose, or if the person so appointed refuse to perform the trust, or die before having completed the same. In Mississippi it is held that the power to sell conferred by will includes the power to sell at private sale,¹³ or at auction; and when an auction * sale has been made, the deed may be exe- [* 724] cuted by a court of chancery, if the executor die before he has executed it.¹⁴ In Missouri and Virginia it is held that the power survives, by force of the statute, to the acting executor or administrator with the will annexed, although the land be devised to the executor in trust to be by him sold at his discretion;¹⁵ but

¹ *Foxworth v. White*, 72 Ala. 224, 229, and earlier cases there cited; *Watson v. Martin*, 75 Ala. 506, 509. But see *Hinson v. Williamson*, *supra*, as to such directions when implying particular confidence.

² *Evans v. Chew*, 71 Pa. St. 47; see *Potts v. Brenehan*, 182 Pa. St. 295; see *Scott v. West*, 63 Wis. 529, 558.

³ *Chandler v. Delaplaine*, 4 Del. Ch. 503, 506.

⁴ 54 Mich. 281, 293. See also *Long, J.*, in *Bennett v. Chapin*, 77 Mich. 526, and *Green v. Russell*, 103 Mich. 638. The term "survivors" in a will authorizing the executors or survivors to convey land applies to those who accept and qualify: *Herrick v. Carpenter*, 92 Mich. 440.

⁵ *Pratt v. Stewart*, 49 Conn. 339.

⁶ Dig. of St. 1894, § 169.

⁷ Rev. St. 1892, § 1919.

⁸ Rev. Code, 1892, § 1838. This statute is confined in its operation to "the sale and conveyance of land devised to be sold" · *Bartlett v. Sutherland*, 24 Miss. 395, 403.

⁹ Rev. St. 1889, § 136; *Laws*, 1883, p. 23; *Phillips v. Stewart*, 59 Mo. 491, 494.

¹⁰ Code, 1887, § 2663.

¹¹ Code, 1891, ch. 86, § 1.

¹² Rev. St. 1887, §§ 2021, 2022, 2094.

¹³ *Buckingham v. Wesson*, 54 Miss. 526, 533.

¹⁴ *Jelks v. Barrett*, 52 Miss. 315, 324.

¹⁵ *Evans v. Blackiston*, 66 Mo. 437 (*Hough, J.*, dissenting); *Dilworth v. Rice*, 48 Mo. 124, 132 (in this case the statute is held to extend "to all powers of sale conferred on executors where they

a power conferred upon several executors who qualify and enter upon the discharge of their duties cannot be exercised by one, or any number less than all of them.¹

All qualifying executors must join.

In Illinois,² Kentucky,³ and New York⁴ the statutes specially provide for the execution of powers touching real estate granted to several executors, by such of them as qualify, or the survivors of them, making no special mention of administrators *cum testamento annexo* in connection therewith, but providing that they "shall have the same rights and powers, and be subject to the same duties, as if they had been named executors in the will." In construing these statutes, it is held that they confer upon the administrator with the will annexed all powers given to the executor for the purpose of paying debts or legacies, or both, and especially when there is an equitable conversion of land into money for the purpose of such payment or distribution, and where the power of sale is imperative and does not grow out of a personal discretion confided to the individual;⁵ but no discretionary trust or power conferred upon the executor,⁶ or for a special purpose collateral to the ordinary duties of an executor or administrator, or indicating a special confidence reposed in the individual.⁷

Statutes giving administrators *c. t. a.* same powers as if named executors in the will

give him no discretionary power, nor power for a special purpose collateral to the administration, nor power indicating special confidence.

[* 725] * In Tennessee the statute gives to an administrator with the will annexed "the same power and authority as the executor had by the will of the testator," and authorizes him to "sell land, if the executor possessed the power."⁸ In construing this statute, the courts of Tennessee preserve the distinction between powers executorial, which follow the office, and such as may be conferred upon the executor as testamentary trustee, which do not.⁹

are peremptory in their character, although they may be accompanied with and involve the exercise of a discretion": p. 136); *Brown v. Armistead*, 6 Rand. 594.

¹ *Littleton v. Addington*, 59 Mo. 275; *Johnston v. Thompson*, 5 Call, 248, 260. Such is the law under the English statute: *Deneale v. Morgan*, 5 Call, 407, 417, and under that of Illinois: see next note. See also *Dunn v. Rennick*, 40 W. Va. 349, 363.

² Rev. St. 1896, p. 321, ¶ 97. The statute has no application where all the executors qualify, and are living; all should join in the conveyance: *Pennsylvania Co. v. Bauerle*, 143 Ill. 459, 472; all the executors who qualify must join in executing a power of sale or purchase: *Wilson v. Mason*, 158 Ill. 304, 312. See preceding note.

³ St. 1894, § 3888.

⁴ 2 Rev. St. * 109.

⁵ *Mott v. Ackerman*, 92 N. Y. 539, 553, citing numerous New York cases; *Greenland v. Waddell*, 116 Ill. 234.

⁶ *Wooldridge v. Watkins*, 3 Bibb, 349, 351; *Clay v. Hart*, 7 Dana, 1, 7. These cases are condemned by *Wagner, J.*, in *Dilworth v. Rice*, 48 Mo. 124, 132. And see *Ely v. Dix*, 118 Ill. 477, 482, citing *Wardwell v. McDowell*, 31 Ill. 364, holding that a sale by the qualifying executor is valid, whether there "was a mere naked power, or a power coupled with a trust, or whether the power was of a discretionary or mandatory character."

⁷ See *Mott v. Anderson*, *supra*.

⁸ Code, 1884, § 3081.

⁹ *Harrison v. Henderson*, 7 Heisk. 315, 349, *et seq.*; *Armstrong v. Park*, 9 Humph.

In Georgia,¹ Nevada,² and Oregon,³ the statute requires all sales made by administrators with the will annexed to conform to the statutory requirements for sales of real estate made by order of the probate court.

In Massachusetts the probate court is empowered to appoint a trustee to sell if the testator has omitted to do so.⁴ The statutes of Maryland⁵ authorize executors to sell in pursuance of power given in a will, but the sale must be ratified and confirmed by the Orphan's Court, after notice given by publication as in sales of real estate under decree in chancery, and the executor is accountable and liable on his bond for the proceeds in the same manner as for the proceeds of personal property sold. The same authority is vested in the remaining trustee or trustees, where one or more of those appointed in the will refuse to act, or have died, as the will vested in all of them. The statute is construed, in this State, as distinguishing between executors who refuse to act, or who die without having executed the power, and those who die before the testator; in the latter case the power had never vested in any one, because the will speaks only from the testator's death, and no power could be transmitted to an administrator *de bonis non*, nor be granted by the Orphan's Court; but a court of equity only could supply a trustee to execute the power of sale.⁶ In this State a mandatory power of sale can be executed by the administrator with the will annexed, appointed in place of a declining executor.⁷ In Texas the provisions of the statute of 21 Hen. VIII., c. 4, are practically adopted,⁸ and it is held that the power to sell real estate conferred upon several "joint" executors may be carried out by a smaller number, to the extent indicated by the testator;⁹ *the ad- [*726] ministrator *de bonis non* succeeds to all the rights, powers, and duties of the former executor, except such rights and powers conferred on the former executor by the will as are different from those conferred by the statute upon executors generally.¹⁰ In Iowa it is held, that the statutes of that State do not change the common-law rule as to the powers of an administrator with the will annexed.¹¹ In Pennsylvania, under a statute providing that a gen-

195, 206; *Green v. Davidson*, 4 Baxt. 488, 493; *Andrews v. Andrews*, 7 Heisk. 234, 247; *Caruthers v. Caruthers*, 2 Lea, 264.

¹ Code, 1895, §§ 3309, 3460.

² Gen. St. 1885, § 2847.

³ Code, 1887, § 1155.

⁴ Pub. St. 1882, p. 792, § 4.

⁵ Pub. Gen. L. 1888, p. 1406, § 282.

The statute does not apply to the executor of a non-resident testator: *Smith v. Montgomery*, 75 Md. 138.

⁶ *Wilcoxson v. Reese*, 63 Md. 542, 546.

⁷ *Venable v. Mercantile Co.*, 74 Md. 187.

⁸ Sayles' Civ. St. 1897, art. 2007; *Anderson v. Stockdale*, 62 Tex. 54.

⁹ *Anderson v. Stockdale*, *supra*, citing earlier Texas cases.

¹⁰ Sayles' Civ. St. 1897, art. 1924, 2012. See also as to the law in this State, *Roberts v. Connellee*, 71 Tex. 11, and cases referred to.

¹¹ *Hodgin v. Toler*, 70 Iowa, 21.

eral gift of the real or personal estate of a testator shall be construed to include any estate over which he has a power of appointment, it is held that property, real as well as personal, devised "according to the intestate laws," passes to the widow and heirs.¹

§ 342. **Constructive or Equitable Conversion.**—It seems most convenient to notice in this connection the doctrine which impresses upon real estate, directed by a testator to be sold for the purpose of distributing the proceeds to the persons designated by him, the character of personal property, and upon personal property directed to be converted into real, the character of real property. The rule invoked by this doctrine is, that in equity property will be treated as being already what the testator intended it to become.² If the conversion is complete, out and out, or absolute and for all purposes, it operates immediately upon the death of the testator, and therefore determines the devolution of the property to the heir, devisee, or executor, — not according to the character in which the testator has left it, but according to that into which he has directed it to be converted; and the rights and liabilities of those interested in it attach from the moment of the testator's death, as if it were then converted, no matter when the actual conversion takes place.³ But since, as in other cases of testamentary disposition, the testator's intention must govern, if it can be ascertained from his language, the rule is equally applicable whether there be an express direction to convert, or whether a conversion is necessarily implied.⁴ There must, however, be no doubt of the testator's intention to convert;⁵ and this intention, whether expressed or implied, must be unconditional.⁶ A conditional conversion is not

Property given by will is treated as that species into which the testator directs it to be changed for the purpose of the gift.

Out and out conversion operates from testator's death.

Testator's intention must be clear, but may be implied;

and it must be unconditional.

¹ Howell's Estate, 185 Pa. St. 350.

² King v. King, 13 R. I. 501, 506; Fletcher v. Ashburner, 1 Bro. Ch. C. 497, 499; Greenland v. Waddell, 116 N. Y. 234, 240.

³ Fisher v. Banta, 66 N. Y. 468, 476; Chew v. Nicklin, 45 Pa. St. 84, 88; Tickel v. Quinn, 1 Dem. 425, 427; Hammond v. Putnam, 110 Mass. 232, 235; Lent v. Howard, 89 N. Y. 169, 176; Corrington's Estate, 124 Ill. 363, 367; DeVaughn v. McLeroy, 82 Ga. 687 (personalty into land and reconversion into money); Ford v. Ford, 80 Mich. 42, holding that double conversion does not differ from single conversion.

⁴ Dodge v. Williams, 46 Wis. 70, 97; Chandler's Appeal, 34 Wis. 505; Lent v. Howard, *supra*; Dodge v. Pond, 23 N. Y.

69; Vaughan v. Farmer, 90 N. C. 607; Asche v. Asche, 113 N. Y. 232, 235; Fraser v. Trustees, 124 N. Y. 479; Davenport v. Kirkland, 156 Ill. 169; Clarke v. Clarke, 46 S. C. 230.

⁵ Hobson v. Hale, 95 N. Y. 588, 597; Hale v. Hale, 125 Ill. 399; Chew v. Nicklin, 45 Pa. St. 84. "If there is any doubt as to the intention of the testator, the original character of the property will be retained": Keller v. Harper, 64 Md. 74, 82. The expression in a will, "I desire my estate to be sold," is equivalent to "I will," etc.: Philadelphia's Appeal, 112 Pa. St. 470, 474.

⁶ "It ought to be settled by this time," says Paxson, J., in Hunt's Appeal, 105 Pa. St. 128, 141, "that in order to work a conversion there must be either, 1st, a

* within the scope of the rule, because in such case there [* 727] is no constructive conversion. Thus, if the testator vest power in another to convert or not, in his discretion, or directs the

A conditional conversion is not a constructive or equitable conversion;

and takes effect on the happening of the contingency;

should be remembered, however, that, where there is an imperative

but a discretion as to time of sale does not except an imperative direction from the rule.

conversion upon the happening of a contingency, or at the election of a person or persons named, it is clear that the question of conversion must depend on the exercise of the discretion, or the happening of the contingency, and cannot be ascribed solely to the testator's will. In such cases the property devolves in the shape in which the testator left it, and the conversion takes effect upon the happening of the contingency.¹ It

direction to convert, the discretion given as to the *time* of sale,² or the mode and manner,³ does not work an exception to the rule; but if the conversion is postponed to a future time certain, before the arrival of

which the property is, according to the testator's direction, to be enjoyed by persons other than the ultimate beneficiaries, there is of course no conversion until the expiration of such time.⁴

positive direction to sell; or 2d, an absolute necessity to sell in order to execute the will; or 3d, such a blending of real and personal estate by the testator in his will as to clearly show that he intended to create a fund out of both real and personal estate, and to bequeath the said fund as money." *Peterson's Appeal*, 88 Pa. St. 397, 402; *Taylor v. Maris*, 90 N. C. 619, 621; *Janex v. Throckmorton*, 57 Cal. 368, 382; *Lynn v. Gephart*, 27 Md. 547, 563; *White v. Howard*, 46 N. Y. 144, 162; *King v. King*, 13 R. I. 501, 507, and cases cited; *Ford v. Ford*, 70 Wis. 19, 50, 51.

¹ *Christler v. Meddis*, 6 B. Mon. 35; *Clay v. Hart*, 7 Dana, 1, 11; *Graham v. Dewitt*, 3 Bradf. 186, 190; *Cook v. Cook*, 20 N. J. L. 375; *White v. Howard*, 46 N. Y. 144, 162, citing earlier New York cases; *Clift v. Moses*, 116 N. Y. 144; *Page's Estate*, 75 Pa. St. 87, 95; *Peter v. Beverly*, 10 Pet. 532, 563; *Evans v. Kingsberry*, 2 Rand. 120, 129; *Nagle's Appeal*, 13 Pa. St. 260, 262; *Miller's Appeal*, 60 Pa. St. 404, 407; *Becker's Estate*, 150 Pa. St. 524; *Ferrie v. Atherton*, 28 Eng. L. & Eq. 1; *Harcum v. Hudnall*, 14 Gratt. 369, 377; *Massey v. Modawell*, 73 Ala. 421; *Keller v. Harper*, 64 Md. 74; *Howard v. Peavey*, 128 Ill. 430.

² *Roland v. Miller*, 100 Pa. St. 47, 50;

Ingrem v. Mackey, 5 Redf. 357; *Tickel v. Quinn*, 1 Dem. 425, 427; *Betts v. Betts*, 4 Abb. N. C. 317, 387; *Delafield v. Barlow*, 107 N. Y. 535, 540; *Underwood v. Curtis*, 127 N. Y. 523; *Mellon v. Reed*, 123 Pa. St. 1, 14. Where the executor is directed to sell within a certain time, his failure to do so will not destroy the power; he has thereafter no longer any discretion: *Fahnenstock v. Fahnenstock*, 152 Pa. St. 56.

³ *Delafield v. Barlow*, *supra*; *Bell v. Bell*, 25 S. C. 149, 154; *Corrington's Estate*, 124 Ill. 363, 367; *Benbow v. Moore*, 114 N. C. 263.

⁴ Hence where the sale is postponed until after the time allowed by the Statute of Perpetuities, the devise cannot be aided by invoking the doctrine of equitable conversion: *In re Walkerley*, 108 Cal. 627; *De Wolf v. Lawson*, 61 Wis. 469, 478. See also *Oggsbury v. Oggsbury*, 115 N. Y. 290, 294. But where there is a positive direction to convert at the expiration of a life estate, and the proceeds bequeathed as money, while the interest of the life-tenant will be treated as realty, that of the remainderman will be treated as money from the time of the testator's death: *Allen v. Watts*, 98 Ala. 384; and if postponement be simply in the interest of the life-tenant and for no other purpose, the defeat of the particular estate, as by renunciation of the

It is held, that the doctrine of equitable conversion does not apply so as to dominate the title of the heir, except where the donee of the power takes a fee by express terms or necessary implication; otherwise the title remains in the heir, until the donee of the power actually exercises it.¹ Where there is an imperative direction to convert, and out of the proceeds to pay certain legacies, and by a subsequent clause an undoubted discretion to convey the land in satisfaction of such legacies, if the executors and legatees [* 728] can agree as to the portions of land which shall be * fair equivalents for the legacies, this does not prevent the land from being equitably converted into personalty.²

It results from these principles, that if the testator intended the conversion for certain purposes only, the conversion is limited to these purposes, and the property not needed for their accomplishment remains unchanged and unaffected by the rule of conversion.³ So, if the purpose of the testator fails, or cannot be accomplished, there is no conversion, because "there is an end of the disposition when there is an end of the purpose for which it was made,"⁴ unless the testator intended to stamp the character of personalty upon realty, or *vice versa*, not only for the purposes of the will but for all purposes, out and out.⁵

Property not needed to accomplish testator's purpose is not converted.

So, if such purpose cannot be accomplished, there is no conversion;

but testator may direct a conversion for all purposes.

Where a conversion is directed, but the proceeds go to the same persons, in the same proportions who would take if there were no conversion, they may elect in which character they will take.⁶ In such case they take by their own act, as upon

Donees of property di-

will where the widow is such devisee for life, will accelerate the conversion: *Small v. Marburg*, 77 Md. 11.

¹ And the intermediate interest of the heir is subject to sale under execution: *Eneberg v. Carter*, 98 Mo. 647, 652; but the title of the purchaser will be divested by a subsequent sale under the power: *Morse v. Hackensack Bank*, 47 N. J. Eq. 279. The intermediate rents and profits go to the heirs, and they may maintain ejectment until the sale: *Estep v. Armstrong*, 91 Cal. 659.

² If they so agree, it is manifest that the legatee takes the land as a purchaser, as a substitute for the money, and not as devisee: *Miller v. Commonwealth*, 111 Pa. St. 321, 327.

³ *King v. King*, 13 R. I. 501; *Ackroyd v. Smithson*, 1 Bro. Ch. C. 503; *Orrick v. Boehm*, 49 Md. 72, 104; *Hawley v. James*, 5 Pa. 318; *Chamberlain v. Taylor*, 105

N. Y. 185, 194; *Luffberry's Appeal*, 125 Pa. St. 513, 518. The same rule obtains in respect to the undisposed of proceeds, when realty is directed to be sold for two or more purposes, one of which is illegal, or a part of the proceeds is given to an object incapable of taking: *Johnson v. Holifield*, 82 Ala. 123, 127; *Roy v. Monroe*, 47 N. J. Eq. 356.

⁴ *Rizer v. Perry*, 58 Md. 112, 119, citing numerous English authorities; *Bates v. Bates*, 134 Mass. 110, 115; *Parker v. Linden*, 113 N. Y. 28; *Phillips v. Ferguson*, 85 Va. 509; *Read v. Williams*, 125 N. Y. 560, 571; *Fifield v. Van Wyck*, 94 Va. 557.

⁵ 3 Redf. on Wills, 140; *King v. King*, 13 R. I. 501, 507; *Craig v. Leslie*, 3 Wheat. 563, 583.

⁶ *Prentice v. Janssen*, 79 N. Y. 478; *Beadle v. Beadle*, 2 McCreery, C. C. 586; *Craig v. Leslie*, 3 Wheat. 563, 578; *Armstrong v. McKelvey*, 104 N. Y. 179.

rected to be converted may elect to take without conversion. a purchase, and not under the will.¹ But all the beneficiaries must acquiesce; a part of them cannot elect.² In case the beneficiary be an infant, a court of equity may elect for him, if it be to his interest,³ but his guardian or trustee cannot.⁴

It may be proper to mention, also, that real estate, although it be constructively converted into personalty, is nevertheless subject to the rules of law governing real estate generally, inasmuch as it is taxable, and controllable as such, and can only be conveyed as such.⁵

§ 343. **Powers vested in Devisee of a Life Estate.**—It may be pertinent to mention, in this connection, some of the rules governing the extent of powers conferred upon the devisee [* 729] of an estate for life, anticipating the discussion of the rules for construing wills.⁶ Testators, desirous of providing for several classes of persons having claims upon their bounty, most usually their widows and children, often create a life estate, or estate during widowhood, in favor of the one, with remainder to the other; and, recognizing the possibility that the mere life estate may prove insufficient for the widow's comfortable support, annex to the devise a power, more or less complete, to dispose of the estate, either at pleasure, or under given restrictions. Powers so conferred are to be executed, like all testamentary dispositions, according to the testator's intention; if that be clearly apparent, there need be no recourse to rules of construction. But the coupling of the power with the gift of a life estate, or estate during widowhood, requires peculiar caution in ascertaining such intention, so that the rights of the respective parties in interest, as well as of possible purchasers under the power, may not be prejudiced.

In extreme cases a court of equity has power to take the execution of a discretionary trust from a life tenant and commit it to another, if the circumstances create an emergency such as to justify judicial interference.⁷

Where a life estate is devised by implication, with an unqualified power of disposal annexed, the gift or limitation over is said to be of no effect;⁸ hence a widow taking an estate

¹ *Mellon v. Reed*, 123 Pa. St. 1, 17.

² *Ridgeway v. Underwood*, 67 Ill. 419, 430; *Potter v. Couch*, 141 U. S. 296, 321; *Swann v. Garrett*, 71 Ga. 566; *Compton v. McMahan*, 19 Mo. App. 494, 503; *Harcum v. Hudnall*, 14 Gratt. 369, 376; *Mellen v. Mellen*, 139 N. Y. 210 (see this case as to what would constitute an election), 221; *McDonald v. O'Hara*, 144 N. Y. 566.

³ *Swann v. Garrett*, 71 Ga. 566.

⁴ *Carr v. Branch*, 85 Va. 597.

⁵ *Wilder v. Ranney*, 95 N. Y. 7, 12;

Crowley v. Hicks, 72 Wis. 535, 544. But in *Mellon v. Reed*, 123 Pa. St. 1, it was held that the interest of a distributee in property equitably converted could be released or assigned by parol, the Statute of Frauds having no application.

⁶ See *post*, §§ 414 *et seq.*; as to executory devises, § 439.

⁷ *Richardson v. Richardson*, 80 Me. 585, 591.

⁸ This rule is more extensively discussed *post*, § 439.

in general terms of devise, together with unconditional power of disposition, may convey an indefeasible title to such estate, although the will contain a devise over.¹ If the devise be in express terms for life or widowhood only, the power is thereby restricted, the devise over is valid, and the purchaser under the power takes an estate terminating with the life, or upon marriage of the devisee,² unless there are other words clearly indicating that a greater power was intended.³ The use of such phrases, in the devise over, as "whatever remains,"⁴ "all [* 730] that may remain,"⁵ "what remains,"⁶ etc., are not of * themselves sufficient to indicate the testator's intention that the life tenant shall, by the exercise of the power, override the gift over; at least not if effect can be given to the words upon other elements of the will.⁷ Where, for instance, real and personal property is included in the gift, such words will be held to apply to the personal, but not to the real estate;⁸ or they may intend the property after the termination of the life estate.⁹ If, however, the testator could have meant nothing else, if the words used are senseless, without meaning, unless understood as conveying a power of disposition to the life tenant, they will be so construed.¹⁰ In such case the words "if anything is left" imply a power of disposition of the whole estate;¹¹ and where the gift over is of the property devised and bequeathed "or as much thereof as may remain unexpended" at the death of the life tenant, a power of disposition of the fee is implied.¹² The payment of legacies for life with remainder to an-

posal with life estate by implication authorizes conveyance of indefeasible title.

Express devise of life estate limits power to the donee's lifetime;

unless otherwise intended.

¹ *Stuart v. Walker*, 72 Me. 145, 149; *Forsythe v. Forsythe*, 108 Pa. St. 129; see *Brockley's Appeal*, 4 Atl. 210, showing that the proceeds of sale not used by the widow pass under the testator's will.

² *Post*, § 439; *Brant v. Virginia Coal Co.*, 93 U. S. 326, 333; *Jones v. Jones*, 66 Wis. 310; *Patty v. Goolsby*, 51 Ark. 61, 73; *Miller v. Potterfield*, 86 Va. 876.

³ *Henderson v. Blackburn*, 104 Ill. 227, 231; *Kaufman v. Breckenridge*, 117 Ill. 305, 313; *Silvers v. Canary*, 109 Ind. 267.

⁴ *Green v. Hewitt*, 97 Ill. 113, 117.

⁵ *Gregory v. Cowgill*, 19 Mo. 415, 417.

⁶ *Foote v. Sanders*, 72 Mo. 616, 620.

⁷ *Paine v. Barnes*, 100 Mass. 470.

⁸ *Henderson v. Blackburn*, *supra*, and cases there cited; *per Clark, J.*, in *Patty v. Goolsby*, 51 Ark. 61, 74.

⁹ *Blanchard v. Blanchard*, 1 Allen, 223, 226; *Brammel v. Cole*, 136 Mo. 201, 212.

¹⁰ *Clark v. Middlesworth*, 82 Ind. 240, 246. No power was expressly given in

this case; but the words, "all my property, real and personal, to my wife Mary A. Clark, during her life, and at her death, should anything remain, the same to be divided among my heirs at law," were held to give a life estate coupled with a power of alienation.

¹¹ *Henderson v. Blackburn*, *supra*.

¹² *Cashman's Estate*, 134 Ill. 88, and cases cited. See also *Griffin v. Griffin*, 141 Ill. 373, where a power of sale for the widow's support was given; and *Roberts v. Lewis*, 153 U. S. 367, in which the Supreme Court (overruling *Giles v. Little*, 104 U. S. 291) held that, under a will giving testator's property to his wife, "the same to be and remain hers, with full power, right, and authority to dispose of the same as to her shall seem most meet and proper, so long as she remains my widow, upon the express condition, however," that, in case of remarriage, whatever shall remain shall go to testator's chil-

other, and the respective rights and liabilities of the successive legatees, will be hereafter discussed.¹

§ 344. Duties and Liabilities arising to Executors and Administrators in Respect of Real Estate.—

Real estate passing directly to heirs or devisees imparts no rights or duties upon executors or administrators. in the absence of a contrary testamentary disposition, and when not needed for the payment of debts, passes directly to the heirs or devisees, it is as much beyond the authority and duty of the personal representatives as if it had not been the property of the testator or intestate.² Where the executor is given by the will a

naked power of sale, the heir or devisee is entitled to the rents and profits until the sale.³ And actions concerning the realty should be brought by and against him and not the personal representative.⁴ The dedication of lands to public use by an executor or administrator, without the order of a court of competent jurisdiction, or power granted by will, is void;⁵ but it has been held that an unlimited power to sell land includes the power to dedicate streets as an incident to the sale.⁶

It is equally obvious, that the duties and rights of executors and administrators in respect of real estate lawfully in their charge—whether by force of testamentary direction, or order of the probate court when necessary to pay debts, or coming to them in the course of administration like personal property constituting assets—are the same as if it were personal property under their charge. They are entitled, on the one hand, to credit for all

expenses reasonably incurred in its protection and *preservation, and liable, on the other, for all losses arising out of negligence in regard thereto. Thus, it is the administrator's duty to restrain even an heir from trespassing upon real estate mortgaged to the intestate, upon which the administrator has obtained judgment of foreclosure;⁷ to bring an action against a disseisor to recover possession thereof;⁸ and to recover damages for trespass upon lands of which he has taken possession as administrator.⁹ It is hardly necessary to mention, that executors vested

dren, the widow during widowhood had power to convey the fee.

¹ *Post*, § 456.

² *Baxter v. Robinson*, 11 Mich. 520, 522 (see separate opinion of Manning, J., p. 523); *Thorp v. Miller*, 137 Mo. 231, 239; *Wilcox v. Smith*, 26 Barb. 316, 337; *Fross' Appeal*, 105 Pa. St. 258, 269; *Hawkins v. Hewitt*, 56 Vt. 430; *Reading v. Wier*, 29 Kans. 429.

³ *Ante*, § 338; *Dunn v. Renick*, 33 W. Va. 476.

⁴ *Ante*, §§ 293, 338.

⁵ *Kaime v. Harty*, 73 Mo. 316.

⁶ *Matter of Sixty-Seventh Street*, 60 How. Pr. 264, 270.

⁷ *Palmer v. Stevens*, 11 Cush. 147, 150.

⁸ *Richardson v. Hildreth*, 8 Cush. 225.

⁹ *Noon v. Finnegan*, 32 Minn. 81. See same case, 29 Minn. 418, stating the converse of the proposition. As to the States in which the personal representative takes the realty and his rights therein, see *ante*, § 337.

with power to sell real estate are, in the same manner, authorized to do all that is necessary in the way of insurance, superintendence, repairs, and paying taxes for the preservation of the estate.¹

This subject is treated more fully in connection with the subject of what proceeds of real estate executors are chargeable with, and what disbursements in respect of realty they may take credit for, on their accounting² and in connection with the subject of assets;³ but it may be mentioned here that real estate coming to the administrator's hands on foreclosure of a mortgage, purchase under execution, etc., should be converted by him into money and distributed as personalty.⁴

§ 345. **Power to Mortgage the Real Estate.**—It may be stated, as a general proposition, that neither executors, unless specially thereto authorized by will, nor administrators have the power to bind the estate of the deceased by borrowing money.⁵ Thus it was held in a recent case in Illinois, that an administrator cannot bind the heirs by his mortgage of the real estate to raise funds for the payment of his intestate's debts, and that a court of equity will not sustain such a mortgage, or a title derived under it, although the borrowed money was honestly applied to pay the debts of the estate;⁶ but the circumstances may be such, that the heirs as well as the administrator will be estopped to question the validity of a mortgage given at their instance.⁷ Courts of equity have authorized the mortgage of real estate to raise money for the payment of debts of a deceased person;⁸ but it seems that, where the jurisdiction over estates of deceased persons is confided to probate courts, the power of courts of equity is thereby excluded.⁹ In some States the statute authorizes the sale *or mortgage* of real estate for the payment of debts of deceased persons;¹⁰ but without statutory provision to that effect courts of probate have no power to order or authorize an executor or administrator to mortgage the real estate;¹¹ hence a mortgage authorized by a court not having

Neither executors nor administrators have power to bind the estate by borrowing money,

unless conferred by statute.

¹ Howard v. Francis, 30 N. J. Eq. 444, 449; Dey v. Codman, 39 N. J. Eq. 258, 263.

² Post, §§ 513, 518.

³ Ante, § 276.

⁴ Ante, § 279, and cases cited; Stevenson v. Polk, 71 Iowa, 278, 291.

⁵ Post, § 356. Smith v. Hutchinson, 108 Ill. 662, 668.

⁶ Johnson v. Davidson, 162 Ill. 232, 235.

⁷ Duryea v. Mackey, 151 N. Y. 204, 207, 209. The same principle is intimated in Johnson v. Davidson, *supra*, where, however, the facts were held not to justify its application.

⁸ Spencer v. Bank of the State, Bai. Eq. 468, 469, 479, and earlier cases of South Carolina there cited.

⁹ Titterington v. Hooker, 58 Mo. 593.

¹⁰ Steffy's Appeal, 76 Pa. St. 94, 96; Griffin v. Johnson, 37 Mich. 87, 90; Lambie's Estate, 94 Mich. 489; Thomas v. Parker, 97 Cal. 456. See *infra* as to power of mortgaging under will.

¹¹ Black v. Dressell, 20 Kans. 153; Deery v. Hamilton, 41 Iowa, 16, 18. See Woerner on Guardianship, § 86, on the power of probate courts to authorize the mortgage of minors' realty.

jurisdiction, or in a proceeding in which the requirements of the statute have not been observed, is void, and cannot bind the interests of the heirs, unless they are precluded from objecting by the doctrine of estoppel.¹

*The power to sell real estate given in a will does not [*732] necessarily include the power to mortgage it. Such a power

Power to sell does not imply power to mortgage real estate. must be exercised to the extent and in the manner specified; it must accomplish the purpose had in view by the testator.² Hence the direction to sell out and out, or for a purpose or with an object beyond the raising of

a particular charge, does not authorize a mortgage, because the testator's intention, the object to be accomplished by the power conferred, is the conversion of the property.³ And it is held that a trust with a power to sell imports, *prima facie*, a power to sell "out and out," and will not authorize a mortgage, unless there is something in the will to show that a mortgage was within the inten-

If power to sell be given to raise funds for a specific purpose, it may include power to mortgage. tion of the testator.⁴ If, however, the conversion be subservient to some other purpose or object, for instance, the raising of money for a specific purpose by the sale of real estate, the power to sell is held to include the power to mortgage, if the intention of the testator is thereby fully accomplished.⁵ It is said, in such case, that the power to sell includes the power to mortgage, because a mortgage is but a conditional sale. And in Pennsylvania it is held to be "familiar law in this State, that an absolute and unrestricted power to sell includes a power to mortgage."⁶

¹ Duryea v. Mackey, 151 N. Y. 204, 208, reversing s. c. 74 Hun, 638. So the mortgage is held void, if based on a petition to sell real estate: Edwards v. Baker, 145 Ind. 281.

² Stokes v. Payne, 58 Miss. 614, 616; Devaynes v. Robinson, 24 Beav. 86, 91; Wood v. Goodridge, 6 Cush. 117, 123.

³ Stroughill v. Anstey, 1 DeG. M. & G. 635, 643; Haldenby v. Spofforth, 1 Beav. 390; Bloomer v. Waldron, 3 Hill (N. Y.), 361, 365; Deery v. Hamilton, 41 Iowa, 16; Price v. Courtney, 87 Mo. 387; Willis v. Smith, 66 Tex. 31, 43.

⁴ Hoyt v. Jaques, 129 Mass. 286; Ferry v. Laible, 31 N. J. Eq. 566, 574, reviewing English and American authorities, and see

a list of cases collected by Stewart, Rep., p. 567.

⁵ "Where the estate is to go subject to a charge, there can be no objection to raise the charge by mortgage": Lord St. Leonards, in Stroughill v. Anstey, 1 De G. M. & G. 635, 645 (citing Haldenby v. Spofforth, 1 Beav. 390, 395; Mills v. Banks, 3 P. Wms. 1, 9; Ball v. Harris, 4 Myl. & Cr. 264, 267); Albany Fire Insurance Co. v. Bay, 4 N. Y. 9, 19, 26; Loe-benthal v. Raleigh, 36 N. J. Eq. 169, 172; Miller v. Redwine, 75 Ga. 130; Swarthout v. Ranier, 143 N. Y. 499.

⁶ McCreary v. Bomberger, 151 Pa. St. 323, 328, relying on earlier Pennsylvania cases.

PART THIRD.

OF THE PRIVITY AMONG EXECUTORS OR ADMINISTRATORS OF THE SAME ESTATE.

CHAPTER XXXVII.

UNITY OF ESTATE AMONG EXECUTORS AND ADMINISTRATORS OF THE SAME DECEDENT.

§ 346. **Power of Co-executors to bind each other by Acts of Administration.** — The interest and estate of each of several executors or administrators of the same testator or intestate in all his effects and chattels is joint and entire, and incapable of being severed.¹ Executors and administrators stand on the same ground in this respect.² We have already seen,³ that if one or more of the number die, resign, or be removed, the estate passes to and vests in those remaining or surviving. They are considered in law as one person; hence the act of one is deemed to be the act of all, although they respectively administer on different parts of the estate.⁴ One co-executor or co-administrator can bring no action at law against another for a debt due to or by the decedent;⁵ while any one or more of several may release the liability of a witness; discharge or compound a debt,⁶ unless such compounding involve a

Interest and title of each of several executors or administrators is joint and inseverable, and passes to survivors.

Act of one is act of all;

but one cannot bring a suit against another for a debt to the estate.

¹ *Wms. Ex.* [911]; *Schoul. Ex.* § 400; 3 *Redf. on Wills*, 222.

² *Douglass v. Saterlee*, 11 *John.* 16, 21.

³ *Ante*, § 179.

⁴ *Grinstead v. Fonte*, 32 *Miss.* 120; *Barry v. Lambert*, 98 *N. Y.* 300, 308. And see *Taylor v. Minton*, 45 *Kans.* 17; *Sullivan v. McMillan*, 26 *Fla.* 543, 576 (holding a refusal to perform testator's contract binding on co-executors).

⁵ *Quinn v. Stockton*, 2 *Lit.* 343, 345; *Simon v. Albright*, 12 *S. & R.* 429. See cases cited *post*, § 349. But one executor, who has taken no part in the administration and received none of the assets, may

sustain an individual action at law against his co-executor who has received all the assets, for a debt due him from decedent; *Pringle v. Pringle*, 130 *Pa. St.* 565.

⁶ *Shaw v. Berry*, 35 *Me.* 279; *Gilman v. Healy*, 55 *Me.* 120, 124; *Hoke v. Fleming*, 10 *Ired. L.* 263; *Bryan v. Thompson*, 7 *J. J. Marsh.* 586; *Herald v. Harper*, 8 *Blackf.* 170; *Hyatt v. McBurney*, 18 *S. C.* 199, 215; *Fesmire v. Shannon*, 143 *Pa. St.* 201. But in North Carolina a distinction is observed between co-executors and co-administrators; while each of several co-executors may bind the estate, the power of one of several administrators is denied

fraud, negligence, or misconduct;¹ release part or the whole of * premises mortgaged for a debt due the deceased;² [* 734] assign promissory notes payable to the deceased,³ or to themselves jointly;⁴ transfer stock;⁵ dispose of the personal assets by sale;⁶ enter into amicable actions, and submit to arbitration so as to bind the estate.⁷ All such acts by any one or more of a greater number of executors or administrators will be binding upon all the others, though they have not concurred therein. A distinction has

Distinction between assets derived from the decedent and those by sale or conversion.

been made between the assets derived directly from the decedent, and such as came to them in consequence of a sale or conversion, because, by the conversion, the title is deemed to pass from the executors in their official capacity to them as individuals, and the principles of joint ownership apply, according to which the title cannot be transferred without the concurrence of all.⁸ But this distinction

is based upon the technical doctrine of the common law, which does not at this day receive general assent, that assets once converted

Not generally applicable in America.

cease to be assets. The doctrine in most American States is, that the proceeds of land or of other property of the deceased sold or converted, as well as securities

given therefor, continue to be assets of the estate; hence the power to sell or assign such proceeds or securities resides in each of several executors or administrators.⁹ It seems now to be so held in Eng-

Service on one of several.

land also.¹⁰ Presentation of a claim to one of several executors is sufficient,¹¹ but whether service on one, of the summons for the establishment of a claim, is good, is a question upon which the authorities are not uniform;¹² notice of dishonor

to make a sale, or compromise a debt due the intestate; *Jordan v. Spiers*, 113 N. C. 344, following earlier North Carolina cases.

¹ In such case the co-administrator is not concluded: *Gulledge v. Berry*, 31 Miss. 346.

² *Devling v. Little*, 26 Pa. St. 502, 509; *Packer v. Owen*, 164 Pa. St. 185; *George v. Baker*, 3 Allen, 326, note; *Stuyvesant v. Hall*, 2 Barb. Ch. 151, 160; *Weir v. Mosher*, 19 Wis. 311; or surrender a lease: *Rick v. Gilson*, 1 Pa. St. 54.

³ *Dwight v. Newell*, 15 Ill. 333; *Wheeler v. Wheeler*, 9 Cow. 34.

⁴ If payable to themselves as administrators: *Mackay v. Church*, 15 R. I. 121, 124.

⁵ *Wood's Appeal*, 92 Pa. St. 379, 391. See *State v. Bates*, 38 S. C. 326 (where one of the executors was the legatee of the stock, and attempted to transfer it to himself before the time to prove claims had expired).

⁶ *Geyer v. Snyder*, 140 N. Y. 394, 399.

⁷ *Lank v. Kinder*, 4 Harr. 457.

⁸ *Smith v. Whiting*, 9 Mass. 334; *Hertell v. Bogert*, 3 Edw. Ch. 20, and 9 Pai. 52, 59, afterward reversed in *Bogert v. Hertell*, 4 Hill, 492; *Sanders v. Blain*, 6 J. J. Marsh. 446. So it was held in Arkansas, that one of two joint administrators of a note payable to them officially was powerless to release one of the makers of the note: *Clark v. Grambling*, 45 Ark. 525.

⁹ *Bogert v. Hertell*, *supra*; *Fesmire v. Shannon*, 143 Pa. St. 201.

¹⁰ *King v. Thom*, 1 Durnf. & E. 487; *Cowel v. Watts*, 6 East, 405.

¹¹ *Post*, § 387, p. * 806. And so the rejection of a claim by one authorizes a suit as on a rejected claim: *post*, § 390, end of section.

¹² *Post*, §§ 397, 380.

or protest to one of several co-executors of a deceased indorser is sufficient.¹

Contracts made by one of several executors for services in the administration of the estate have been held binding upon the others,² but since all contracts made by an administrator must be personal,³ the liability of the estate in consequence thereof can be determined only in a proceeding between the estate and its representatives; hence the contract or promise of a general administrator is not binding against his successor.⁴ Nor is the contract of one executor to purchase real estate, under the power in a will, binding upon his co-executor, though he assumes to act for both.⁵ Whether one of several [* 735] *executors or administrators may petition for the sale of real estate to pay debts or legacies,⁶ is held differently in different States. In California,⁷ Massachusetts,⁸ Missouri,⁹ and it seems New Jersey,¹⁰ sales by one of several executors or administrators have been held void, chiefly on the ground that a power confided to two or more must be executed by all; but the sale of real estate by order of the court must be distinguished from the exercise of a power given by will, and a different principle should govern. Hence, on the other hand, it has been held in New York,¹¹ that both on general principles and under its statute it is the duty of *any* of several administrators to apply to the surrogate for the sale of real estate to pay debts of the deceased if the personalty be insufficient; and so in Wisconsin.¹² In Michigan,¹³ North Carolina,¹⁴ and it seems Missouri,¹⁵ such sales are held irregular, but not collaterally assailable; and in New Jersey equity will enjoin the heirs from proceeding in ejectment to recover lands directed to be sold by two, but the deed executed by only one of the administrators.¹⁶ The principles govern-

An administrator's personal contract is not binding upon a successor.

Whether all of several executors or administrators must join in sale.

¹ *Ante*, § 327 *a*.

² *Wilkerson v. Wootten*, 28 Ga. 568.

³ *Post*, § 356.

⁴ *Pearce v. Goddard*, 2 Brev. 360; *Weston v. Murnan*, 4 Ind. 271.

⁵ *Wilson v. Mason*, 158 Ill. 304, 312.

⁶ See on this subject, *post*, § 464.

⁷ *Gregory v. McPherson*, 13 Cal. 562, 578.

⁸ *Hannum v. Day*, 105 Mass. 33, 35 (Wells, J., dissenting, holding such sale voidable at most, but not void).

⁹ *Littleton v. Addington*, 59 Mo. 275, 278.

¹⁰ *Personette v. Johnson*, 40 N. J. Eq. 173, 175, holding it at least "proper, if not necessary," that all join. Where one of the executors is personally interested in a

fund representing real estate which is necessary to pay debts, application by the other is sufficient: *Hathersly v. Bissett*, 52 N. J. Eq. 693.

¹¹ *Jackson v. Robinson*, 4 Wend. 436, 442.

¹² *Melms v. Pfister*, 59 Wis. 186, 196, holding a majority sufficient under a statutory provision.

¹³ *Osman v. Traphagan*, 23 Mich. 80, 86.

¹⁴ *Blythe v. Hoots*, 72 N. C. 575, 577.

¹⁵ *Stowe v. Banks*, 123 Mo. 672, 676.

¹⁶ *Wortman v. Skinner*, 12 N. J. Eq. 358; whether all should join in the deed, where the sale is by more than one, see *post*, at end of § 480.

ing the execution of powers by one of several donees have already been discussed;¹ and the validity of sales of real estate by one of several executors or administrators must again be referred to in connection with the subject of sales of real estate.² That either of the co-executors may discharge himself by proper administration, as well as his liability on joint accounting, is also discussed in connection with the subject of accounting.³

§ 347. **Acknowledging or Promising to pay a Debt by one of Several Executors or Administrators.** — There is much contrariety

<p>States in which promise to pay debt does not defeat plea of limitation, when made by only one of several executors or administrators.</p> <p>named Alabama,⁵ Delaware,⁶ and New York;⁷ but that it</p> <p>Contrary.</p> <p>Kentucky,⁸</p> <p>Co-administrator may show that debt acknowledged by one administrator is not due.</p> <p>Instrument signed by one of several does</p>	<p>of opinion on this subject in the several States, following upon the further question, whether either a sole or all of several executors or administrators can bind the estate by the acknowledgment of, or the promise to pay debts.⁴ Of the States which hold that such a promise by one of several administrators does not take the debt out of the Statute of Limitation may * be [* 736]</p> <p>will defeat the plea of limitation against all executors, although the promise was made by only one, is held in Maryland,⁹ Massachusetts,¹⁰ New Jersey,¹¹ and South Carolina.¹² It is self-evident that, where one of several administrators admits a debt to be due, his co-administrators will not be thereby precluded from showing that it has been paid;¹³ and that the admission or promise to pay by one is not sufficient to establish the debt or entitle the plaintiff to recover against the estate if resisted by others of the administrators.¹⁴ One of sev-</p>
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¹ *Ante*, §§ 339 *et seq.*

² *Post*, § 464.

³ *Post*, § 535, p. * 1180.

⁴ As to which see *post*, §§ 381, 401, 402.

⁵ *Caruthers v. Mardis*, 3 Ala. 599; *Pitts v. Wooten*, 24 Ala. 474. But otherwise if the action be against the surviving promisor after his co-administrator's death: *Hall v. Darrington*, 9 Ala. 502.

⁶ *Conoway v. Spicer*, 5 Harr. 425.

⁷ First decided in *Johnson v. Beardslee*, 15 John. 3; a *dictum* to the same effect in *Hammon v. Huntley*, 4 Cow. 493, was questioned, but not overruled, in *Cayuga Bank v. Bennett*, 5 Hill (N. Y.), 236, 240.

⁸ *Hord v. Lee*, 4 T. B. Mon. 36; *Northcut v. Wilkinson*, 12 B. Mon. 408.

⁹ *McCann v. Heald*, 25 Md. 575.

¹⁰ *Emerson v. Thompson*, 16 Mass. 429, 431; and a promise made to an adminis-

trator will support the action of a subsequent administrator *de bonis non*: *Sullivan v. Holker*, 15 Mass. 374.

¹¹ In this State the question was for the first time decided in 1872: *Shreve v. Joyce*, 36 N. J. L. 44, 49.

¹² *Briggs v. Starke*, 2 Mill Const. R. 111.

¹³ *James v. Hackley*, 16 John. 273. In this case an administrator assumed the payment of a debt, received money of the estate to pay it, and gave his note to plaintiff for the amount, which he subsequently renewed. Three years afterward he became insolvent, and plaintiff sued the administrators; the defence of payment raised by one of them was sustained.

¹⁴ *Forsyth v. Ganson*, 5 Wend. 558, 561; *McIntire v. Morris*, 14 Wend. 90, 97; *Hall v. Boyd*, 6 Pa. St. 267; *Hammon v. Huntley*, 4 Cow. 493; *Weston v. Murnan*, 4 Ind. 271; *McCann v. Heald*, 25 Md. 575.

eral executors has no power, by an instrument signed by himself alone, to bind the others without their consent.¹ So if one of two executors fraudulently consent to a judgment against both, the other executor will be relieved in equity, although the judgment creditor was not privy to the fraud, if he be a trustee for the party to the fraudulent agreement.²

not bind the others.

Equity will relieve against a fraudulent confession of judgment by one on the motion of another.

As the payment of a debt by one of several executors or administrators is necessarily a discharge to all, so the payment of a legacy by one releases all the others from liability therefor, even if payment was by a note, and the maker became insolvent without discharging it.³ So the delivery of property to the legatee by one precludes

Payment of debt or legacy by one releases it as to all executors.

[* 737] * the other executor from further authority over such property;⁴ the transmission of funds by an ancillary administrator to a legatee residing in another State, in discharge of her legacy, does not subject such funds to administration in the State of her residence.⁵

§ 348. **The Liability of one Co-executor or Co-administrator for the Acts of Another.**— Since each of several executors or administrators has full power to reduce to possession all assets and collect all debts due to the estate, and is responsible for all assets he receives, payment to him will discharge the debtor.⁶ But payment of money or delivery of assets by one co-executor or co-administrator to another does not discharge him. Having received the assets in his official capacity, he can discharge himself only by a due administration thereof in accordance with the provisions of the will or the requirements of the law.⁷ But this rule will not be applied in favor of the defaulting administrator.⁸ Co-executors and co-administrators are not liable to one another; but each is liable to the beneficiaries of the estate, whether creditors, next of kin, or legatees, to the full extent of the assets received.⁹ Hence a receipt given

Payment to one of several executors or administrators will discharge debtor;

but payment or delivery of assets by one to another no discharge.

Not liable to one another, but each to the beneficiaries.

¹ Even though it be the extension of an indebtedness by the testator: *Bailey v. Spofford*, 14 Hun, 86.

² *Nason v. Smalley*, 8 Vt. 118, 122.

³ *Mosely v. Floyd*, 31 Ga. 564, 581.

⁴ *McCants v. Bee*, 1 McCord Ch. 383, 393.

⁵ *Sedgwick v. Ashburner*, 1 Bradf. 105.

⁶ *Ante*, § 346; *Stone v. Union Bank*, 13 R. I. 25.

⁷ *Nanz v. Oakley*, 120 N. Y. 84, 88; *Edmonds v. Crenshaw*, 14 Pet. 166, 169;

Ames v. Armstrong, 106 Mass. 15, 18; *Brown's Appeal*, 1 Dall. 311 (but this case holds one who pays money to his co-executor, who wastes it, liable to creditors, but not to legatees); *Verner's Estate*, 6 Watts, 250; *McNair's Appeal*, 4 Rawle, 148; *Fisher v. Skillman*, 18 N. J. Eq. 229; *Weldy's Appeal*, 102 Pa. St. 454 (criticising *Brown's Appeal*, *supra*); *Matter of Storm*, 28 Hun, 499.

⁸ *Daly's Estate*, Tuck. 95.

⁹ *Snydam v. Bastedo*, 40 N. J. Eq. 433.

Joint receipt by two or more raises a presumption of payment to both, which may be rebutted.

by the one to the other is of no legal effect;¹ and if two joint executors sign a receipt for money, it raises the presumption that both received it, and the *onus* of showing affirmatively that he did not receive any part of the money, and that it was out of his power to control or secure it, is upon him who denies liability.²

* Ordinarily, one joint executor or administrator is not [* 738] liable for the assets which come into the hands of another,³

One is not liable for assets coming to the hands of another, nor for the waste of another, unless he consent to or join in the act of waste, or carelessly permit it.

nor for the laches, waste, *devastavit*, or mismanagement of a co-executor or co-administrator;⁴ unless he consent to or join in any act resulting in a loss to the estate, in which case, though the loss be the direct consequence of the default, carelessness, or mismanagement of the other, they will all be equally liable.⁵ So if he carelessly permit the co-executor to mismanage or waste the estate, he becomes liable.⁶ What constitutes such negligence as to make one liable for the *devastavit* or

mismanagement of the estate by his co-executor or co-administrator, must always largely depend upon the circumstances of each case.⁷

¹ Black's Estate, Tuck. 145, 146; *Heath v. Allin*, 1 A. K. Marsh. 442; *Storms v. Quackenbush*, 34 N. J. Eq. 201; *Gaultney v. Nolan*, 33 Miss. 569; *Gates v. Croft v. Williams*, 88 N. Y. 384.

² *Monell v. Monell*, 5 John. Ch. 283, 296; *Sterrett's Appeal*, 2 Pa. 419; *Hall v. Carter*, 8 Ga. 388; *Stewart v. Conner*, 9 Ala. 803; *Nettman v. Schramm*, 23 Iowa, 521 (by a divided court); *Edmonds v. Crenshaw*, 1 Harp. Ch. 224 (holding such receipt conclusive between the remaining executor and legatees); *McKim v. Aulbach*, 130 Mass. 481. But see *Stell's Appeal*, 10 Pa. St. 149, 152, quoted and approved in *Wilson's Appeal*, 115 Pa. St. 95, 103.

³ *Kerr v. Waters*, 19 Ga. 136; *Ochiltree v. Wright*, 1 Dev. & B. Eq. 336; *Kerr v. Kirkpatrick*, 8 Ired. Eq. 137; *Fennimore v. Fennimore*, 3 N. J. Eq. 292; *Peter v. Beverly*, 10 Pet. 532; *Call v. Ewing*, 1 Blackf. 301, 302; *Brazier v. Clark*, 5 Pick. 96; *Vanpelt v. Veghte*, 14 N. J. L. 207; *Duncan v. Davison*, 40 N. J. Eq. 535, 538; *Tompkins v. Tompkins*, 18 S. C. 1, 21; *Estate of Sanderson*, 74 California, 199; *English v. Newell*, 42 N. J. Eq. 76, 82.

⁴ *Nanz v. Oakley*, 120 N. Y. 84, 89; *State v. Belin*, 5 Harr. 400; *Ray v. Doughty*, 4 Blackf. 115; *Davis v. Walford*, 2 Ind. 88; *Lenoir v. Winn*, 4 Desaus. Eq. 65; *Sparhawk v. Buell*, 9 Vt. 41; *Sutherland v. Brush*, 7 John. Ch. 17;

Heath v. Allin, 1 A. K. Marsh. 442; *Gaultney v. Nolan*, 33 Miss. 569; *Gates v. Whetstone*, 8 S. C. 244; *McKim v. Aulbach*, 130 Mass. 481; *Wilson's Appeal*, 115 Pa. St. 95, citing earlier Pennsylvania cases; *Wilmerding v. McKesson*, 103 N. Y. 329, 338, 340.

⁵ *Roberts v. Thomas*, 32 Ga. 31; *Fonte v. Horton*, 36 Miss. 350; *Hauser v. Lehman*, 2 Ired. Eq. 594; *Clarke v. Jenkins*, 3 Rich. Eq. 318; *Holcombe v. Holcombe*, 13 N. J. Eq. 413; *Weigand's Appeal*, 28 Pa. St. 471; *Hengst's Appeal*, 24 Pa. St. 413; *Johnson v. Corbett*, 11 Pa. 265, 277; *Hinson v. Williamson*, 74 Ala. 180, 195; *McCormick v. Wright*, 79 Va. 524; *In re Niles*, 113 N. Y. 547, 558, holding that where a breach of trust is committed by an executor, with the subsequent assent or acquiescence of a co-executor, the latter is estopped from proceeding, as a beneficiary of the estate, against the former.

⁶ *Hengst's Appeal*, *supra*; *Kincade v. Conley*, 64 N. C. 387, 391; *Clark v. Clark*, 8 Pa. 152; *Deaderick v. Cantrell*, 10 Yerg. 263; *Thomas v. Scruggs*, 10 Yerg. 400, 405; *Earle v. Earle*, 93 N. Y. 104, 112; *Wilmerding v. McKesson*, 28 Hun, 184; s. c. 103 N. Y. 329, 338; *English v. Newell*, 42 N. J. Eq. 76, 82.

⁷ *Noland v. Calvin*, 12 Sm. & M. 273, 276; *In re Osborn*, 87 Cal. 1.

In the North Carolina case before cited,¹ two executors were held jointly liable, although but one of them had actively participated in the administration, because it was neither alleged nor proved that the other had dissented from the wrongful investment of the funds. It is clearly culpable negligence if one permits the misapplication of funds which he could have prevented by the exercise of reasonable care and diligence.² But the failure to examine a co-[* 739] executor's bank account for two years,³ or * failing to withdraw, or to attempt to withdraw, the funds from a co-executor upon notice of his insolvency,⁴ is not such negligence; nor, *a fortiori*, is one liable for a *devastavit* committed after his death by his co-executor, who was at the time of the death solvent, and trusted and respected in the community.⁵ So an executor is not liable for the acts of a co-executor who has been vested with title to that part of the estate in his hands, and given unlimited power over it without consulting his co-executor;⁶ nor, where he has none of the funds under his control, is he chargeable with the consequences of the neglect of his co-executor to make such disposition of the subject of the trust, pursuant to the directions of the will, where the latter assumes management of the entire fund, unless there is occasion to suspect that he has failed, or may fail to execute the will in that respect.⁷ But if several executors agree among themselves to receive, one of them one part, another of them another part, of the estate, and to intermeddle with the same, each will be chargeable for the whole, because the receipts of each are pursuant to the agreement made among them.⁸

§ 349. Remedies in Protection of Co-administrators against Liability for One Another's Acts.—It follows from the unity of the estate of several executors and administrators, which is such that in relation thereto they are all considered as one person in law, —*first*, that each has power to take possession of the assets, which neither of the others can hinder, and that, having taken possession, neither of the others can take them from him;⁹ and, *secondly*, that they can neither contract with one another,¹⁰ nor bring

Co-executors and administrators can neither hinder one another in taking possession of assets, nor take them from one another.

¹ Kincade v. Conley, 64 N. C. 387.

² Fonte v. Horton, 36 Miss. 350; Jones's Appeal, 8 W. & S. 143; Adair v. Brimmer, 74 N. Y. 539, 566; Ingsley v. Shire, 54 Kan. 793.

³ Irwin's Appeal, 35 Pa. St. 294.

⁴ Worth v. McAden, 1 Dev. & B. Eq. 199.

⁵ Young's Appeal, 99 Pa. St. 74, 84.

⁶ Walker v. Walker, 88 Ky. 615; *In re Balvelt*, 131 N. Y. 249.

⁷ Cocks v. Haviland, 124 N. Y. 426, 431.

⁸ 2 Lomax, Ex. 299; Knight v. Haynie, 74 Ala. 542, 546; Weldy's Appeal, 102 Pa. St. 454; Allen v. Shanks, 90 Tenn. 359.

⁹ Hall v. Carter, 8 Ga. 388, 405, *et seq.*; Williams v. Maitland, 1 Ired. Eq. 92, 106; Wood v. Brown, 34 N. Y. 337; Kent, J., in Douglass v. Satterlee, 11 John. 16, 21; Burt v. Burt, 41 N. Y. 46, 51.

¹⁰ Since nothing can pass from the one to the other, each having the right to the whole without any contract: Schoul. Ex., § 400, and English authorities cited. See

Nor sue one another at law. an action at law against one or more of their number, because a man cannot be both plaintiff and defendant in the same cause, and in bringing an action all must join as plaintiffs.¹ Now, it would be clearly irrational and unjust to hold any person responsible for the acts of others which he can neither control nor prevent, and equally unwise and unjust to dispense with any of the elements of protection to the estates of deceased persons which the vigilance, prudence, and good faith of all or any one of the joint executors and administrators afford; hence it is the duty of all and each of them to interpose when any jeopardy to the interests of the estate by the *negligence or bad faith of a co- [*740]

But one may invoke equitable relief against another who is jeopardizing the estate, executor or co-administrator comes to their notice. This they may do by invoking the aid of a court of equity, which, upon proof of mismanagement or jeopardy of the estate by any one or more of the executors or administrators, will restrain him from further meddling with the estate, and compel him to restore the funds in his hands,² unless a complete remedy is given by statute in the probate court.³ Power is now given to probate courts in most States, either to remove or demand bond and security from executors and administrators whenever it be necessary for the safety of the estate; where such is the case, courts of equity will not interfere between co-executors, unless it be absolutely necessary for the purposes of justice;⁴ but if there be no adequate power in the probate court, equity will grant relief.⁵ But where one who is at the same time legatee and co-executrix knows of and acquiesces in the sale of property of the estate without authority of the probate court, she cannot hold her co-executor liable for a loss resulting to her interest as legatee.⁶

It may be remarked, that, although co-executors are not liable to each other, yet after the death of one indebted to the testator the survivor may, in some States, bring an action at law against his representatives;⁷ while other States hold the contrary.⁸ Where

Case *v. Abeel*, 1 *Pai.* 393, 398; *Gilbert's Appeal*, 78 *Pa. St.* 266, 270.

¹ *Wms. Ex.* [956]; *Moore v. Willett*, 2 *Hilt.* 522; *Bodle v. Hulse*, 5 *Wend.* 313; *Rinehart v. Rinehart*, 15 *N. J. Eq.* 44; *Whitney v. Coapman*, 39 *Barb.* 482; *Martin v. Martin*, 13 *Mo.* 36, 51; *Whiting v. Whiting*, 64 *Md.* 157.

² *Elmendorf v. Lansing*, 4 *John. Ch.* 562, 565; *Sheehan v. Kennelly*, 32 *Ga.* 145; *Wood v. Brown*, 34 *N. Y.* 337; *Barings v. Willing*, 4 *Wash. (U. S. C. C.)* 248, 251.

³ See *ante*, §§ 268 *et seq.*, as to the powers of probate courts to remove executors and administrators.

⁴ *Beach v. Norton*, 9 *Conn.* 182, 196; *Whiting v. Whiting*, 64 *Md.* 157, 161.

⁵ *Smith v. Lawrence*, 11 *Pai.* 206, 208; *Rogers v. Moor*, 1 *Root*, 472; *McGregor v. McGregor*, 35 *N. Y.* 218.

⁶ *Hiller v. Ladd*, 85 *Fed. R.* 703 (Ross, J., dissenting on the merits, but concurring in the judgment for the defendant on the ground of plaintiff's laches), 722.

⁷ *Steinmann v. Saunderson*, 14 *S. & R.* 357; *Paff v. Kinney*, 1 *Bradf.* 1; *Lancaster v. McBryde*, 5 *Ired. L.* 421; *Hendricks v. Thornton*, 45 *Ala.* 299, 309.

⁸ *Hosmer v. Baer*, 5 *La. An.* 35; *Lawrence v. Lawrence*, *Lit. Sel. Cas.* 123.

one has satisfied a judgment against two for waste committed by two others, he may compel contribution from the one against whom judgment was also rendered.¹ So where one of the co-executors has paid the balance appearing due upon a joint account.² One nominated in the will, but who has not qualified as executor, may bring action against the executor qualifying.³ The validity of a promissory note given by one executor, and indorsed by several other persons to himself and co-executor, for money of the estate used by the maker, has been sus-

One satisfying a judgment against several may compel contribution.

An executor may be sued by one nominated, but not having qualified as executor.

tained, upon the ground that the note constituted a joint [* 741] and *several contract as to all who indorsed it, and that the executors might therefore sustain an action at law upon it against the indorsers;⁴ and that an express promise to pay made by one executor to another may be the basis of an action at law between them.⁵ But where two executors united in misusing the funds of an estate in the purchase of land for their own profit, and profits arising therefrom are in the hands of one of them, and the title to the land is also held by him, the other executor cannot maintain a bill in equity for an account and division of the profits.⁶

Questions sometimes arise as to the *situs* of personal property, when there are several executors or administrators of the same estate residing in different counties, or different townships or municipalities in the same county. The rule in such case seems to be, that the *situs* of such property is the place of residence of the executor or administrator who has the actual possession and control of it.⁷ The matter of the assessment and payment of taxes where there are several co-executors or co-administrators has been referred to in discussing the subject of taxation.⁸

Situs of assets, in case of several executors, is where the one who has possession resides.

§ 350. **Executor's Executor representing the Executor's Testator.**—In some of the American States⁹ a sole executor may transmit

¹ *Marsh v. Harrington*, 18 Vt. 150.

² *Conner v. McIlvaine*, 4 Del. Ch. 30.

³ *Hunter v. Hunter*, 19 Barb. 631; *Marsh v. Oliver*, 14 N. J. Eq. 259.

⁴ *Faulkner v. Faulkner*, 73 Mo. 327, 339.

⁵ *Faulkner v. Faulkner*, *supra*; *Phillips v. Phillips*, 1 Stew. 71. But in this latter case the promise seems to have been made contemporaneously with the distribution of the assets, so that the promisee might have taken as legatee.

⁶ *Bowen v. Richardson*, 133 Mass. 293.

⁷ *Brown v. Noble*, 42 Oh. St. 405.

⁸ *Ante*, § 329.

⁹ The rule has been expressly recog-

nized as existing in Florida: *Hart v. Smith*, 20 Fla. 58; Georgia: *Windsor v. Bell*, 61 Ga. 671, 675; Kentucky: *Dean v. Dean*, 7 T. B. Mon. 304, 307; North Carolina: *Roanoke Navigation Co. v. Green*, 3 Dev. 434; South Carolina: *Lay v. Lay*, 10 S. C. 208, 214, in which case it was held that the executor of an executor, who had paid legatees in unequal proportions, might make the reimbursement to his immediate testator's estate to which the latter would have been entitled as executor of the first testator, if he had lived; *Reeves v. Tappan*, 21 S. C. 1; but the subject is now regulated by statute in this State: *Laws*, 1880, p. 363, No. 309, § 3.

Authority of the executor's executor. to his own executor the administration of the estate of his testator according to the common-law doctrine, * that the executor of an executor, how [* 742] far soever in degree remote, "stands as to the points both of being, having, and doing, in the same state and plight as the first and immediate executor."¹ The reason given by Blackstone is: "For the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is, therefore, allowed to transmit that power to another, in whom he has equal confidence."²

In the United States, however, the authority of an executor to administer the estate of the original testator is negatived by States de- statute in Alabama,³ Arizona,⁴ Arkansas,⁵ California,⁶ nying it. Colorado,⁷ Connecticut,⁸ Delaware,⁹ Kansas,¹⁰ Maine,¹¹ Maryland,¹² Massachusetts,¹³ Michigan,¹⁴ Minnesota,¹⁵ Mississippi,¹⁶ Missouri,¹⁷ Nebraska,¹⁸ Nevada,¹⁹ New Hampshire,²⁰ New Jersey,²¹ New York,²² North Dakota,²³ Ohio,²⁴ Oklahoma,²⁵ Oregon,²⁶ Pennsylvania,²⁷ South Carolina,²⁸ Texas,²⁹ Utah,³⁰ Vermont,³¹ Virginia,³² Washington,³³ West Virginia,³⁴ and Wisconsin.³⁵ In these States, therefore, upon the death of an executor, as well as for the vacation of his office for any other reason before the estate is fully administered, an administrator *de bonis non cum testamento annexo* must be appointed, upon whom devolve all the powers of the deceased Executor's ex- executor. In those States in which the common-law ecutor takes rule in this respect still prevails, it seems that the

¹ Wms. Ex. [959]; Burch v. Burch, 19 Ga. 174, 184; Dean v. Dean, 7 T. B. Mon. 304.

² 2 Bla. Comm. 506.

³ Code, 1896, § 111.

⁴ Rev. St. Ariz. 1887, ¶ 1008.

⁵ Dig. of St. 1894, § 6.

⁶ Code Civ. Proc. § 1353; Civ. Code, § 1372.

⁷ Gen. L. 1883, §§ 3515, 3530. Mills' Ann. St. 1891, § 4686.

⁸ Gen. St. 1887, § 553.

⁹ Rev. C. Del. 1874, § 10, p. 541.

¹⁰ Gen. St. 1897, p. 518, § 10.

¹¹ Rev. St. 1883, p. 541, § 23.

¹² Pub. Gen. Laws, 1888, p. 1338.

¹³ Pub. St. 1882, p. 756, § 10. Hence no action lies against an executor's executor for a legacy given by the first testator; an administrator *de bonis non c. t. a.* must be appointed: Tallon v. Tallon, 156 Mass. 313.

¹⁴ How. St. 1882, § 5845.

¹⁵ Gen. St. 1891, § 5667.

¹⁶ Ann. St. 1892, § 1856.

¹⁷ Rev. St. 1889, § 46.

¹⁸ Cons. St. 1893, § 1233.

¹⁹ Gen. St. 1885, § 2712.

²⁰ Gen. L. 1878, p. 459, § 8; Publ. St. 1891, ch. 188, § 8.

²¹ Rev. St. 1877, p. 396, § 2; Gen. St. 1896, p. 1425, § 2.

²² Matter of Moehring, 154 N. Y. 423.

²³ Rev. C. Dak. 1895, § 5736.

²⁴ Rev. St. 1880, § 6003; Bates' Ann. St. 1897, § 6003.

²⁵ St. 1890, § 1295.

²⁶ Gen. Laws, 1887, § 376.

²⁷ Pepper & Lewis Dig. 1896, p. 1462, § 68.

²⁸ Laws, 1880, p. 363, No. 309, § 3; Rev. St. 1893, § 2014.

²⁹ Laws, 1874, § 5514. See Sayles' Civ. St. 1897, p. 694, art. 1924.

³⁰ Rev. St. 1898, § 3802.

³¹ St. 1894, § 2379.

³² Code, 1887, § 2643.

³³ Code, 1896, § 5115.

³⁴ Code, 1891, p. 683, § 8.

³⁵ Reed v. Wilson, 73 Wis. 497.

executor of the executor takes the uncompleted administration of the original testator's estate by operation of law, although the deceased executor made no provision to that effect in his own will;¹ thus, if such

first testator's unadministered property by operation of law;

[* 743] * executor prove the will of his immediate testator generally, without renouncing the executorship of the original testator, he becomes the executor of the original testator; but he may so renounce, and yet qualify as executor of his immediate testator.² The authority of the executor's executor depends, however, upon the probate of the original testator's will by the first executor; hence, if the original executor die before the grant of letters testamentary to him, the executorship is not transmissible to his executor, but an administrator *cum testamento annexo* must be appointed.³ So, if the original testator provide by his will for a successor to the executor in the event of his death, the executor of the executor does not become the representative of the original testator.⁴

but may renounce;

and is not entitled unless the deceased executor has obtained probate of the testator's will.

The subject of accounting between the representatives of the deceased executor or administrator and his estate is referred to under the subject of accounting.⁵

§ 351. **Succession in the Administration.** — An administrator *de bonis non administratis* succeeds, as implied by the term used to designate his office (administrator of goods remaining unadministered), to the legal ownership of all effects of the deceased which have not already been administered by the sole executor or administrator, or all of several executors or administrators, who may have died, resigned, or been removed.⁶ To the extent of such unadministered property as may remain in specie, the common law and the statutes of the several American States are in perfect harmony.⁷ The administrator *de bonis non* takes such property as the representative of the deceased, not as succeeding to the prior executor or administrator, and is therefore said to be not in privity, in this respect, with the former incumbent of the office.⁸ He is bound to take into possession, to

Administrator *d. b. n.* succeeds to all unadministered assets.

¹ "It seems to be the uniform rule, that, so long as the chain of representation remains unbroken by any intestacy, the ultimate executor is the representative of every preceding testator": Hart v. Smith, 20 Fla. 58, 62; Schoul. Ex., § 43; Wms. Ex. [254]; 3 Redf. on Wills, 73, pl. 17.

² Worth v. McAden, 1 Dev. & B. Eq. 199, 209.

³ Drayton's Will, 4 McCord, 46, 51; Wms. Ex. [255].

⁴ Roanoke Navigation Co. v. Green, 3 Dev. L. 434.

⁵ Post, § 536.

⁶ Ante, § 179.

⁷ Wms. Ex. [915] *et seq.*; Schoul. Ex., § 408; 3 Redf. on Wills, 101.

⁸ Appeal of American Board, &c., 27 Conn. 344, 354; State v. Wright, 4 Har. & J. 148, 156; Sloan v. Johnson, 14 Sm. & M. 47, 51; Waterman v. Dockray, 78 Me. 139, 141; Bliss v. Seaman, 165 Ill. 422, 429.

inventory and distribute, all effects of the deceased existing specifically, whether found in the hands of third persons or of the antecedent executor or administrator at the time of his death or removal, even though the debts have all been paid, if anything remains to be done to vest the title in the legatees * or dis- [* 744] tributees;¹ including money of the testator laid up by itself so as to be distinguishable from that of the executor,² as well as debts owing to the deceased. Thus the possession of a promissory note by the former administrator does not defeat an action upon it by the administrator *de bonis non*, if it has not been collected or disposed of by some legal means;³ and if an administrator has not accounted for a promissory note made by himself to the intestate, the administrator *de bonis non* may sustain an action upon it.⁴ And so, if a former administrator, after his removal, collects money for which judgment had been rendered in his favor as the representative of the estate, the administrator *de bonis non* may recover the amount as having been obtained for his use.⁵ On the same principle it has also been held that he may maintain a bill in equity to prevent the misapplication of a fund recovered by an insolvent distributee from the administrator in chief, when the fund is needed to pay debts.⁶

But at common law the authority of the administrator *de bonis non* does not extend to any property which has been administered, either fully, or partially, so that the assets or effects have been in any wise converted or changed. Thus, where the executor or administrator retains a specific chattel in payment of a debt due him by the deceased, or to compensate him for a debt of the deceased paid with his own money, such chattel becomes his own property, and on his death goes to his own representative.⁷ So if the property of the deceased be sold under a *fiери facias*, and the executor or administrator buy them of the sheriff, or if he take goods not of the de-

But not, at common law, to any property converted, nor to the proceeds thereof.

¹ *Alexander v. Stewart*, 8 Gill & J. 226, 244; *Gregory v. Harrison*, 4 Fla. 56; *Fay v. Muzzey*, 13 Gray, 53, 57; *Beall v. New Mexico*, 16 Wall. 535, 541.

² *Wms. Ex.* [916]; *Stair v. York Bank*, 55 Pa. St. 364, 366; *per Woods, J.*, in *United States v. Walker*, 109 U. S. 258, 261; *Marvel v. Babbitt*, 143 Mass. 226 (in this case proceeds of sale of realty under order of court).

³ *Morse v. Clayton*, 13 Sm. & M. 373, 380; *Cowgill v. Linville*, 20 Mo. App. 138, 146.

⁴ *Kelsey v. Smith*, 1 How. (Miss.) 68.

⁵ *Salter v. Cain*, 7 Ala. 478. So if, in a suit, money is to be paid to an estate, the administrator *de bonis non* must be

made a party: *Hinton v. Bland*, 81 Va. 588, 594.

⁶ The administrator *de bonis non* is the proper person to whom such a judgment should be paid: *Brice v. Taylor*, 51 Ark. 75.

⁷ "The rule is well established," says Kent, Ch., in *Livingston v. Newkirk*, 3 John. Ch. 312, 318, "that, if an executor or administrator pays, out of his own moneys, debts to the value of the assets in hand, he may apply the assets to his own use towards satisfaction of the moneys he has expended. The assets, by such election, become his own property." And see authorities referred to in *Foster v. Bailey*, 157 Mass. 160, on p. 164 *et seq.*

ceased, and the owner recover damages against him in trespass or trover, these goods become his own, because he has paid for them,¹ and the administrator *de bonis non* has nothing to do with them. The like result follows from the sale of goods,² the [* 745] * hire of chattels,³ the leasing of lands,⁴ or collection of a debt,⁵ including the representative's own debt when held to be converted into assets in his hands by his appointment.⁶ The act of sale constitutes an act of administration; the title to the thing sold has passed from the executor or administrator to the purchaser; and the price paid therefor is said, before the English Statute of Distribution, to have been liable for debts of the deceased only,⁷ and, after said statute, to creditors, legatees, and distributees; there is no office, in such case, for the administrator *de bonis non* to perform.⁸ For the same reason, a note or other obligation given to an administrator or executor in his official capacity becomes his own property, and may be sued on by him in his individual capacity, and after his death goes to his own legal representatives.⁹ So, in Pennsylvania, on the death of an administrator before settling his account, his executor may recover on a bank account which stood in the administrator's representative capacity,¹⁰ though originally standing in the intestate's name; and the administrator *de bonis non* cannot recover such fund from the bank after it has been paid out to the deceased administrator's executor, without notice that the fund is claimed as property of the original intestate's estate.¹¹ So, also, it was held in Massachusetts that the representative of an administrator *de bonis non* has the right to settle the account of his intestate with that estate and ascertain the balance due, before such representative can be compelled to turn over the remaining assets, whether converted or in specie, to the successor of such administrator *de bonis*

¹ *Ante*, § 176.

² *Carrick v. Carrick*, 23 N. J. Eq. 364, followed in *Bradway v. Holmes*, 50 N. J. Eq. 311; *Slaughter v. Froman*, 5 T. B. Mon. 19; *Gilbert v. Hardwick*, 11 Ga. 599, 601; *Calder v. Pyfer*, 2 Cr. C. C. 430.

³ *Harney v. Dutcher*, 15 Mo. 89, 94.

⁴ *Boyd v. Sloan*, 2 Bai. 311.

⁵ *Wilson v. Arrick*, 4 MacArthur, 228, affirmed in 112 U. S. 83; *United States v. Walker*, 109 U. S. 258.

⁶ *Hodge v. Hodge*, 90 Me. 505.

⁷ Creditors might bring *devastavit* against executors, but not against their representatives after their death, since *devastavit* was held in the nature of tort, where the rule is *actio personalis moritur cum persona*: *Kennedy, J., in Potts v. Smith*, 3 Rawle, 361, 368.

⁸ See an interesting *résumé* of the au-

thorities bearing upon this question, and a clear deduction of the principle of the common law leading to the exclusion of the administrator *de bonis non* from all estate except what remains specifically, unaffected by any act of the antecedent executor or administrator, by *Kennedy, J., in Potts v. Smith, supra*; also *Wernick v. McMurdo*, 5 Rand. 51, *per Carr, J.*; *Green v. Byrne*, 46 Ark. 453, 466; *Waterman v. Dockray*, 78 Me. 139, 141.

⁹ *Newhall v. Turney*, 14 Ill. 338; and see the authorities generally under this section. See also cases cited *post*, § 353, p. * 751, note 9.

¹⁰ *Slaymaker v. Bank*, 103 Pa. St. 616.

¹¹ *Sibbs v. Society*, 153 Pa. St. 435, distinguishing *Stair v. York Bank*, 55 Pa. St. 364.

non in the first estate; the latter is entitled only to the balance found due.¹

It follows from these principles, that the administrator *de bonis non* can sustain no action at law against his predecessor for anything save unadministered effects existing in specie.²

An administrator *d. b. n.* cannot sue his predecessor at law for anything save unadministered assets;

but equity will annul fraudulent acts of the predecessor and restore the property, or compel accounting.

equity, however, a distinction is drawn between legal and valid acts of administration, and such as are invalid, or fraudulent, as being for the individual benefit of the administrator, in violation of the policy of the law.³ In such case a court of equity will annul the acts complained of, and subject the property to the control of the administrator *de bonis non*,⁴ [* 746] or even entertain a bill for an accounting.⁵ In Alabama this principle is applicable in an action at law;⁶ but in South Carolina the administrator *de bonis non* is estopped from charging his predecessor with fraud by reason of the privity between them.⁷

§ 352. Administrators de Bonis non under American Statutes.

— In some of the American States the powers of administrators *de bonis non* over the estates of decedents, as discussed in the preceding section, are considerably augmented, so as to include not only effects remaining in specie and unadministered, but also liabilities of the prior executors or administrators arising out of their official acts, thus making it their duty to settle with their predecessors, and, if necessary, to bring such actions against them, their sureties and representatives, as at common law are given only to creditors, legatees, and distributees.⁸ The departure from the common law is due to a difference in the conception of the functions of executors and administrators, involving their reciprocal rights and duties. Dur-

¹ Foster v. Bailey, 157 Mass. 160, referring to numerous cases; three judges dissenting hold that so far as assets remain in specie the administrator of the administrator *de bonis non* should immediately deliver the same to the new administrator *de bonis non*.

² Hodge v. Hodge, 90 Me. 505; Johnson v. Hogan, 37 Tex. 77, 80; Neale v. Hagthorp, 3 Bland, 551, 563; Wernick v. McMurdo, 5 Rand. 51; Cheatham v. Burfoot, 9 Leigh, 580; Smith v. Carrere, 1 Rich. Eq. 123; Thieves v. Mason, 55 N. J. Eq. 456; Thomas v. Stanley, 4 Sneed, 411, denying the distinction between an action against the representatives of a deceased administrator and one against the former administrator removed or his sureties; United States v. Walker, 109

U. S. 258, 261; per Clopton, J., in Eubank v. Clark, 78 Ala. 73, 80; Waterman v. Dockray, 78 Me. 139; Wilson v. Arrick, 4 MacArthur, 228; s. c. 112 U. S. 83.

³ Such acts are held void, and do not therefore constitute administration: Prosser v. Leatherman, 4 How. (Miss.) 237, 240; Miller v. Helm, 2 Sm. & M. 687, 695.

⁴ Forniquet v. Forstall, 34 Miss. 87, 96; Scott v. Searles, 7 Sm. & M. 498, 505; Cochran v. Thompson, 18 Tex. 652, 657; Villard v. Robert, 1 Strobb. Eq. 393, 410.

⁵ Whitaker v. Whitaker, 12 Lea, 393.

⁶ Swink v. Snodgrass, 17 Ala. 653, 658.

⁷ Steele v. Atkinson, 14 S. C. 154, 159; Knobeloch v. Bank, 43 S. C. 233.

⁸ Ante, § 351.

ing one period of English history, administrators as well as executors became the owners of the residuum of estates in their charge;¹ it was very important, then, to cut off the possibility that such residuum should go to a subsequent administrator, by converting the estate, so that, on the death or removal of the executor or administrator, there would be no residuum for the administrator *de bonis non*. Under this condition of things, conversion, whether rightful or wrongful, constituted administration, in the sense of changing the executor's or administrator's title, because that which he first held *in auter droit* by the conversion was made his *in proprio jure*; ² he took the same title as any purchaser from the executor or administrator would obtain at a sale of the effects, so that neither a creditor, heir, or legatee, nor an administrator *de bonis non*, could further follow it. Thus it became the rule at common law, that for a wrongful conversion, whereby creditors, legatees, or distributees

of the deceased were prejudiced in their rights, they have [* 747] an action against the * wrong-doer for damages,³ for which

he and his sureties, and in some instances his personal representatives, are liable. This rule has been retained, whatever may be its origin, and obviously destroys any right in the administrator *de bonis non* to property already converted, as well as all right of action against the predecessor for a wrongful conversion, since that is given to other parties.⁴

The historical justification of this rule, however valid in England, does not exist in America, except as an element of the common law; hence, many of the States have discarded the rule itself; in some instances by judicial authority, but most generally by statutory enactments. Administration is, in the States not adhering to the artificial common-law rule, understood to consist in the legal proceedings necessary to satisfy the claims of creditors, next of kin, legatees, or whatever other parties may have any claim to the property of a deceased person; until all such claims are satisfied, — whether of creditors or heirs, the widow or minor children of the deceased, — administration is not completed. Executors and administrators are the functionaries appointed by the law to accomplish this purpose, and are invested

Common-law rule discarded in many States.

Authority of administrators *d. b. n.* extends to all acts necessary to complete the functions of administration,

¹ *Per* Kennedy, J., in *Potts v. Smith*, 3 Rawle, 361.

² *Ante*, §§ 174, 175.

³ *State v. Campbell*, 10 Mo. 724, 727; *State v. Morton*, 18 Mo. 53, 71. The statute of 4 & 5 W. & M. c. 24, § 12, explains that, inasmuch as it was in doubt whether the statute of 30 Car. II. giving a remedy against executors *de son tort* extended to rightful executors and administrators, "who for want of privity in law were not

before answerable, . . . notwithstanding that such executors or administrators had wasted the goods and estate of the first testator or intestate, or converted the same to their own use," the executors and administrators of such executors and administrators are chargeable in like manner as the executor or administrator would have been.

⁴ *Young v. Kimball*, 8 Blackf. 167; *Bliss v. Seaman*, 165 Ill. 422, 429.

with the legal ownership of the decedent's property until it is accomplished. Stripped of extraneous elements and considerations, this is the office of administration, and the scope of power of executors and administrators is commensurate therewith.¹ Two principles follow from this view which are inconsistent with the common-law rule under discussion: first, that the conversion of property from the form in which the decedent left it into some other form, *e. g.*, changing it into money by a sale, etc., does not exhaust the authority of the executor or administrator over it in its changed form, but it still remains to be administered; and next, that upon the death, removal, or resignation of the executor

* or administrator before the administration has been fully [* 748] completed, all the authority vested in him must pass to an

including the power to call former administrators to account, and to compel the production of all moneys and other property of the estate not accounted for, and hold them responsible in damages for waste.

administrator *de bonis non*, so that the purpose of the law demanding administration may be accomplished.

This necessarily includes the power to call the former administrator or his representatives to account for any balance of money, bonds, notes, etc., belonging to the estate, which he had in possession at the time of the removal or death; because this is unadministered property, and may be lawfully administered by the administrator *de bonis non* only. It must with the same necessity include the power to call the predecessor to account, and respond in damages for any *devastavit*, mismanagement, or other breach of duty whereby any property of the deceased was diverted from a due course of administration, because the wrongful acts of an executor or administrator, not being within the scope of his lawful authority, render him liable as for trespass,² and it is the duty of the lawful representative of the estate to recover whatever may be due to it.³

These principles are recognized, in some States, to their full extent. Thus it is held that, upon the death, removal, or resignation

In such States the administrator *d. b. n.* alone can recover against the former

of an executor or administrator, the successor alone may sue for and recover against him, his sureties and representatives, all property of whatever nature of the deceased in his hands,⁴ and demand accounting for prop-

¹ See Introduction, § 10.

² Executors and administrators derive their authority from the law, and this authority is lawfully to administer. Unlawful acts of administration may be said to be *ultra vires*, or like the acts of a mere creature of the law beyond the scope of its authority, which bind only the individual, but not the interest which he represents. Hence, for the wrong done the individual is liable to the interest wronged,

which is represented by the administrator *de bonis non*.

³ Todd v. Willis, 66 Tex. 704, 713.

⁴ Banks v. Speers, 103 Ala. 436; Martin v. Ellerbe, 70 Ala. 326, 340; Wickham v. Page, 49 Mo. 526; State v. Fulton, 35 Mo. 323; Bolton v. Whitmore, 12 Mo. App. 581; State v. Heinrichs, 82 Mo. 542, 552; Davis v. Clark, 58 Kans. 454; Shackelford v. Runyan, 7 Humph. 141; Whitaker v. Whitaker, 12 Lea, 393; State v. Porter,

[* 749] erty converted or squandered,¹ * whether the debts have been paid or not, so long as any duty remains to be performed by an administrator.² In Texas it was formerly held that he might recover the balance in hands of a former administrator, but could not sue for *devastavit*;³ but it is now held there that the administrator *de bonis non* has the power to maintain a proceeding against his predecessor to set aside his fraudulent sale, although it had been approved by the probate court,⁴ and to recover from him any loss resulting to the estate from his maladministration.⁵ So in Maryland, an order of the probate court is necessary to authorize an action by the administrator *de bonis non* for the balance, that the court may determine, it is said, whether such balance consists of unadministered property.⁶ In Mississippi he can sue the predecessor when

administrator, so long as any act of administration remains to be accomplished.

9 Ind. 342; *Lucas v. Donaldson*, 117 Ind. 139, 141; *Nevitt v. Woodburn*, 160 Ill. 203; *Wilson v. Hinton*, 63 Ark. 145; *Shawhan v. Loffer*, 24 Iowa, 217, 230; *Stewart v. Phenice*, 65 Iowa, 475, 478; *Commonwealth v. Strohecker*, 9 Watts, 479; *Weld v. McClure*, 9 Watts, 495; *Hardy v. Miles*, 91 N. C. 131; *Slagle v. Entrekin*, 44 Oh. St. 637, 639; including proceeds of realty sold by order of court to pay debts: *Neagle v. Hall*, 115 N. C. 415.

¹ *State v. Farmer*, 54 Mo. 439, 445; *Morehouse v. Ware*, 78 Mo. 100, 102; *Van Bibber v. Julian*, 81 Mo. 618, 627; *Holden v. Piper*, 5 Colo. App. 71; *Oglesby v. Gilmore*, 5 Ga. 56, 62; *Knight v. Lasseter*, 16 Ga. 151; *Graham v. State*, 7 Ind. 470; *Badger v. Jones*, 66 N. C. 305; *Palmer v. Pollock*, 26 Minn. 433, 440; *Balch v. Hooper*, 32 Minn. 158, 161; *Drenkle v. Sharman*, 9 Watts, 485; *Eubank v. Clark*, 78 Ala. 73, 80; *Grant v. Reese*, 94 N. C. 720, 725; *Granger v. Reid*, 36 La. An. 845; *Forniquet v. Forstall*, 34 Miss. 87, 96; *Minot v. Norcross*, 143 Mass. 326, 334; *Tulbert v. Hollar*, 102 N. C. 406, 409. And in connection herewith, see authorities cited *post*, § 536, where the subject of accounting between successive administrators is discussed.

² *Vastine v. Dinan*, 42 Mo. 269, 272; *University v. Hughes*, 90 N. C. 537; *Ham v. Kornegay*, 85 N. C. 119; *Scott v. Crews*, 72 Mo. 261, 265; *Morehouse v. Ware*, 78 Mo. 100, 103. But if the debts have been paid and final settlement made, so that nothing remains to be done by an administrator but to pay what is due the heirs, a suit on the bond ought to be allowed to

the heirs without the expensive process of appointing an administrator *de bonis non*: *State v. Matson*, 44 Mo. 305, 308; even where there has been no final settlement, where the persons interested in the estate all join in the suit: *State v. Thornton*, 56 Mo. 325, 327. For the same reason, no action lies by an administrator *de bonis non* against a predecessor who is himself the only party interested in the assets: *State v. Smith*, 52 Conn. 557, 564. So, also, it has been held by a federal circuit court that a suit in equity might be maintained by the heirs and distributees, after final settlement and discharge of an administrator, for assets which had been fraudulently withheld from administration, it appearing that all debts had been fully paid, and that no one but the parties to the suit could be affected, and that no appointment of a new administrator was necessary: *Hubbard v. Urton*, 67 Fed. R. 419. See as to the effect of an accounting between administrators *de bonis non* and their predecessors, *post*, § 536.

³ *Murphy v. Menard*, 11 Tex. 673; s. c. 14 Tex. 62, 67; *Johnson v. Hogan*, 37 Tex. 77, 80, relying on *Murphy v. Menard*, and *Stubblefield v. McRaven*, 5 Sm. & M. 141.

⁴ *Todd v. Willis*, 66 Tex. 704, reviewing numerous Texas cases, p. 708 *et seq.*

⁵ *Dwyer v. Kalteyer*, 68 Tex. 554, 558.

⁶ *State v. Hart*, 57 Md. 234, citing many earlier cases. The administrator *de bonis non* can recover no part of the estate from the executor which the latter had collected and administered: *Baker v. Bowie*, 74 Md. 467.

Distinction between successors to deceased administrators and to such as have resigned or been removed.

the estate is insolvent or when suit is necessary for the payment of debts.¹ A distinction is made in some States between the successors of deceased executors or administrators, and of such as have resigned or been removed; giving the successor authority against the latter, but not against the representatives of the former.²

In New York the statute prior to 1880 made provision for an accounting in the Surrogate's Court where the predecessor's letters were revoked, but the Surrogate had no power to order the delivery of unadministered assets to the administrator *de bonis non*, nor was the latter empowered to call the executor of his predecessor to an accounting;³ but since 1880 the code extends the power of the administrator *de bonis non* so as to call his deceased predecessor's representative to account in the Surrogate's Court, and confers jurisdiction on that court to enforce distribution to the successor.⁴ Parties proceeding in their own right as creditors or distributees either in the Surrogate's Court or by concurrent remedy in equity are barred from instituting proceedings to compel such accounting after six years; but the administrator *de bonis non*, proceeding in his representative character, has ten years within which to compel his predecessor to account, though he may be also interested personally.⁵

In New York it is held that, where an executor loans out money belonging to the estate, taking bond and security in his individual name, the cause of action in case of default in the payment accrues to the executor in his individual capacity, and in case of his death to his personal representative, so that the administrator *de bonis non* of the testator has no right to maintain such action.⁶ So it

Suit on note to executor to be by executor's representative.

has been held that where a note given for a debt due to the estate is made payable to the administrator with his official designation, either his executor, or an administrator *de bonis non* of the original intestate may maintain action thereon after the administrator's death,⁷ but where the

strict common-law theory still prevails, such suits cannot be maintained by the administrator *de bonis non*, but only by the executor of the payee.⁸

¹ Weir v. Monahan, 67 Miss. 434, 450.

² So in Illinois: Marsh v. People, 15 Ill. 284, 285; Stose v. People, 25 Ill. 600; Short v. Johnson, 25 Ill. 489, 496. Ohio: Tracy v. Card, 2 Oh. St. 431, 438, citing and commenting on Blizzard v. Filler, 20 Ohio, 479, and distinguishing between the representatives of one who died in office, and of one who died before action brought but after resignation. Rhode Island: Court of Probate v. Smith, 16 R. I. 444, 447. And formerly in New York.

³ The remedy seems to have been in equity: see Vann, J., on p. 326, in Matter of Rogers, *infra*.

⁴ Code Civ. Pr. § 2606. Matter of Rogers, 153 N. Y. 316, 322.

⁵ Matter of Rogers, 153 N. Y. 316 and cases cited.

⁶ Caulkins v. Bolton, 98 N. Y. 511.

⁷ Wood v. Tomlin, 92 Tenn. 514, and authorities cited in the opinion.

⁸ See cases cited *post*, § 353, p. *751, note 9.

The subject of accounting between successive administrators, the effect to be given thereto, and the principles applicable, as well as accounting in case of deceased administrators or guardians, is treated of in a subsequent section, to which the reader is referred.¹

[*750] *§ 353. **Privity between Successive Administrators.**—

The question of privity between an administrator *de bonis non* and his predecessor, that is to say, the extent to which the one is bound by the antecedent acts of the other, must be determined by the scope and effect of these acts upon the course of the administration. It is well settled, both at common law and in all the States, that acts binding upon the original administrator as acts of administration, by which the right of a debtor, creditor, legatee, or distributee against or in favor of the estate of the deceased is affected, are equally binding upon all successors.² To this extent, the privity between them is complete, because what an administrator does lawfully within the sphere of his powers is in law the same as if his testator or intestate had done it, and not to be questioned by any one representing him.³ This privity does not arise out of any relation between *them* to each other, but is the result of the relation of each of them to the testator or intestate, which, to the extent to which property left by him may come into their hands respectively, is the same in both.⁴

Valid acts of administration are binding upon all successors,

In those States which have augmented the powers of administrators *de bonis non*,⁵ the estate comes into their hands affected, nevertheless, by all the rightful acts of the predecessors, including matters of evidence affecting parties in interest. Thus, the presentation to the executor of a claim against the estate is good against the administrator *de bonis non*, and need not be presented anew;⁶ and the subsequent resignation of the executor does not impair the value of his written acknowledgment of such presentation;⁷ or it may be proved by the admissions of the administrator made while in authority.⁸ So judgment by default,⁹ as well as the promise of an administrator to pay a debt, is binding upon his successor, in all cases where such promise is binding upon the estate;¹⁰ so the admission of notice of non-payment of

including matters of evidence;

e. g. presentation of a claim against the estate;

admission of presentation;
promise to pay a debt of the estate;
notice of non-payment to bind a de-

¹ *Post*, § 536.

² At common law this necessarily follows from the principle that the administrator *de bonis non* takes only the unadministered assets, — unadministered in the artificial sense, which deems every conversion or change wrought in the effects an administration.

³ *Wernick v. McMurdo*, 5 Rand. 51;

Johnston v. Lewis, Rice Eq. 40, 48; *Martin v. Ellerbe*, 70 Ala. 326, 341.

⁴ *Ante*, § 351, p. *743.

⁵ *Ante*, § 362.

⁶ *Thomas v. Chamberlain*, 39 Oh. St. 112, 122.

⁷ *Starke v. Keenan*, 5 Ala. 590.

⁸ *Pharis v. Leachman*, 20 Ala. 662, 679.

⁹ *Wyche v. Ross*, 119 N. C. 174.

¹⁰ *Newhouse v. Redwood*, 7 Ala. 598.

ceased
indorser;
agreement to
set off a debt.

a * promissory note indorsed by the deceased;¹ [*751]
and so an agreement to set off a demand due from
the administrator against a debt due the estate.²

An illegal act
of the adminis-
trator is not
binding upon
his successor;

e. g. a fraudu-
lent sale of
assets,

as well as
or a warranty.

The proposition stated involves, as a correlative thereto, that the
successor is not bound by any illegal act of an executor
or administrator;³ the authority of the administrator *de
bonis non* being derived, not from his predecessor, but
from the deceased testator or intestate, there is no such
privity as will estop the successor from assailing the un-
lawful acts of his predecessor.⁴ Hence, an adminis-
trator *de bonis non* may proceed against his predecessor,
as well as purchasers from him, to annul a fraudulent sale of the
property of the estate;⁵ and he is not liable for the war-
ranty of the preceding administrator, because an admin-
istrator cannot bind the estate by his contract.⁶

At common
law adminis-
trator *d. b. n.*
cannot sue
purchaser from
a former ad-
ministrator for
price of prop-
erty sold,

sue for the

nor on note to
predecessor,

nor maintain
error to correct
a judgment ob-
tained by him.

There is some difference in the decisions as to the rights of admin-
istrators *de bonis non* touching the contracts made by
their predecessors. It appears from what has already
been said in this respect, that, where the common-law
rule is observed, the proceeds of a sale belong to the
administrator in his own right, and on his death de-
volve to his personal representatives.⁷ It is obvious
that in such case the administrator *de bonis non* cannot
sue for the price of the goods so sold;⁸ nor for a promissory note
made to the predecessor.⁹ The want of privity, at com-
mon law, is a bar to the right of an administrator *de
bonis non* to maintain a writ of error to correct a judg-
ment obtained by the antecedent executor,¹⁰ and the
existence of a judgment recovered by a prior executor is

¹ Duncan v. Watson, 28 Miss. 187, 206.

² Nettles v. Elkins, 2 McCord Ch. 182, 184.

³ See ante, § 352, p. *748, note. But where the executor embarked the funds of the estate in an unauthorized investment (with the approval of those in interest), and then resigned, turning over to the administrator *de bonis non* the unauthorized investment, who adopted the same, and took the benefit thereof until their value depreciated, it was held, in an action on the executor's bond, that he was entitled to credit for the sum paid out by him in such investment: Thayer v. Kinsey, 162 Mass. 232.

⁴ Bell v. Speight, 11 Humph. 451, 454; Fay v. Muzzey, 13 Gray, 53, 57; Weeks v. Love, 19 Ala. 25.

⁵ Forniquet v. Forstall, 34 Miss. 87, 98; Jelke v. Goldsmith, 52 Oh. St. 499.

⁶ O'Neill v. Abney, 2 Bai. 317; post, § 356.

⁷ Ante, § 351.

⁸ Calder v. Pyfer, 2 Cr. C. C. 430.

⁹ Cravens v. Logan, 7 Ark. 103; Cook v. Holmes, 29 Mo. 61; Arrington v. Hair, 19 Ala. 243; but where the strict common-law theory no longer prevails, it has been held that such action may lie: Sheets v. Peabody, 6 Blackf. 120; and see authorities ante, § 352, p. *749.

¹⁰ Grout v. Chamberlin, 4 Mass. 611. This decision gave rise to the enactment of a statute in imitation of the English statute 17 Car. II. c. 8.

no bar to a suit on the same cause of action by the administrator *de bonis non*; ¹ the latter cannot sue [*752] out *scire facias* upon a judgment obtained by the original administrator; ² nor can execution issue against an administrator *de bonis non*, although he have sufficient assets, upon a judgment against his predecessor, ³ for judgment against the administrator in chief gives no cause of action against the administrator *de bonis non*; ⁴ nor can a judgment in favor of an administrator be revived against his successor. ⁵ The rigor of this rule at law induced courts of chancery to adopt a different course, allowing the administrator *de bonis non* to revive suits instituted by the executor, ⁶ and statutes, both in England ⁷ and some of the American States, ⁸ giving administrators *de bonis non* authority to continue suits brought by or against former administrators, and to maintain *scire facias*, writs of error, etc., on judgments by or against them, in so far as they affected the estate under administration; ⁹ and to this extent establishing privacy between successive administrators. ¹⁰ And it is held in a recent case, that an administrator *de bonis non* may sue a third person upon a contract made with his predecessor, whenever the proceeds of the claim, when recovered, would be assets. ¹¹

Judgment obtained by a prior executor no bar to suit by successor; nor can he sue out *scire facias*; nor can execution issue against, nor judgment be revived against him. Suits are allowed to be revived by and against subsequent administrators. *Scire facias* to be brought, writs of error, etc., or suit on contract with predecessor.

§ 354. **Privacy between Special and General Administrators.**—It appears from an earlier chapter, ¹² that the authority of an administrator *pendente lite* extends to the collection of the assets, and therefore includes the power to bring suit for debts due the deceased, and ejectment for leaseholds, even against heirs or next of kin, ¹³ and other acts necessary in the protection of the estate; ¹⁴ but not to

¹ Grout v. Chamberlin, 4 Mass. 613.

² Allen v. Irwin, 1 S. & R. 549, 553; Potts v. Smith, 3 Rawle, 361, 379.

³ Ruff v. Smith, 31 Miss. 59.

⁴ Brothers v. Gunnels, 110 Ala. 436.

⁵ Alexander v. Raney, 8 Ark. 324; Bobo v. Gunnels, 92 Ala. 601.

⁶ Fletcher v. Wier, 7 Dana, 345; Elison v. Andrews, 12 Ired. 188; Taylor v. Savage, 1 How. (U. S.) 282, 286.

⁷ 17 Car. II. c. 8, aptly entitled, "An Act for avoiding unnecessary Suits and Delays."

⁸ See the remarks of Metcalf, J., in Brown v. Pendergast, 7 Allen, 427, on the history of the Massachusetts statute.

⁹ Taylor v. Benham, 5 How. (U. S.) 233, 261; Dykes v. Woodhouse, 3 Rand.

287, 291; Graves v. Flowers, 51 Ala.

402, 405; Trumble v. Williams, 18 Neb. 144, 149.

¹⁰ Stacy v. Thrasher, 6 How. (U. S.) 44, 60.

¹¹ McGuinness v. Whalen, 17 R. I. 619, and cases cited.

¹² Ante, § 181.

¹³ In re Colvin, 3 Md. Ch. Dec. 278, 295; Cain v. Warford, 7 Md. 282.

¹⁴ In Pennsylvania he may execute a deed in specific performance of a contract for the sale of land: Park v. Marshall, 4 Watts, 382. And in Maine a special administrator can maintain a bill to redeem his intestate's land, where the right to redeem might be barred before appointment of a general administrator: Libby v. Cobb, 76 Me. 471.

The authority of special administrators ceases with the occasion calling for their appointment;

but while in office their valid acts of administration bind their successors.

the payment of legacies or making distribution.¹ But it expires as soon as the suit which required his appointment is ended,² and cannot be continued by *the consent of parties;³ and he must then [* 753] 'account to the probate court.⁴ These, as well as

other special administrators, such as *durante minore ætate*, *durante absentia*, or the like, are governed by principles anal-

ogous to those applying to administrators *de bonis non*. They are in privity with the executor or administrator in chief, to the extent of binding the estate, and hence their successors, by their lawful acts of administration.⁵

It is clear, and was held in Pennsylvania,⁶ that the necessity of retaining the property for administration by the domestic administrator in chief gave to the administrator *durante absentia* the preference over a foreign administrator.

¹ Ellmaker's Estate, 4 Watts, 34, 36; ante, § 181.

² Commonwealth v. Mateer, 16 S. & R. 416, 420; Clemens v. Walker, 40 Ala. 189, 201.

³ Cole v. Wooden, 18 N. J. L. 15.

⁴ Lee v. Price, 12 Md. 253.

⁵ Per Bell, J., in Taylor v. Barron, 35 N. H. 484, 493; Cowles v. Hayes, 71 N. C. 230; McKamy v. McNabb, 97 Tenn. 236.

⁶ Willing v. Perot, 5 Rawle, 264.

OF THE PAYMENT OF DEBTS BY EXECUTORS AND ADMINISTRATORS.

§ 355. **Origin of the Common-law System of Paying Debts of Deceased Persons.**—The principal function of executors and administrators is to pay the debts and discharge the liabilities of their testators or intestates. To accomplish this purpose, the title to all the personal property of the decedent is vested in them in all cases; as well as, under English and American statutes, a power, contingent upon the insufficiency of the personal property, over the real estate. In some of the American States, as has already been shown,¹ no distinction is made between real and personal property in this respect, being alike subject, in the hands of the executor or administrator, to be applied to the payment of debts.

Personalty
liable for debts
at common
law.

A just regard for the rights of creditors produced, in England, the statutes which deprived the ecclesiastical courts of their former substantially unlimited control over the goods and effects of persons dying intestate within their jurisdiction. The common-law courts, and, to a still greater extent, the courts of chancery, then undertook to accomplish justice between creditors on the one hand, determining their relative priorities, and between creditors and the widow and next of kin on the other, assuming a superintending control over executors and administrators at law and in equity, and leaving the ecclesiastical courts with power to do little more than grant probate of wills and appoint administrators. Owing to the heterogeneous elements entering into its inception and development,² the system of administration at

Intricacy of
the common-
law method of
paying debts.

[* 755] common law, as affected by English statutes, and particularly its provisions for the payment of debts out of decedents' estates, became highly intricate, costly, and fraught with hazard to even the most prudent and well-meaning executor or administrator. In America this complicated machinery has, in most States, been supplanted by a simple, efficient, and inexpensive system under their statutes, easily understood, in its principal features, by persons of ordinary intelli-

Simplified un-
der American
statutes.

¹ *Ante*, § 337.

² As to which, see *ante*, §§ 137 *et seq.*

gence, safe and speedy in its operation, accomplishing its purpose at a minimum of cost and litigation.

It will be nevertheless unavoidable, in the discussion of this subject, to begin each topic with at least a meagre outline of the common-law system, not only as constituting the law to the extent in which it has not been displaced by statutory enactment, but chiefly, also, as furnishing the key to the theory and principles underlying the systems established in the several States.

OF THE PRIORITY OF DEMANDS AGAINST THE
ESTATES OF DECEASED PERSONS.

§ 356. **Distinction between the Debts of the Decedent, and Liabilities contracted by the Personal Representative.**—Before entering upon the consideration of the duties and powers of executors and administrators in respect of the debts of the deceased, it must be observed that the expenses of administration, including the cost of the probate of the last will, if any, and of the funeral of the deceased, necessarily take precedence of the debts incurred by the deceased. The costs attendant upon the administration are incidental to and conditioned by its prime purpose, which could not be accomplished without making them a charge upon the property administered. They are debts of the decedent only in the sense of constituting a necessary incident to the post-mortuary disposition of his property; and since they imply the act or contract of the person having charge of the administration, such person necessarily incurs a personal liability to discharge them.

Costs of administration chargeable to the estate.

It is a well-recognized principle, that for liabilities contracted by the personal representative, although for the benefit and in the interest and behalf of the estate, it is not liable to creditors. Disbursements, reasonable in amount and for services necessary in the proper discharge of the duties imposed upon them, will constitute a charge in favor of executors and administrators against the estate, although their allowance should leave no surplus to pay creditors of the deceased;¹ but in the absence of statutory authority the probate court, as already stated,² has no jurisdiction to adjudicate between the personal representative and the creditor.

Executors and administrators cannot bind the estate by any contract, although assuming to do so; but they are primarily liable to the creditor.

[* 757] * It follows, that the estate is not liable to an attorney for his services at the instance of an executor or administrator,

¹ See *post*, § 362, as to expenses of incident to probate and right to administration, and § 517 as to expenses minister.

² *Ante*, § 152.

but that the latter is himself liable in a suit by the attorney;¹ so for corn fed to the stock of the estate;² for the terms of a contract by the administrator in renting the land of the estate;³ or for improving the property,⁴ or for the purchase of other property,⁵ or for the erection of a monument "for the estate,"⁶ or buying horses to use on decedent's farm, though he buys "as administrator."⁷ The same holds good in respect of negotiable paper made, indorsed, or accepted by him, although he add to his signature his official character;⁸ and, *a fortiori*, where he gives a bond.⁹ So where the executor employs a salesman to take charge of the stock in trade belonging to the estate,¹⁰ or a sawyer to saw lumber.¹¹ So where money is borrowed by pledging property of the estate,¹² unless pledged for the purposes of administration;¹³ for the same reason, the estate is not bound by the administrator's agreement to credit a note payable to his decedent with the value of work done upon the lands of the estate,¹⁴ nor by his contract to extend the time of payment of a note due the estate;¹⁵ nor are the expenses incurred by the administrator

¹ Thomas v. Moore, 52 Oh. St. 200; Pike v. Thomas, 62 Ark. 223; Tucker v. Grace, 61 Ark. 410; Lusk v. Patterson, 2 Colo. App. 306; Miller v. Tracy, 86 Wis. 330, 333; Wait v. Holt, 58 N. H. 467; Gurnee v. Maloney, 38 Cal. 85, 88; Page's Estate, 57 Cal. 238; Austin v. Munro, 47 N. Y. 360, 366; Parker v. Day, 155 N. Y. 383. The executor can create no lien on the estate for such services: Platt v. Platt, 105 N. Y. 438, 501; Bryan v. Craig, 64 Ark. 438.

² Daily v. Daily, 66 Ala. 266. As to the effect of the statute in Missouri, see Powell v. Powell, 23 Mo. App. 365.

³ Yarborough v. Ward, 34 Ark. 204.

⁴ Ness v. Wood, 42 Minn. 427, 429, in which case it was attempted to enforce a mechanic's lien against the estate.

⁵ Wilson v. Mason, 158 Ill. 304, 312.

⁶ Durkin v. Langley, 167 Mass. 577; see also Ferrin v. Myrick, 41 N. Y. 315.

⁷ And a judgment on such a declaration against "A as administrator" was held a personal judgment, the addition being "*descriptio personæ*": Rich v. Sowles, 64 Vt. 408.

⁸ First National Bank v. Collins, 1; Mont. 433; Germania Bank v. Michaud, 62 Minn. 459; Schmittler v. Simon, 101 N. Y. 554, 558; McCalley v. Wilburn, 77 Ala. 549, 552; Perry v. Cunningham, 40 Ark. 185; Curtis v. National Bank, 39 Oh. St. 579, 583; Kingman v. Soule, 132 Mass. 285; Wilson v. Friedenberg, 22

Fla. 114; White v. Thompson, 79 Me. 207, 209; Hellier v. Lord, 55 N. J. L. 367; Banking Co. v. Morehead, 116 N. C. 410.

⁹ McLean v. McLean, 88 N. C. 394; Staples v. Staples, 85 Va. 76; Claghorn's Estate, 181 Pa. St. 600.

¹⁰ Dodson v. Nevitt, 5 Mont. 518, 521.

¹¹ Bott v. Barr, 95 Ind. 243. In this case the administrator was held liable personally, but the liability of the estate was not passed on.

¹² National Bank v. Weeks, 53 Vt. 115, where money is paid at the executor's request to relieve the estate of a mortgage, no claim lies against the estate: Winston v. Young, 52 Minn. 1.

¹³ See *ante*, § 331, authorities under last note of p. * 693.

¹⁴ Cook v. Cook, 24 S. C. 2041. But a contract executed on both sides, in which the executor, upon selling certain of decedent's goods, agrees that the purchaser shall pay therefor by giving credit for the amount upon an account which he holds against the deceased, is valid as against the executor: Neely v. Baird, 157 Pa. St. 417.

¹⁵ Maddock v. Russell, 109 Cal. 417. See also Claghorn's Estate, 181 Pa. St. 600; and, holding the contrary: North v. Walker, 66 Mo. 453. As to the duty and liability of the representative in bringing actions to recover the debts due to the estate, see *ante*, § 324, and cases cited; as

in carrying on the business of the decedent without authority, the debts of the estate;¹ even if expressly authorized to carry on business, the creditor must look to the executor personally. And still less can the administrator bind the estate by his tort.² In such cases, since the estate is not bound by his acts, his sureties are not liable.³ If the administrator, for a debt due the estate, wrongfully sues out an attachment, he cannot subject the estate to an action for damages by his tortious conduct, but is liable to respond personally for the injury.⁴

It seems that, if an executor or administrator wish to avoid personal liability, he must expressly stipulate that the creditor shall be paid out of the estate only.⁵ So where he executes a note for the mere purpose of acknowledging an indebtedness of the estate, he may show this in exoneration of his liability, but cannot do so by parol evidence.⁶ Where administration expenses are charged on the estate by the will, an action will lie against the estate;⁷ and if the executor contracts to do what it is his duty to do in his official capacity, he is not personally bound.⁸

[*758] *In view of the ultimate liability of the estate for the disbursements made in its behalf by the executor or administrator, and of the duty incumbent upon the probate court to pass upon the question of the reasonableness of the charges, as well as of the liability of the estate, it would seem that original jurisdiction to adjudicate between executors or administrators and their creditors for services in respect of the estate should, on principle, be vested in the probate courts, to avoid circuitry of action and unnecessary costs and delay.⁹ It is sometimes held, that in suits for services rendered to an executor in behalf of an estate there may be judgment *de bonis testatoris*, as well as *de propriis*;¹⁰ and that an attorney employed in the administration may waive his claim against the executor or administrator, and apply directly to the court for the

to the right to effect compromises with debtors of the estate, *ante*, § 326; as to his right to bind the estate by admissions or promises, § 381, and to waive the bar of limitations, *post*, §§ 400-402; also § 381.

¹ As to which see § 328, p. *688; § § 123, 124; *In re Rose*, 80 Cal. 166.

² *Thompson v. Canterbury*, 2 McCrary, 332; *Daily v. Daily*, 66 Ala. 266; *Richardson v. Palmer*, 24 Mo. App. 480, 490, and cases cited; *Van Slooten v. Dodge*, 145 N. Y. 327, 332; *Eustace v. Jahns*, 38 Cal. 3, 23. Nor is the estate liable for his misrepresentations in the sale of real estate under order of court: *post*, § 477, and authorities there cited; nor for unauthorized covenants: *post*, § 480.

³ *Curtis v. National Bank*, 39 Oh. St. 579; *McLean v. McLean*, 88 N. C. 394.

⁴ *Gilmer v. Wier*, 8 Ala. 72.

⁵ *Studebaker v. Montgomery*, 74 Mo. 101, 103; *East Tennessee Co. v. Gaskell*, 2 Lea, 742, 745; *Patterson v. Craig*, 1 Baxt. 291, 293; *New v. Nicoll*, 73 N. Y. 127, 131; *Banking Co. v. Morehead*, 116 N. C. 413 (holding a note made by the executrix "but not personally" exempted her from personal liability). See *post*, § 381.

⁶ *Stirling v. Winter*, 80 Mo. 141.

⁷ *Boynton v. Laddy*, 50 Hun. 339.

⁸ *Brown v. Farnham*, 55 Minn. 27.

⁹ See *Edwards v. Love*, 94 N. C. 365, 369.

¹⁰ *Bennet v. Bradford*, 1 Coldw. 471,

allowance of his claim out of the estate.¹ *A fortiori*, if the services rendered be of value to the estate, and the executor insolvent, an action will lie in equity to enforce payment for such services out of the assets of the estate.² So it is provided by statute in Connecticut, that an action may be maintained for moneys paid or services rendered the estate in the hands of the executor or administrator, to be paid wholly out of the estate;³ and it is held in California, that it is the usual and ordinary practice in that State for the court to allow a counsel fee to the retiring attorney, after a change of attorneys for the executor, in advance of the final settlement; and that while such an allowance fixes the liability of the estate to the counsel, it is not a determination of the contract between him and the executor.⁴

But it appears from the cases above cited, that the contrary is well established as the general rule.

473; *Portis v. Cole*, 11 Tex. 157. It was so held in *Behrens v. Leucht*, 2 Cin. 217 (but this decision was reversed in the appellate court: *Lucht v. Behrens*, 28 Oh. St. 231, 237); *Edwards v. Love*, 94 N. C. 365, 369.

¹ *Portis v. Cole*, *supra*; *Long v. Rodman*, 58 Ind. 58. The Supreme Court of Missouri has not as yet passed on this question, but a direct action was held to lie by the Court of Appeals: *Nichols v. Reyburn*, 55 Mo. App. 1. (In this case suit originated in the Circuit Court, and Bond, J., dissented without stating his reasons, which may, however, be inferred from his opinion in the subsequent case of *Yeakle v. Priest*, 61 Mo. App. 47, in which case the other judges, while concurring in the result, dissent from the reasons assigned by him); *State v. Walsh*, 67

Mo. App. 348. It may be doubted whether, under the circumstances, the law can be looked upon as definitely settled in this State.

² *Pike v. Thomas*, 47 So. W. (Ark.) 110; *Thompson v. Smith*, 64 N. H. 412; *Clapp v. Clapp*, 44 Hun, 451. So in South Carolina an exception is recognized where the executor is in advance to the estate, and insolvent, and has no funds of the estate in his hands, in which case the creditor of the executor may be allowed to take the latter's place: see cases referred to in *Ex parte Chappell*, 34 S. C. 99.

³ *Brown v. Eggleston*, 53 Conn. 110, 116 (disallowing the claim sought to be established, as not being within the statute).

⁴ *Estate of Kasson*, 119 Cal. 189.

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* CHAPTER XXXVIII.

OF THE PAYMENT OF LIABILITIES ARISING AFTER THE DEATH OF
THE DECEDENT.

THE subject of debts of the testator or intestate maturing after his death, as well as of such as are of a contingent nature, is treated in a subsequent chapter, in connection with the subject of establishing claims against the estates of deceased persons.¹

§ 357. **Funeral Expenses allowable as Incidental to the Administration.**—In England, funeral expenses, proportioned to the degree and quality of the deceased, are to be allowed before any debt or duty whatever,² even before a debt due to the crown,³ and are placed by Williams, in his truly great work on Executors and Administrators, before expenses of probate and of administration.⁴ In America, funeral expenses are sometimes classed with debts of the deceased; and while they invariably take the first rank as debts, yet when so considered and treated, they are necessarily postponed to expenses of administration.⁵ It is clear that, if the executor voluntarily pay them, he must be allowed credit for the disbursement as an expense incident to the administration, because the funeral is a work of necessity, as well as of charity and piety.⁶ Hence it is the duty of the executor or administrator to bury the deceased in a manner suitable to the estate he leaves behind him;⁷ there is no distinction in this respect between an executor and an administrator;⁸ and if this duty, in the absence or neglect of the executor, is performed by another,—not officiously, but under the necessity of the case,—the law implies a promise to reimburse him for the reasonable expenses incurred and paid.⁹ But this pre-

Funeral expenses rank first at common law.

So in America, where they are also classed with debts.

¹ *Post*, §§ 393, 394.

² 3 Co. Inst. 202.

³ *Rex v. Wade*, 5 Price, 621, 627.

⁴ *Wms. Ex.* [988].

⁵ As to the statutory preference of funeral expenses, when treated as debts, over other debts, see *post*, § 365.

⁶ *Gregory v. Hooker*, 1 Hawks, 394, 402; *Patterson v. Patterson*, 59 N. Y. 574, 583, *et seq.*; *Wilson v. Shearer*, 9 Met. (Mass.) 504, 507; *Palmes v. Stephens R. M. Charlt.* 56; *Rappelyea v. Russell*, 1

Daly, 214, 217; *Regina v. Stewart*, 12 Ad. & E. 773; *McClellan v. Filson*, 44 Oh. St. 184, 187, *et seq.*

⁷ If there are assets: *Hapgood v. Houghton*, 10 Pick. 154, 156.

⁸ *Dampier v. Trust Co.*, 46 Minn. 526.

⁹ Cases cited *supra*; *Fogg v. Holbrook*, 88 Me. 169; *Ray v. Honeycutt*, 119 N. C. 510; *France's Estate*, 75 Pa. St. 220, 225, in which it was held that the widow's statement to a stranger that she did not intend any one else to pay the expenses,

sumption does not extend to gratuitous services rendered for a deceased friend or relative, such as searching for the remains of a missing person, requesting the clergyman to perform the burial services, writing and sending to the newspapers advertisements

* for the funeral, depositing the corpse in one's house, and [* 760] permitting the mourners to assemble there, etc.¹

In this view, the propriety of distinguishing between funeral expenses as an incident of the administration, for which the executor

Distinction between funeral expenses as incident to the administration, and as debts.

or administrator who paid them is to be reimbursed in preference to any creditor of the deceased, and such expenses as constituting a demand against the estate, provable against the executor or administrator, becomes apparent.² If the latter neither ordered the funeral, nor made himself personally responsible to the under-

taker, it would be unjust to hold him liable *de bonis propriis* for expenses incurred or laid out by others. In such case, if all the assets of a decedent are exhausted in the payment of other expenses of administration, the plea of *plene administravit*, or want of assets, must evidently be admissible in favor of the executor or administrator.³ As debts, however, they are in all the States preferred to all other debts of the deceased. But the distinction between an implied promise to reimburse an undertaker or other person for burying the deceased, and an express contract by the executor or administrator in regard to the funeral, must be borne in mind in determining whether the estate is liable, or the executor or administrator personally. In the former case the estate is primarily chargeable; in the latter, the action can be brought only against the executor or administrator personally.⁴

§ 358. What constitutes Funeral Expenses. — The ancient notions upon the subject of funerals have undergone considerable change in the efflux of time, both in England and America, in respect of the services and incidentals deemed requisite, as well as the magnitude of the outlay therefor. Thus it was held in the days of William and Mary, "that

Ancient rule as to what constitutes funeral expenses.

and that she did it voluntarily, out of respect to her husband, constituted no bar to her right to recover them; *Sullivan v. Horner*, 41 N. J. Eq. 299, 300.

¹ *Hewett v. Bronson*, 5 Daly, 1, 4.

² *Booth v. Radford*, 57 Mich. 357; *McClellan v. Filson*, 44 Oh. St. 184, 186.

³ *Hapgood v. Houghton*, 10 Pick. 154, 156; *Adams v. Butts*, 16 Pick. 343, 346; *Gregory v. Hooker*, 1 Hawks, 394, 404; *Parker v. Lewis*, 2 Dev. L. 21; *Trueman v. Tilden*, 6 N. H. 201; *Campfield v. Ely*, 13 N. J. L. 150.

⁴ *Ferrin v. Myrick*, 41 N. Y. 315, 319, reviewing English and American cases; *Durkins v. Langley*, 167 Mass. 577; *Ray v. Honeycutt*, 119 N. C. 510 (emphasizing the liability of the estate); *Samuel v. Thomas*, 51 Wis. 549, 552 (distinguishing between necessary expenses and such as are not indispensable, classing among the latter expensive monuments, costs of photograph and memorial cards); *Foley v. Bushway*, 71 Ill. 386 (denying the liability of the estate for a monument); *Sweeney v. Muldoon*, 139 Mass. 304.

for strictness no funeral expenses are allowable against a creditor, except for the coffin, ringing of the bell, parson, clerk, and bearers' fees, but not for the pall or ornaments."¹ "To which," says Dr. Burn,² "the expenses of the shroud and digging the grave ought to be added." Feasting and banquet-

Funeral banquets.

ing were deemed incongruous with the solemnity, and [* 761] * expenses for festivals were not allowable out of insolvent

estates.³ Mourning apparel for the family has been disallowed, as constituting no part of the funeral

Mourning apparel.

proper;⁴ and in the absence of statutory provision on the subject, gravestones, monuments, and enclosures of burying places were held not chargeable to insolvent estates.⁵

Gravestones, monuments, etc.

In our own time funeral expenses are held to include carriage hire in towns and cities to convey the family and friends to the place of interment,⁶ but not from one town to another and back,⁷ suitable gravestones,⁸ monuments,⁹ burial plots,¹⁰ and vaults;¹¹ also mourning apparel to enable the widow and children to attend decently at the funeral.¹²

Modern rule allows carriage hire.

Gravestones, monuments, burial plots.

Vaults.

Mourning apparel for widow and children.

Mourning rings.

Re-interment.

In England, in a case where the testatrix had committed "anything not specified" to the discretion of the executors, the payment of £93 for mourning rings distributed among the friends and relatives of the deceased was allowed.¹³ Reasonable expenses for taking up, removing, and re-interring the body are allowed, if the place of original burial is found improper for such purpose.¹⁴ The expense of communicating intelligence of the death of the deceased to his family,¹⁵ also

¹ *Per* Holt, C. J., in *Shelly's Case*, 1 Salk. 296.

² 4 Burn's *Eccl. Law*, 468 (9th ed.).

³ "Dead debtors must not feast to make their living creditors fast": *Went. Off. Exec.* 259, the editor citing 2 *Godolphin*, ch. 26, § 2, to show that the executor is chargeable with this species of waste.

⁴ *Flintham's Appeal*, 11 S. & R. 16; *Johnson v. Baker*, 2 Car. & P. 207; *Griswold v. Chandler*, 5 N. H. 492; *Macknet v. Macknet*, 24 N. J. Eq. 277, 296; *Succession of Holbert*, 3 La. An. 436.

⁵ *Brckett v. Tillotson*, 4 N. H. 208; *Tuttle v. Robinson*, 33 N. H. 104.

⁶ *Donald v. McWhorter*, 44 Miss. 124, 130.

⁷ *Lund v. Lund*, 41 N. H. 355, 362.

⁸ *Fairman's Appeal*, 30 Conn. 205, 209; *Crapo v. Armstrong*, 61 Iowa, 697; *Moulton v. Smith*, 16 R. I. 126; *Webb's Estate*, 165 Pa. St. 330.

⁹ *Porter's Estate*, 77 Pa. St. 43, 49; *Lutz v. Gates*, 62 Iowa, 513; *Campbell v. Purdy*, 5 Redf. 434, 439; *Allen v. Allen*, 3 Dem. 524, 528; *Pistorius's Appeal*, 53 Mich. 350; *Van Emon v. Superior Court*, 76 Cal. 589; *Griggs v. Veighte*, 44 N. J. Eq. 179, 189; also repairs thereon: *Bell v. Briggs*, 63 N. H. 592. The executor of a solvent estate is justified in following the directions of the will concerning a monument: *Danforth's Estate*, 66 Mo. App. 586.

¹⁰ *Chalker v. Chalker*, 5 Redf. 480, 484.

¹¹ *McGlinsey's Appeal*, 14 S. & R. 64.

¹² *Wood's Estate*, 1 Ashm. 314, 316; *Allen v. Allen*, 3 Dem. 524, 526.

¹³ *Paice v. Archbishop of Canterbury*, 14 Ves. 364, 371.

¹⁴ *Allen v. Allen*, 3 Dem. 524, 528; but otherwise if the first place of burial was proper: *Watkins v. Romine*, 106 Ind. 378.

¹⁵ *Hasler v. Hasler*, 1 Bradf. 248.

Funeral notice.

the expenses of the widow and heirs in travelling to the place where the testator sent for them, but which they did not reach until after his death,¹ and where the decedent dies away from home, the expenses of transportation of the body to his home should be allowed, to which may be added the cost of

* a person to accompany the body for the purpose of superintending such transportation.² [* 762]

It is to be observed, however, that the rights of creditors should not be defeated or jeopardized by the allowance of credit for extravagant monuments or tombstones;³ nor can an estate be charged with the cost of a monument erected, not in memory and to the honor of the deceased, but of the family.⁴

Extravagant monuments or tombstones not payable out of estate.

The estate is not liable for the funeral expenses of the widow of the deceased;⁵ and since the husband is primarily liable for the burial of his deceased wife,⁶ it would seem that her estate cannot be held liable therefor.⁷ But in New York a decision to this effect by the surrogate was reversed by the appellate court;⁸ and in Ohio the wife's estate was also held liable,⁹ and so in Massachusetts;¹⁰ and in Rhode Island by force of statute.¹¹ It is held that neither

Estate not liable for widow's funeral; nor that of a deceased wife for her funeral.

Post-mortem examination.

the costs of a coroner's inquest,¹² nor the expenses of a post-mortem examination by a physician, in the in-

¹ *Jennison v. Hapgood*, 10 Pick. 77, 88.

² *Sullivan v. Horner*, 41 N. J. Eq. 299, 303.

³ *Little v. Williams*, 7 Ill. App. 67, 69, disallowing \$42.35 for a tombstone, because the estate was insufficient to pay preferred claims: *Spire v. Lovell*, 17 Ill. App. 559.

⁴ *Morgan v. Morgan*, 83 Ill. 196.

⁵ *Lawall v. Kreidler*, 3 Rawle, 300.

Where husband, wife, and child perished in the same accident, the funeral expenses of all were allowed against the husband's estate: *Sullivan v. Horner*, 41 N. J. Eq. 299.

⁶ *In re Weringer*, 100 Cal. 345; *Patterson v. Patterson*, 59 N. Y. 574, 583; *Jenkins v. Tucker*, 1 H. Bl. 90, 93; *Ambrose v. Kerrison*, 10 C. B. 776, 779; *Sears v. Giddey*, 41 Mich. 590.

⁷ *Garvey v. McCue*, 3 Redf. 313; *Staple's Appeal*, 52 Conn. 425; *Galloway v. McPherson*, 67 Mich. 546. In Pennsylvania, the husband being primarily liable, the wife's estate is only liable if he is insolvent: *Waesche's Estate*, 166 Pa. St. 204. In California, while the husband is primarily liable, yet, if he is poor, and the deceased wife's estate is large, a reasonable

amount may be allowed out of her estate: *In re Weringer*, 100 Cal. 345; and in New Jersey, while the husband is primarily liable, yet if he is insolvent, the wife's estate is liable to a proper third party: *Gould v. Moulahan*, 53 N. J. Eq. 341.

⁸ *McCue v. Garvey*, 14 Hun, 562, 564. The reasons given by the court were not satisfactory to the surrogate, who refused to follow the rule indicated; but the appellate court, in the subsequent case of *Freeman v. Coit*, 27 Hun, 447, 450, adhered to its previous decision, distinguishing, however, between funeral expenses and charges for medical services during the wife's last illness, which the husband was not allowed to recover.

⁹ *McClellan v. Filson*, 44 Oh. St. 184.

¹⁰ *Constantinides v. Walsh*, 146 Mass. 281; and if the husband is compelled to pay the bill, he may recover the amount from the estate of his wife: *Morrissey v. Mulhern*, 168 Mass. 412.

¹¹ *Moulton v. Smith*, 16 R. I. 126, but disallowing a physician's bill for services during the wife's last illness.

¹² *Houts v. McCluney*, 102 Mo. 13.

terest of science, constitute any part of the funeral expenses.¹ So a dinner, furnished by the owner of the house from which the deceased was buried to the persons who had attended the funeral, after their return, and
 [* 763] feed * furnished to their horses, according to the custom of the neighborhood, were held not chargeable to the estate.²

Meals for guests, and horse-feed.

§ 359. **Extent of Allowance for Funeral Expenses out of Insolvent Estates.**—It has never been questioned that the funeral expenses are to be restricted to the amount necessary to bury the deceased in the style usually adopted for persons of the like rank and condition in society.³ A distinction is observed in this respect between solvent and insolvent estates, the rights of creditors being looked upon as more imperative than those of the next of kin.⁴ In early times very strict rules were established to limit the amount allowed for funeral expenses as against creditors; but, probably in consequence of the change in the value of money, and also, no doubt, because more liberal views prevailed in the course of time, the limits were, from time to time, extended by the courts. Thus the authorities refer to 11s. 6d. as the maximum allowed in Baron Powell's circuit toward the close of the seventeenth century;⁵ in 1745, £2 was allowed;⁶ and about the same time Chancellor Hardwicke announced that at law, where a person died insolvent, the rule was that no more shall be allowed for a funeral than is necessary, —at first only 40s., then £5, and at last £10. He thought this a hard rule, even at law, and held that a court of chancery was not bound by such strict rules.⁷ In 1830, the limit mentioned by Lord Holt was thought to be too narrow, and £20 was allowed under the circumstances of the case, without fixing a maximum as a rule.⁸ £100 was suggested as a reasonable sum by the creditors of a deceased insolvent nobleman, in a case arising soon after.⁹

Distinction between solvent and insolvent estates.

Costs allowed in ancient times.

But no precise rule is laid down at the present time, either in England¹⁰ or America;¹¹ as in cases of solvent
 [* 764] estates, so in those * of insolvents, reasonable expenses according to the decedent's condi-

No precise rule possible in modern times.

¹ Smith v. McLaughlin, 77 Ill. 596.

⁷ He accordingly allowed £60: Stag v. Punter, 3 Atk. 119.

² Shaeffer v. Shaeffer, 54 Md. 679, 684.

⁸ Hancock v. Podmore, 1 B. & Ad. 260, 265.

³ 3 Redf. on Wills, 243; Wms. Ex. [968]; Schoul. on Ex. § 421; Willard on Ex. 272; Kelley, Pr. Guide, § 220.

⁹ £2,210 had been expended in this case, which the Vice-Chancellor disallowed: Bissett v. Antrobus, 4 Sim. 512.

⁴ See ante, § 358; In re Weringer, 100 Cal. 345.

¹⁰ Wms. Ex. [970], citing Edwards v. Edwards, 2 C. & M. 612; Reeves v. Ward, 2 Scott, 390, 395.

⁵ On the authority of Longueville, as reported in East India Company v. Skinner, Comb. 342; but Lord Holt allowed £10 in this case.

¹¹ Sullivan v. Horner, 41 N. J. Eq. 299, 304.

⁶ Greenside v. Benson, 3 Atk. 248, 249.

tion in life must be allowed. In determining what is reasonable, an undertaker is chargeable with only such knowledge as to the decedent's property, etc., as is apparent upon reasonable observation, and is entitled to payment of his demand in full, if in accordance with decedent's apparent condition, although the estate prove insolvent.¹ But although payments for gravestones, monuments, etc., are held to be proper funeral expenses, if not in derogation of the rights of creditors,² yet it is held that the expenditure should not be incurred without the advice of the probate court, because it is not necessary before the state of the assets have been ascertained;³ and authorities are not wanting which hold that expenses for monuments are in no case a proper charge against creditors.⁴ And while the preponderance of late cases seems to allow such expenditures, even in cases of insolvent estates, it is obvious that they should never exceed the cost of a plain stone to mark the grave and indicate the name of the deceased.⁵ In Louisiana the judge may reduce the funeral charges of an insolvent estate, upon request of any creditor, to a reasonable rate, regard being had to the station in life which the deceased held; but in no case can the judge allow more than \$200.⁶

§ 360. **Extent of Allowance in Solvent Estates.**—Impossible as it is to lay down a precise rule to be followed in respect of the funeral expenses allowable in insolvent estates, even greater latitude is necessary where there are sufficient assets to pay the debts. The circumstances determining what is reasonable in such cases are numerous, and the degree of importance attached to each is incapable of exact measurement, impressing themselves more or less strongly on different minds. Public opinion and general expectation, fashion, the feelings of friends and neighbors, the age, standing, property, and habits of life of the decedent, as well as the standing and [* 765] rank in society of the surviving family, must all be considered.⁷ But large expenditures for burials, disproportioned to the assets of an estate, should not be encouraged.⁸ If greater economy were insisted on, in small as well as in

¹ *In re Rooney*, 3 Redf. 15.

² See cases under § 358, *ante*, p. * 760 *et seq.* In *Springsteen v. Samson*, 32 N. Y. 703, 714, the majority of the court, however, held the expenditure of \$285 for a monument unauthorized in a solvent estate.

³ *Fairman's Appeal*, 30 Conn. 205, 209; *Matter of Erlacher*, 3 Redf. 8, 12.

⁴ *Willard on Ex. 273*; and see authorities under § 358, *supra*.

⁵ In *Fairman's Appeal*, *supra*, the amount allowed was \$15. In *Tuttle v.*

Robinson, 33 N. H. 104, 117, the amount indicated as proper in an estate yielding \$3,000 to the distributees was from \$15 to \$30.

⁶ Civ. Code, art. 3193, 3194.

⁷ 3 Redf. on Wills, 243; *Estate of Milenovich*, 5 Nev. 161, 182.

⁸ *Estate of McKenna*, 1 Leg. Gaz. Rep. 12. Says Brewster, J.: "The assets of an estate should not be squandered in ostentatious displays for the gratification of the weakest of all vanities": *Bradley's Estate*, 11 Phila. 87.

great estates, many a widow and heir struggling under the privations of bitter poverty would have reason to be thankful for being prevented from wasting a substantial part of their means upon the fruitless pomp and ceremony of an extravagantly costly funeral.¹ It should also be remembered, that if the survivors sincerely desire to commemorate the merits of a departed spouse, father, or other relative, or one admired for his virtues, by the erection of an imposing monument, the offering should be their voluntary act; it loses its value and significance if paid for out of the decedent's estate.² And where a relative, other than the executor or administrator, contracts for the erection of a monument, the estate is not liable therefor.³ The discretion vested by a testator in his executor, in the procuring and erection of a suitable monument over his grave, is not to be exercised without regard to the rights of legatees, but should be controlled by the courts, to avoid injustice;⁴ but if there is no devise over, and the whole residuum is placed at the disposition of the executor, courts will not interfere with his discretion as to the costs of a monument.⁵ Nor can a testator absolutely limit the executor in the performance of his duty to give a decent burial to the testator by any provision in the will, when such provision is inadequate.⁶

Monuments should be the voluntary act of survivors at their own cost.

Discretion of executor directed by the will to erect a monument.

§ 361. **Expenses of Last Illness when preferred to Debts.**—Physicians' bills and other expenses of the last illness are sometimes classed with funeral expenses.⁷ So, in Utah;⁸ and in Texas if presented within sixty days [* 766] after the grant of letters; * otherwise, the allowance to the widow and for the support of the family take precedence.⁹ But if there be no statutory provision to such effect, expenses of the last illness cannot be classed with those for the funeral, because they necessarily accrue *before* the death, and therefore constitute a debt of the deceased; while the funeral, taking place after, cannot constitute a debt of the deceased, but only of the executor or administrator. It

Expenses of last illness classed with those for the funeral.

But only if so provided by statute.

¹ In *Offley v. Offley*, reported in Finch's Pr. Ch. 26, decided in 1691, when the purchasing power of money was very much greater than it is now, £600 was allowed by the court of chancery; and yet the personal property of the estate was insufficient to pay its debts.

² *Per Sargent, J.*, in *Lund v. Lund*, 41 N. H. 355, 362.

³ *Foley v. Bushway*, 71 Ill. 386; *Sweeney v. Muldoon*, 139 Mass. 304; *Samuel v. Thomas*, 51 Wis. 549, 552.

⁴ *Matter of Luckey*, 4 Redf. 95, 97;

Cool v. Higgins, 23 N. J. Eq. 308, 310; *Barclay's Estate*, 11 Phila. 123, 126.

⁵ *Bainbridge's Appeal*, 97 Pa. St. 482, one of the judges dissenting: p. 486.

⁶ *In re Galland*, 92 Cal. 293, citing *Bell v. Briggs*, 63 N. H. 592.

⁷ *Campfield v. Ely*, 13 N. J. L. 150, 151; *Percival v. McVoy*, *Dudley L.* 337, 339; *Rouse v. Morris*, 17 S. & R. 328; *Wilson v. Shearer*, 9 Met. (Mass.) 504, 507; *Booth v. Radford*, 57 Mich. 357; and see *post*, § 365.

⁸ *Rev. St.* 1898, § 3870.

⁹ *Rev. St. Tex.* 1888, § 2016.

follows that in the account of the executor or administrator he can be allowed credit for expenses of last illness only as for a debt paid, of whatever class the statute assigns to it; and in the absence of statutory preferment, it will rank with other simple contract debts.¹ Of course, if there are several creditors of equal rank, and the assets are insufficient to pay them all, expenses of last illness must be paid *pro rata*.²

§ 362. **Expenses necessary in the Administration of the Estate.**

— It has already been stated,³ that for the expenses attending the accomplishment of the purpose of administration growing out of the contract or obligation entered into by the personal representative he is to be reimbursed out of the estate, and that his claim to reimbursement must be superior to the rights of the beneficiaries. The expenses under this category include those paid for probate of the will, as well in the probate court as on appeal, or other proceeding in a contest, if carried on in good faith;⁴ and the executor nominated in such will is entitled to a settlement of his account, and reimbursement for his expenses in preserving the estate and for the funeral, although the will be finally pronounced invalid;⁵ and, generally, all expenses necessary in the protection and preservation of the estate,⁶ which have been held to include the costs of establishing a claim against the estate.⁷ But the general rule seems rather to be that costs incurred by the administrator in defence of claims against the estate, or in prosecuting claims in favor of it, pertain to the *administration, and are to be allowed in full; but costs [* 767] incurred by claimants in establishing their claims stand on the same footing with the claims themselves.⁸ The allowance of counsel fees and costs is discussed in connection with the subject of accounting.⁹ Repairs necessary upon real estate of which the executor or administrator has lawful possession also constitute expenses of administration;¹⁰ if the expense incurred is general, affecting all the property of the estate, it should

¹ United States v. Eggleston, 4 Sawy. 199.

² Tweedy v. Bennett, 31 Conn. 276, 280; Bennett v. Ives, 30 Conn. 329, 335.

³ Ante, § 356; see also post, § 514.

⁴ Post, § 517, where the authorities are collected.

⁵ Gilbert v. Bartlett, 9 Bush, 49, 52, et seq.; Phillips v. Phillips, 81 Ky. 328; Browne v. Rogers, 1 Houst. 458; post, § 517.

⁶ See post, on accounting, §§ 514 et seq.

⁷ To be allowed in full, although the debts so established are paid only *pro rata*: Shields v. Sullivan, 3 Dem. 296; Matter of Randell, 2 Connolly, 29, 43.

⁸ Taylor v. Wright, 93 Ind. 121, 123; Shute v. Shute, 5 Dem. 1. So of costs of another administration of which the decedent was administrator: Hullett v. Hood, 109 Ala. 345, 353.

⁹ Post, §§ 515, 516, 517.

¹⁰ Post, § 518.

be charged generally, but if attaching to a specific portion or piece of property, it should be charged against such portion or piece.¹

The liability of the administrator as such cannot be treated as a continuation of a running account with the deceased in his lifetime;² nor can the defendant in an action by an administrator upon a contract made by him as such, or to recover assets of the estate, set off or counter-claim a debt due him from the deceased.³ And it is held that one who renders services for a trust estate has no recourse against the trust, except to subject an equitable demand of the trustee to the payment of the debt.⁴

§ 363. **Provisional Alimony for the Surviving Family.**—The provisions, money, and other personal property set apart under the statutes of the several States for the support of the widow and dependent children during the period intervening before they come into possession of dower or distributive share are also paramount to the claims of creditors of the decedent. The liability of the administrator, in this respect, is purely statutory, as this species of protection to the surviving family is unknown to the common law.⁵

Alimony for surviving family paramount to claim of creditors of deceased.

Whether or not this allowance takes precedence over mortgages, judgment liens, or preferred debts owing by the decedent, or expenses of last illness, funeral and administration expenses, has been discussed in an earlier section, to which reference is hereby [* 768] made.⁶ * In some of the States the appraisers are directed to set apart and return the allowance in a schedule separate from the inventory, with which the administrator has then nothing to do;⁷ or if brought into the inventory, they are not deemed general assets, and are fully accounted for by showing a delivery pursuant to the decree of the court, or the provision of the statute.⁸ In Ohio, it is held that this allowance is payable out of the proceeds of the sale of real estate recovered by the administrator from a fraudulent grantee.⁹

The distinction between the provisional alimony allowed to widow and surviving family, and the distributive share of the widow and children, must not be lost sight of; because the administrator cannot be allowed credit in his account as against creditors of the estate, for the disbursements on

Distinction between alimony and distributive share.

¹ Patton's Estate, Myr. 241; Emanuel v. Norcum, 7 How. (Miss.) 150, 154.

² Bucklin v. Chapin, 1 Lans. 443, 450.

³ McLaughlin v. Winner, 63 Wis. 120, 124, citing numerous authorities. See the subject of set-off: § 398.

⁴ Lyon v. Hays, 30 Ala. 430; Magwood v. Johnston, 1 Hill, Ch. 228, 232; Garnett v. Carson, 11 Mo. App. 290.

⁵ Ante, §§ 77 et seq.

⁶ Ante, § 85.

⁷ Collier v. Collier, 3 Oh. St. 369, 375; Kapp v. Public Administrator, 2 Bradf. 258.

⁸ Hollenbeck v. Pixley, 3 Gray, 521, 524; Sawyer v. Sawyer, 28 Vt. 245, 248.

⁹ Allen v. Allen, 18 Oh. St. 234. As to what property out of which the allowance may be made, see ante, § 91.

account of boarding, clothing, or schooling the minor heirs,¹ nor for medical services rendered the family after the death of the deceased,² nor for necessities furnished to the widow.³

¹ *Post*, § 519 and cases there cited; *Brewster v. Brewster*, 8 Mass. 131; *Sorin v. Olinger*, 12 Ind. 29, 33; *Prince v. Prince*, 47 Ala. 283.

² *Johnston v. Morrow*, 28 N. J. Eq. 327; *Bomford v. Grimes*, 17 Ark. 567.

³ *Washburn v. Hale*, 10 Pick. 429, 432. And see *post*, § 519.

[* 769]

* CHAPTER XXXIX.

OF THE PRIORITY OF DEBTS CREATED BY THE DECEDENT.

§ 364. **Priority of Debts at Common Law.** — At the common law the real estate of a deceased person does not constitute assets in the hands of an executor or administrator for the payment of debts unless charged thereon by will; from which it follows that a testator may charge his lands with such debts and in such order as he may prefer.¹ But as to the personal assets the executor or administrator is bound, at his peril, to observe the order of priority in the payment of the debts of his testator or intestate; for if he pay those of a lower rank first, having notice of the existence of debts of a higher degree, he must, on a deficiency of assets, answer to those of the higher degree out of his own estate.² Without notice, however, the payment of a debt of lower degree, whether voluntary or compulsive, may be pleaded in bar of the higher debt.³ So he must plead a debt of higher nature, of which he has notice, in bar of an action upon the inferior debt, and *rien ultra*, if the assets are not sufficient for both, or he will be held as admitting sufficient assets to pay both debts.⁴

Real estate not
assets at com-
mon law.

Testator may
prefer cred-
itors.

The order in which debts are payable out of a decedent's estate is, at common law, as follows: *first*, debts due the crown by record of specialty; *second*, certain debts peculiar to the English laws and customs, such as debts to the post-office for letters, money due the parish from deceased overseers of the poor, funds in the hands of officers of friendly societies, regimental debts, etc.; *third*, judgments of courts of record (except those of foreign countries), and decrees in equity rendered against the deceased in his lifetime; *fourth*, recognizances before courts of record or magistrates, and securities by statute, such as the statute merchant, statute staple, and the like; *fifth*, debts by special contract under seal,⁵ and

Priority at
common law.

¹ This principle is recognized in a recent case in Virginia to the extent of sanctioning a testator's preferment of creditors, so far as their claims were to be satisfied out of realty, but denying the power to prefer creditors out of the personalty: *Deering v. Kerfout*, 89 Va. 491, 494.

² As to the rights and liabilities of executors and administrators in paying

debts under the American system of administration, see *post*, § 520, in connection with the subject of accounting.

³ *Harman v. Harman*, 2 Show. 492.

⁴ *Rock v. Leighton*, 1 Salk. 310.

⁵ The distinction between debts by specialty and simple contract debts was abolished by statute 32 & 33 Vict. c. 46, having long before been abolished in nearly all of the American States.

rent; *sixth*, simple contract debts, those due the crown taking precedence of those due any subject, and damages for injuries to real or personal property of another.¹

* § 365. **Expenses of Funeral and Last Illness as Debts.**—[* 770]

The order of priority established in the several States differs

more or less from that existing at common law, and of course among the States themselves. In all of them, however, funeral expenses (if not treated as incident to

the administration, and therefore excluding all debts)² constitute a preferred class of debts, ranking first in all but two of the States. In North Carolina they are postponed to debts constituting a specific lien, to the extent of the property covered by the lien;³ and in Rhode Island they are postponed to debts due the United States.⁴

So expenses of the last illness, when treated as debts,⁵ generally take rank before other debts.⁶ In Louisiana, they are postponed to law charges, and precede wages to

domestic servants.⁷ In New Hampshire, they rank after expenses of administration, funeral expenses, widow's allowance, and taxes;⁸ in Rhode Island, after debts preferred under the laws of the United States.⁹ In North Carolina, no provision is made for the expenses of last illness as such, but claims for medicine and medical attendance for twelve months preceding the death are assigned to the sixth class, preceding general debts.¹⁰ In Utah,¹¹ and Texas, as already suggested,¹² they rank with funeral expenses,—in Texas, if claimed within sixty days, otherwise after the widow's allowance and expenses

¹ See Wms. Ex. [988-1050], as to the priority of debts in England.

² How far funeral expenses are treated as administration expenses, rather than debts, see *ante*, § 357. As to the right of an administrator who voluntarily pays the funeral expenses, without taking an assignment from the undertaker, to be subrogated to the latter's claim to reimbursement out of the realty, see *Fay v. Fay*, 43 N. J. Eq. 438, and a collection of cases appended thereto by the reporter.

³ Code, 1883, § 1416.

⁴ Gen. L. 1896, p. 730, § 16. But federal courts recognize the priority of funeral expenses over claims due the United States: *United States v. Eggleston*, 4 Sawy. 199, 204.

⁵ See *ante*, § 361.

⁶ In Illinois, where expenses of the last illness are preferred to other debts, an exception is made against physicians, whose bills are postponed to funeral expenses, provisional alimony to widow and

family, other expenses of last illness, and debts due the school fund: *St. & C. Ann. St. 1896*, p. 301, § 70. In Georgia, where the statute is said to be conflicting, it is held that the year's support has preference over all debts, expenses of last illness included: *Whitehead v. McBride*, 73 Ga. 741; and the statute now so provides: *Code, 1895*, § 3424. See, as to the preference of the widow's allowance, *ante*, § 85.

⁷ Voorhies' Rev. Civ. Code, 1888, art. 3199-3204. But in Louisiana all preferred claims must be recorded, except such expenses as arise after the death; and no preference can be given if the record is not proved: *Succession of Elliott*, 31 La. An. 31, 37, citing *Civ. Code*, art. 3274.

⁸ *Publ. St. 1891*, ch. 192, § 20.

⁹ *Gen. L. 1896*, p. 730, § 16.

¹⁰ *Code, 1883*, § 1416.

¹¹ *Rev. St. 1898*, § 3870.

¹² *Ante*, § 361.

of administration.¹ The statutes of Kentucky,² Maryland,³ New York,⁴ and Tennessee⁵ seem to contain no provision for the expenses of last illness. In Florida, funeral expenses rank next after [* 771] *expenses of administration; then debts for board and lodging during last illness, and next physicians' and druggists' bills during last illness.⁶

§ 366. **Debts to the Government of the United States.** — Of the debts created by the decedent in his lifetime, those which are due to the government of the United States are payable before all others. This is recognized by the statutes of some of the States,⁷ which place debts having preference under the laws of the United States in a class preceding all other debts, except that in most of them funeral expenses and expenses of last illness are preferred. But the preference in favor of the United States exists under the law of Congress,⁸ and is valid for all States, whether their statutes are silent on the subject, as is the case in most of them, or contain inconsistent provisions,⁹ as in North Carolina,¹⁰ Utah,¹¹ Montana,¹² and Vermont.¹³ This principle was first announced by Chief Justice Marshall,¹⁴ not without doubting whether the Act of Congress applied to other persons than receivers of public money, and with a dissenting opinion so holding of Justice Washington.¹⁵ But the doctrine announced by Chief Justice Marshall has been maintained in a series of decisions,¹⁶ and is now fully acquiesced in. It goes a little

Debts due to the government of the United States.

Under law of Congress.

¹ Sayles' Ann. St. 1897, art. 2069.

² Gen. St. 1894, § 3868.

³ Pub. G. L. 1888, p. 1358, § 115.

⁴ Code C. Pr. 1897, § 2719.

⁵ Code, 1884, § 3195.

⁶ Rev. St. 1892, § 1909.

⁷ California, Connecticut, Georgia (the last two placing debts due to the United States and those due to the State in the same class), Idaho, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New York, North Dakota, Ohio, Oregon, Rhode Island, Virginia, Washington, West Virginia, and Wisconsin.

⁸ "Where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied": 1 St. at Large, 515, § 5; Rev. St. § 3466. If the executor or administrator pay any other debt of the deceased before such as may be due to the United States, he becomes answerable in his own person and estate to the United States: Rev. St. § 3467.

⁹ United States v. Duncan, 4 McLean, 607; Commonwealth v. Lewis, 6 Binn. 266, 269; Aikin v. Dunlap, 16 John. 77, 85; United States v. Hahn, 37 Mo. App. 580.

¹⁰ Placing taxes assessed in the lifetime in the third, and debts due to the United States together with debts due the State of North Carolina in the fourth class: Code, 1883, § 1416.

¹¹ Postponing such debts to wages (limited in amount) of employees: Rev. St. 1898, § 3870.

¹² Mont. St. 1895, § 2151 (same as Utah).

¹³ In this State, taxes are placed in the third, debts due the State of Vermont in the fourth, and debts due the United States in the fifth class: St. 1894, § 2503.

¹⁴ United States v. Fisher, 2 Cr. 358, 385.

¹⁵ Ibid., p. 397.

¹⁶ Turning mostly upon the effect of voluntary assignments in favor of creditors upon their debts due to the United States: United States v. Hooe, 3 Cr. 73,

Extent of this preference in America.

further than the English preference in favor of the crown, which, before the distinction between specialties and simple contract debts was abolished, permitted specialties to the subjects, and still permits judgments of record in their favor to be paid before simple contract debts due the crown; while the Act of Congress makes no distinction in this respect, but places all debts due the general government before all other debts whatever.¹ This priority, however, does not operate as a lien upon the property of the debtor,² nor in derogation of a lien existing before his death,³ nor of the widow's allowance under the State law,⁴ and necessarily depends upon notice being given to the executor or administrator, either by action against him or otherwise, in default of which payment to other creditors cannot make him liable as for *devastavit*.⁵ And the priority extends only to the net proceeds of the property of the deceased after payment of the necessary expenses of administration, including taxes and funeral charges, but not expenses of last illness.⁶

§ 367. **Debts to the State and State Corporations.**—In most States, taxes, rates, and other dues to the State rank before debts due the citizens. It is so provided by statute in Alabama,⁷ Arizona,⁸ Connecticut,⁹ Georgia,¹⁰ Idaho,¹¹ Iowa,¹²

Kansas,¹³ Maine,¹⁴ Maryland,¹⁵ Massachusetts,¹⁶ Minnesota,¹⁷ Missouri,¹⁸ New Hampshire,¹⁹ New York,²⁰ North Carolina,²¹ Ohio,²²

88; *Thelusson v. Smith*, 2 Wheat. 396; *Conard v. Atlantic Insurance Co.*, 1 Pet. 386; *United States v. Hack*, 8 Pet. 271; *Beaston v. Farmers' Bank*, 12 Pet. 102, 133; *United States v. Backus*, 6 McLean, 443.

¹ *United States v. Duncan*, 4 McLean, 607.

² See cases under notes, *supra*.

³ *Brent v. Bank of Washington*, 10 Pet. 596, 610, *et seq.*

⁴ *Postmaster v. Robbins*, 1 Ware, 165, 167.

⁵ *Dictum* by Marshall, C. J., in *United States v. Fisher*, 2 Cr. 390, note; *Aikin v. Dunlap*, 16 John. 77, 85; *United States v. Rickett*, 2 Cr. C. C. 553; *United States v. Clark*, 1 Paine, 629, 642.

⁶ *United States v. Eggleston*, 4 Sawy. 199; *United States v. Hunter*, 5 Mas. 229; *Postmaster v. Robbins*, 1 Ware, 165, 167.

⁷ Code, 1896, § 126.

⁸ Rev. St. Ari., ¶ 1232.

⁹ Gen. St. 1888, § 575.

¹⁰ Code, 1895, § 3424.

¹¹ Rev. St. 1887, § 5630.

¹² Rev. Code, § 2420.

¹³ Gen. St. 1889, § 2864.

¹⁴ Rev. St. 1883, p. 555, § 1.

¹⁵ Publ. Gen. L. 1888, art. 93, § 115; *Bonaparte v. State*, 63 Md. 465.

¹⁶ Pub. St. p. 776, § 1.

¹⁷ Gen. St. 1891, § 5735.

¹⁸ Laws, 1881, p. 35; Rev. St. 1889, § 6761–6763. *State v. Donaldson*, 28 Mo. App. 190. Taxes on personalty, whether they accrue before or after decedent's death, are demands which may be established against the estate: *State v. Tittman*, 103 Mo. 553; *State v. Seahorn*, 139 Mo. 582, 604; and such taxes on personalty accruing during the administration are payable without presentation, and are not barred by any Statute of Limitation either general or special, and do not depend for their rank or classification on the time of presentation: *State v. Tittman*, 119 Mo. 661.

¹⁹ Publ. St. 1891, ch. 192, § 19.

²⁰ Code, Civ. Pr. 1897, § 2719.

²¹ Code, 1883, § 1416.

²² *Bates' Ann. St.* 1897, § 6090, pl. 4. As to the manner of establishing a claim for taxes, see *Gager v. Prout*, 48 Oh. St. 89.

Oklahoma,¹ Oregon,² Rhode Island,³ South Carolina,⁴ Tennessee,⁵ Utah,⁶ Vermont,⁷ Virginia,⁸ and * West Virginia.⁹

A noteworthy exception to the general rule in this respect is made by Pennsylvania, whose statute directs debts due the Commonwealth to be paid last.¹⁰ In some of the States taxes and public dues to counties and incorporated cities and towns are placed in the same class with debts due the State. Debts due to municipalities and State corporations. The phrase "debts due the public" embraces a debt due by the decedent on the bond, as surety, of the county treasurer;¹¹ it does not, however, include debts due to an incorporated bank, although owned entirely by the State;¹² nor does the phrase "debts and arrearages to the States."¹³ But in Georgia it is held, that, although such a debt is not in legal contemplation due to the State,¹⁴ yet the legislature may give it priority in the same manner, and does so by giving to a banking corporation the same powers and rights as the State possessed;¹⁵ it was there also held, that debts due to a railroad owned by the State constitute a part of the State's revenues, and are within the statutory priority over claims of citizens;¹⁶ but debts due to a county are not entitled to rank with debts due to the State.¹⁷ In Illinois, debts due to the school fund have priority over debts owing to other persons.¹⁸

Whether the State is entitled, in the absence of statutory enactment, to the priority claimed by the crown under the common law, was doubted in Virginia,¹⁹ denied in South Carolina,²⁰ but affirmed in a series of early cases in Maryland,²¹ and Georgia.²² Preference of State in the absence of statutes.

¹ St. 1890, ch. 19, § 27, pl. 4.

² Code, 1887, § 1183.

³ G. L. 1896, p. 730, § 16.

⁴ Rev. St. 1893, § 2048. It has been

held in this State that the State does not lose its general priority by taking special security: *Lenoir v. Winn*, 4 Des. Eq. 65, 70. But this priority extends only to

⁵ Code, 1884, § 3195.

⁶ Code, Utah, 1898, § 3870, placing debts due the State in the same class with those of the U. S. and postponing them only to wages of employees to the extent of \$100, accruing within 60 days of death.

⁷ St. 1894, § 2503.

⁸ Code, 1887, § 2660.

⁹ Code, 1887, p. 667, § 25.

¹⁰ *Pep. & L. Dig.* 1896, p. 1432, § 16.

¹¹ *Baxter v. Baxter*, 23 S. C. 114, 118.

¹² *Bank of the State v. Gibbs*, 3 McCord, 377.

¹³ *Fields v. Wheatley*, 1 Sneed, 351, 353.

¹⁴ *Bank of the United States v. Planters' Bank*, 9 Wheat. 904.

¹⁵ *Central Bank v. Little*, 11 Ga. 346, 349; *Mahone v. Central Bank*, 17 Ga. 111, 119.

¹⁶ *State v. Dickson*, 38 Ga. 171, 183.

¹⁷ *Hargrove v. Lilly*, 69 Ga. 326, 328.

¹⁸ *Rev. St.* 1896, p. 301, § 70.

¹⁹ 1 *Lomax on Ex. 611 et seq.* (2d ed.), and cases there cited; *Leake v. Ferguson*, 2 Gratt. 419, 438, *Nimmo v. Commonwealth*, 4 Hen. & M. 57.

²⁰ *State v. Harris*, 2 Bailey, 598, 599.

²¹ *State v. Rogers*, 2 Har. & McH. 198; *Murray v. Ridley*, 3 Har. & McH. 171, 176; *Contee v. Chew*, 1 Har. & J. 417; *State v. Bank of Maryland*, 6 Gill & J. 205, 226; *Smith v. State*, 5 Gill, 45, 51.

²² *Robinson v. Bank of Darien*, 18 Ga. 65, 96.

It is generally held that a claim for taxes is such a one as should be paid by the personal representative even without presentation to him or allowance by the court,¹ but that it may also be proved up as a claim against the estate in the probate court like other demands.² The duties and liabilities of the personal representative respecting the payment of taxes is more fully discussed elsewhere.³

§ 368. **Debts owing in a Fiduciary Capacity.**—Money held or owing by an executor, administrator, guardian, or other person sustaining a fiduciary relation at the time of his death, constitutes, in so far as such money or other property *cannot be specifically traced and segregated from [* 774] the decedent's own money and property, a debt corresponding to the second grade of debts in England. Such debts are preferred to judgment and simple contract debts in Colorado,⁴ Georgia,⁵ Illinois,⁶ Kentucky,⁷ Virginia,⁸ and West Virginia.⁹ In Delaware¹⁰ and South Carolina,¹¹ a debt due from an administrator or guardian was held to constitute a debt ranking with bond debts.

The preference of trusts is not extended to appointees of another State,¹² nor to a debt due for money collected by an attorney.¹³ It is not intended to embrace all kinds of trust in the broadest meaning of the term, such as factors and ordinary agents holding funds of their principals; but the statutory term is to be construed in its more restricted sense as referring to special or technical trusts and not those which the law implies from a contract.¹⁴ A note given by an executor as such to a legatee, for the balance due him, is held to be

¹ *Ante*, § 329; *post*, § 386.

² *State v. Tittman*, 103 Mo. 553; *In re Jefferson*, 35 Minn. 215.

³ On personal property, *ante*, § 329; on real estate, *post*, § 518.

⁴ Code, 1891, § 4780.

⁵ Code, 1895, § 3424; *Ragland v. Justices*, 10 Ga. 65, 73; *Johnson v. Brady*, 24 Ga. 131, 136.

⁶ Rev. St. 1896, p. 301, § 70.

⁷ Gen. St. 1887, p. 603, § 33; *Salter v. Salter*, 6 Bush, 624, 633; *Hemphill v. Lewis*, 7 Bush, 214; *White v. Corrico*, 2 Met. (Ky.) 232; *Muldoon v. Crawford*, 14 Bush, 125.

⁸ Code, 1887, § 2660.

⁹ Code, 1887, p. 667, § 25.

¹⁰ *Robinson v. Robinson*, 3 Harr. 433, 440.

¹¹ *Rice v. Cannon*, 1 Bai. Ch. 172, 176, on the authority of *McDowell v. Caldwell*, 2 McCord Ch. 43, 56, deducing the dignity of a claim against a deceased guardian from the circumstance that the liability constituted a breach of the guardian's bond, whereby the penalty was forfeited and became a debt by specialty. In *Rolain v. Darby*, 1 McCord Ch. 472, 476, a few years previously, it was held that a breach of trust constitutes a simple contract debt.

¹² *Caruthers v. Corbin*, 38 Ga. 75, 98.

¹³ *Smith v. Ellington*, 14 Ga. 379.

¹⁴ *Svanoe v. Jurgens*, 144 Ill. 507, and cases cited; *Shepherd v. Furness*, 153 Ill. 590.

such demands as constitute specific liens, such as taxes: *State v. Harris*, 2 Bailey, 508; and it has no prerogative over liens, judgments, mortgages, &c., held by citi-

zens: *Commissioners v. Greenwood*, 1 Des. 450, 453; *Baxter v. Baxter*, 23 S. C. 114, 118.

within the statute;¹ but not a note given by one executor to another for a loan, which, with a third party as security, is turned over to the legatee.² But the preference extends to the debt of a father who has received property belonging to his minor child as natural guardian, although his receipt in that capacity would not discharge the person paying from liability to the minor.³ It makes no difference that the debt due in a fiduciary capacity is owing by a deceased partner, where his separate assets are insufficient to pay all debts.⁴

Without statutory provision on the subject, it seems that no preference can be given to debts of this kind over other claims.⁵ But it is held in Florida, that money held by a guardian passes, at his death, to his legal representative *in trust*, and does not therefore constitute assets, but must be accounted for to the ward without being proved as a debt.⁶

§ 369. **Judgments against the Decedent in his Lifetime.** — Under the English law, debts of record come next in order of priority [*775] after debts by particular statutes. They constitute a preferred class in many of the States; ranking by themselves in the States of Arkansas,⁷ Delaware,⁸ Kansas,⁹ Maryland,¹⁰ Minnesota,¹¹ Missouri,¹² New Jer-

¹ *Latimer v. Sayre*, 45 Ga. 468; *Yerby v. Lynch*, 3 Gratt. 460, 466; *Smith v. Blackwell*, 31 Gratt. 291, 297.

² *Ibid.*

³ *Curle v. Curle*, 9 B. Mon. 309.

⁴ *Robinson v. Allen*, 85 Va. 721, 730.

⁵ *Green v. Brooks*, 25 Ark. 318, 322; *Fox's Estate*, 92 N. Y. 93. But see, apparently to the contrary: *Smith v. Combs*, 49 N. J. Eq. 420; *Conn. Trust Co. v. Security Co.*, 67 Conn. 438; and in Michigan it was intimated that if a guardian actually holds the money for his ward in trust, it should not be distributed *pro rata* with his other creditors upon his death; but the point decided was that a claim for damages for neglect of his duty as guardian was not preferred to other debts of the estate: *Dodson v. McKelvy*, 93 Mich. 263, 273. See *ante*, §§ 305, 312, as to property held by the decedent in *auter droit*, and the administrator's liability in regard thereto in the absence of statutory provision; and *post*, § 402, p. *848, as to the necessity of proving such claims within the time and with the formalities required by the probate law.

⁶ *Governor v. Hooker*, 19 Fla. 163, 172.

⁷ Dig. of St. 1894, § 110, pl. 3; if presented for allowance within one year, if not, they go with other claims into the fifth class: *Keith v. Parks*, 31 Ark. 664. Delivery bond judgments are included: *Eddins v. Grady*, 28 Ark. 500.

⁸ *Laws*, 1852 (ed. of 1874), p. 546.

⁹ *Gen. St.* 1889, § 2864.

¹⁰ *Publ. Gen. L.* 1888, art. 93, § 115.

¹¹ *St.* 1878, p. 589, § 38. But this provision seems to be omitted in the Revision of 1891.

¹² *Rev. St.* 1889, § 183. They take the fourth class if presented within one year for classification; if not, they take the sixth class with all other claims presented during the second year: *State Bank v. Tutt*, 44 Mo. 366. Formerly on notice to the administrator: *Bryan v. Mundy*, 14 Mo. 458; *Ewing v. Taylor*, 70 Mo. 394, 398, overruling intermediate cases. But in *Wernse v. McPike*, 100 Mo. 476, 487 (followed in *Stephens v. Bernays*, 119 Mo. 143, 147), it was held that filing the judgment for classification was sufficient. This decision seems to ignore the distinction between judgments rendered against a decedent in his lifetime, and one against his executor or administrator after

sey,¹ New York,² North Carolina,³ and Wyoming;⁴ and classed with mortgages, recognizances, and other liens existing at the time of the debtor's death, in California,⁵ Georgia,⁶ Idaho,⁷ Indiana,⁸ Montana, Nevada,⁹ Oregon,¹⁰ South Carolina,¹¹ Texas,¹² and Washington.¹³ In some States the statutes giving priority to judgments have been repealed;¹⁴ and in many of them such preference has never been given, in which, therefore, in so far as the priority of payment of the debts of deceased persons is fixed by statute, the common-law preference in favor of judgments does not exist.

It is to be observed, that, in those States in which judgments are ranked with mortgages, recognizances, and other liens existing against the decedent's property at the time of his death, the priority accorded them is but the recognition of their quality as *liens* upon the property descending.¹⁵ Hence the priority extends only to the property to which *the judgments attach as such lien; and they are payable [* 776]

his death. In the latter instance notice to the administrator preceded the judgment and the representative had opportunity to make any defence of which he was aware. But against a judgment in the lifetime, — dormant, it may be, until revived by the "classification," — he can make no defence, if he have no notice thereof, although the same may be impeachable for the want of jurisdiction in the court having rendered it, or may be set off by a judgment in favor of the deceased, or may have been satisfied, of which the administrator might make proof by record or otherwise. And in a later case the court recognized the administrator's right to appear and plead payment, but does not point out how he is to appear without having notice: *McGinnis v. Loring*, 126 Mo. 404, 411. As to the notice which executors and administrators are required to take, at their peril, of judgments of record against the decedent remaining unsatisfied at the time of his death, see *infra*, p. * 777.

¹ Gen. St. 1896, p. 2368, § 58, classing judgments with funeral charges and physicians' bills during last illness.

² Code, C. Pr. N. Y. 1897, § 2719.

³ Code, 1883, § 1416.

⁴ Rev. St. Wyo. 1887, § 2132.

⁵ Code, Civ. Pr. 1885, § 1643.

⁶ Code, 1895, § 3424. They have priority over debts for rent, bonds, and other obligations, notes and open accounts, and

stand next in dignity to debts due the public, payable according to their date: *Davis v. Smith*, 5 Ga. 274, 282.

⁷ Rev. St. Idaho, 1887, § 5606.

⁸ Ann. St. 1894, § 2534, pl. 5. The words, "Judgments which are liens upon the decedent's real estate," contained in the Rev. St. of 1876, are omitted in the later revisions, in lieu of which the following are inserted: "Debts secured by liens upon the personal and real estate of the deceased, created or suffered by him in his lifetime, and continuing in force."

⁹ Rev. St. 1885, § 2908.

¹⁰ St. 1887, § 1183.

¹¹ Rev. St. 1893, § 2048. Judgments recovered after a fraudulent assignment, and a sale by the assignee before the proceeding to set aside the assignment, are to be paid *pro rata* with simple contract debts: *Le Prince v. Guillemot*, 1 Rich. Eq. 187, 221.

¹² Sayles' Tex. Civ. St., art. 2091.

¹³ Code, Wash. 1896, § 5568.

¹⁴ So in Pennsylvania, in 1834: *Deichman's Appeal*, 2 Whar. 395, 396; *Kentucky*, in 1869. *Place v. Oldham*, 10 B. Mon. 400; the omission in the Revision of the Statutes in Indiana, above referred to, seems to have the same effect.

¹⁵ See, as to distinction between the priority of judgments as liens, and as constituting a debt of higher grade, *Kerr v. Wimer*, 40 Mo. 544, 553.

according to seniority, until such property is exhausted.¹ Unless preferred by the statute as debts of higher dignity, they rank with ordinary debts for such amounts as remain unsatisfied after exhausting the property over which the lien extends.²

At common law, however, and in those of the States in which judgments are assigned to a preferred class by virtue of their dignity as debts, they are payable out of the general assets, without regard to their seniority, whether of operative force or dormant, ratably, if there are not sufficient assets to pay all of them in full.³ The reason of the priority accorded to them is to be found in their superior dignity as debts of record, fixed and unquestionable, over mere choses in action. It is analogous to the preference formerly given to specialties over simple contract debts. The distinction drawn at common law between judgments of courts of record and those of courts not of record, recognized in some of the States,⁴ does not, therefore, commend itself as just or logical, and the preponderance of authorities is against this distinction,⁵ except that, as will be noticed below, administrators are required, in some States, to take notice of judgments rendered against the deceased by courts of record, but not of those of justices of the peace, until notice has been served upon them.

As at common law,⁶ so in the several American States, the preference, where it is given, extends only to domestic judgments; those of sister States or foreign countries are placed in the same class with simple contract debts.⁷

And so, by the words of the statute, the preference [*777] is given only to judgments rendered in the lifetime of the debtor, and extends in no case to a judgment rendered against the administrator.⁸ But where the

Preference when due to their dignity as debts of record.

Distinction between judgments of courts of record, and of courts not of record.

Preference extends only to domestic judgments, and only when rendered before debtor's death.

¹ Bassett v. Slater, 81 Mo. 75.

² King v. Morris, 40 Ga. 63; Williams v. Price, 21 Ga. 507 (holding that dormant judgments are not entitled to priority over bonds and other obligations, and must be revived before the administrator can pay them); Hocker's Estate, 14 Philad. 659, holding that the liens of judgment prevail over preferred debts until the fund is exhausted; to same effect, Ramsey's Appeal, 4 Watts, 71; Bryan's Estate, 4 Philad. 228, 235; Wade's Appeal, 29 Pa. St. 328; Galloway v. Bradfield, 86 N. C. 163, 166.

³ Ainslie v. Radcliff, 7 Pai. 439, 444; Trust v. Harned, 4 Bradf. 213; Kerr v. Wimer, 40 Mo. 544; Tucker v. Yell, 25 Ark. 420.

⁴ Sherwood v. Johnson, 1 Wend. 443, 446, holding that the judgment of a justice of the peace, as being of a court not of record, must be postponed to the judgment of a court of record, and that it ranks with specialties.

⁵ Bryan v. Mundy, 14 Mo. 458, 461; Patterson v. Ramsey, 1 Binn. 221 (before the preference of judgments was abolished).

⁶ Duplex v. De Roven, 2 Vern. 540.

⁷ McElmoyle v. Cohen, 13 Pet. 312; Harness v. Green, 20 Mo. 316; Gainey v. Sexton, 29 Mo. 449; Brown v. Public Administrator, 2 Bradf. 103; Cameron v. Wurtz, 4 McCord, 278.

⁸ Davis v. Smith, 5 Ga. 274, 290; Bernes v. Weisser, 2 Bradf. 212; Rut-

damages have been assessed, or a verdict rendered,¹ or where by the rules of the court a judgment may be rendered after the death of the defendant,² such judgment may be treated as a judgment obtained during the debtor's lifetime.³ So a judgment entered against a defendant in his lifetime may be revived after his death for purposes of lien and execution, by *scire facias* against his administrator, without bringing in the widow and heirs or devisees.⁴ But if such judgment is to be enforced out of the general assets, in the probate court, there must be notice to the administrator or executor of the *scire facias* to revive the same.⁵

The hardship of the common-law rule requiring executors and administrators to take notice, at their peril, of all judgments of record against the decedent remaining unsatisfied at the time of his death, led to the enactment of a number of statutes, according to the last of which⁶ no judgment not entered or docketed in books kept for that purpose shall have any preference against heirs, executors, or administrators. The statute of New York, extending the preference to judgments *docketed* and decrees *enrolled* only, accomplishes a similar purpose. In other States, by the terms of the statutes, judgments and recognizances, mortgages, etc., *of record* only, are intended, of the existence of which the executor or administrator may satisfy himself without much expense or trouble. In Delaware, the law provides that executors and administrators are deemed to have notice

ledge v. Simpson, 141 Mo. 290. Although interlocutory judgment had been obtained against the debtor before his death: Thomas v. McElwee, 3 Strobb. L. 131; Parker v. Gainer, 17 Wend. 559, 560. Where judgment of foreclosure is obtained against a mortgagor, but who dies before sale under foreclosure, the deficiency remaining after applying the proceeds of sale is not a judgment debt obtained during mortgagor's lifetime, so as to be preferred: Cook v. Jennings, 40 S. C. 204 (the judge delivering the opinion dissenting on this point).

¹ Mills v. Jones, 2 Rich. 393; *Re Dunn*, 5 Redf. 27.

² Nichols v. Chapman, 9 Wend. 452, 455; Salter v. Neaville, 1 Bradf. 488.

³ In Minnesota a judgment so rendered without making the executor or administrator a party fixes the liability of the estate to pay it "in the course of administration," and need not be presented to the commissioners appointed to audit claims against the estate: Berkey v. Judd, 27 Minn. 475. But it must be for the specific cause of action in litigation at

the time of the debtor's decease; nor can an action brought for some other purpose be changed after his death into one for the recovery of a debt against his estate; parties brought in subsequently to the decedent's death cannot claim to have an action pending at his death: Fern v. Lurthold, 39 Minn. 212, 217.

⁴ *Post*, § 410. Grover v. Boon, 124 Pa. St. 399. In Missouri, on the other hand, a statute was construed as authorizing a revival of a judgment by proceeding against the heirs or devisees of a deceased debtor without making the personal representative a party and without showing that any real estate descended; but such revival has no effect as to the personal assets of deceased, nor does it impose any personal liability upon such heirs or devisees: Stewart v. Gibson, 71 Mo. App. 232.

⁵ But if there be no administrator, and no necessity for one, and assets have gone into the hands of the heirs, they must be made parties, and the judgment will be revived at least to the extent of the assets: Schmidtke v. Miller, 71 Tex. 103, 106.

⁶ 23 & 24 Vict. ch. 38, § 3.

of judgments, decrees, recognizances, and mortgages of record in the county where letters are granted. In many of the States, as will appear more fully hereafter,¹ the judgment creditor must give the same notice of his demand as other creditors; but in some instances the common-law rule is still applied: if, in ignorance of the existence of judgments, the executor or administrator exhausts the estate by the payment of inferior claims, he makes himself personally liable.²

Notice must be given as of other debts.

[* 778] * § 370. **Recognizances, Mortgages, and Obligations of Record.** — In some of the States,³ recognizances, mortgages, and other obligations of record for the payment of money rank next after judgments; in others, as appeared in connection with the discussion of judgments,⁴ they take the same class. Recognizances differ from ordinary bonds chiefly in this, that the latter are the creation of a new debt, or an obligation *de novo*, the former are an acknowledgment on record of a prior debt, with condition to be void on performance of the thing stipulated.⁵ Mortgages, like judgments, may constitute a preferred debt as against the general assets, as they do in some States, or a general debt without preference, as in most of them, operating, however, as liens upon particular property thereby pledged. This twofold relation to the estates of deceased persons of claims secured by mortgage or pledge collaterally, gives rise to a divergence of the law on the question, whether the creditor may take a *pro rata* share in the general assets of an insolvent estate, and then fall back upon his special security for the balance of his claim, or whether he can be compelled to realize on his collateral security or mortgage before he is allowed to share in the general assets. This question will be more fully discussed in connection with the subject of proving claims against the estates of deceased persons.⁶

Obligations of record.

When operating as a lien.

§ 371. **Debts by Specialty.** — The preference existing at common law in favor of debts by specialty, as bonds, covenants, and other instruments under seal, over simple contract debts, has now been abolished, it is believed, in all the States but Georgia.⁷ There a distinction is made between liquidated demands, including foreign judgments, dormant judgments, bonds and other obligations in writing for the payment of money, and all debts the amount due on which was fixed or acknowledged by the deceased prior to his death, — which constitute the seventh

Other specialty debts exist only in Georgia.

¹ *Post*, § 397.

² *Nimmo v. Commonwealth*, 4 Hen. & M. 57.

³ Delaware and New York.

⁴ *Supra*, § 369.

⁵ *Wms. Ex.* [1006].

⁶ *Post*, § 408.

⁷ "As there is no distinction made in most of the American States, in regard to the order of payment, between specialty and simple contract debts, most that is found in the English books on this subject may be omitted here": 3 Redf. on Wills, 259.

class; and open accounts, which constitute the eighth class.¹ Thus, the breach of a covenant of warranty of title is held to constitute a debt by specialty, the damages thereon * being payable ratably with bonds or other obligations.² In South Carolina the preference given to bonds and debts by specialty over simple contract debts was abolished by Act of March 9, 1874, and they now rank with simple contract debts in the fifth class; debts due to the public constituting the second; judgments, mortgages, and executions — the oldest first — the third; and rent the fourth class.³ In all other States, specialty debts and ordinary debts are now assigned to the same class.

§ 372. **Rent.** — Debts for rent, which at common law take rank with specialties, are preferred to judgments in Delaware, not to exceed, however, the rent due for one year, whether prospective or retrospective.⁴ In Georgia they are postponed to judgments, but preferred to debts by specialty, taking the seventh class;⁵ in Maryland they are preferred to judgments;⁶ in Pennsylvania, to all debts except for funeral expenses, expenses of last illness, and servants' wages;⁷ and in South Carolina, to ordinary debts.⁸ In other States no preference is given, it is believed, to debts for rent over other debts.

It is obvious, however, that rents due or accruing upon leases held by the testator or intestate, and extending to a period not determined at the time of his death, may stand upon a different ground from other debts if the leases are beneficial to the lessees. Although the lessors may not have it in their power to enforce the payment of the rent covenanted for in preference to other claims against the estate, yet they may forfeit the lease for its nonpayment; and to avoid such forfeiture, if the estate would suffer loss thereby, it may become the duty of the executor or administrator to pay the rent in preference to other claims.⁹ So, also, while a proceeding to recover rent by distress proceedings cannot be commenced against an administrator, the landlord may have a lien upon the crops grown, which gives him a preference over unsecured claims.¹⁰

§ 373. **Wages.** — Wages due to servants constitute a preferred class of debts in several States, not exceeding, generally, one year in time, and confined to domestic servants and laborers on a farm. In this sense they constitute the third class in

¹ Code, 1895, § 3424.

² *Davis v. Smith*, 5 Ga. 274, 285.

³ *Heath v. Belk*, 12 S. C. 582, 583.

⁴ Laws, 1852, ed. of 1874, p. 546.

⁵ Code, 1895, § 3424.

⁶ Pub. Gen. L. 1888, p. 1354, § 115; *Longwell v. Ridinger*, 1 Gill, 57, 60.

⁷ *Pep. & L. Dig.* 1896, p. 1432, § 16.

⁸ Rev. St. 1893, § 2048.

⁹ Code, Civ. Pr. N. Y. 1897, § 2719; *Dennistoun v. Hubbell*, 10 Bosw. 155, 164.

¹⁰ *Lillard v. Noble*, 159 Ill. 311, in which case the landlord was also administrator of the deceased tenant.

Delaware, following next after funeral expenses and expenses [* 780] of last illness; the sixth class in Indiana, but not * exceeding \$50, for work within two months prior to the debtor's death; the fourth class in Louisiana, following expenses of last illness; the sixth class in North Carolina, following judgments; and the first class in Pennsylvania, together with debts for funeral and last illness. In Maryland it is held that the statute gives a lien for wages due for work and labor against the property of the debtor; but this is not a preference to be paid out of general assets, and cannot be enforced against the administrator except by proceeding against the property in courts of ordinary jurisdiction.¹ A somewhat similar law seems to prevail in Mississippi.²

The term "servant" has been held to mean menial servants,³ and to include bar-keepers.⁴ They waive their preference when they take promissory notes bearing interest in payment.⁵ Although the statute restricts the amount of wages preferred to one year, yet it has been held that this is not confined to the last year of the decedent's life.⁶

Wages due laborers other than menial servants are also entitled to preference in some of the States. Thus, in Alabama, debts due to overseers for the year in which the debtor dies constitute ^{Wages of} the sixth class, taking precedence of other debts; so, in laborers. Georgia, the overseer may have a lien for his wages, if he work as a common day laborer on the plantation.⁷ In California wages due miners, mechanics, salesmen, clerks, servants, and laborers, for services rendered within sixty days next preceding the death of their employer, not exceeding one hundred dollars in amount, rank next after expenses of administration, and before any other debts of the deceased person.⁸ So, in Wyoming and Kansas, "wages of servants" are classed with expenses of administration and of last sickness, and are second only to funeral expenses; the term "servant" is held in Kansas not to be confined to house-servants, but to extend to all wage-earners, including, for instance, a clerk in the store of the decedent; nor is the time of service limited to the last sickness of the deceased.⁹ In Louisiana preference is given, against living debtors as well as against the estates of deceased persons, to debts for supplies of provisions for six months back,¹⁰ and to the salaries of clerks.¹¹

¹ Everett v. Avery, 19 Md. 136, 151.

² The claim for labor performed in the debtor's lifetime may be by proper proceedings enforced against the exempt property of his estate: *Mitchener v. Robins*, 73 Miss. 383.

³ Those who make part of the family: *Ex parte Meason*, 5 Binn. 167, 175. But *contra*, in Kansas: see *infra*.

⁴ *Boniface v. Scott*, 3 Serg. & R. 351, 352.

⁵ *Silver v. Williams*, 17 Serg. & R. 292, 293.

⁶ *Martin's Appeal*, 33 Pa. St. 395, 396.

⁷ But not for his salary as overseer: *Rust v. Billingslea*, 44 Ga. 306, 318.

⁸ Code, Civ. Pr. § 1205; *Belknap*, Pr. L. 203.

⁹ *Cawood v. Wolfley*, 56 Kans. 281.

¹⁰ Code, 1870, art. 3208-3213.

¹¹ Code, 1870, art. 3214.

In Utah "wages of employees" for services rendered within sixty days prior to the decedent's death constitute the first class of debts, being postponed only to expenses of funeral, last sickness, and administration.¹

§ 374. **Simple Contract Debts.**—After the preferred debts have been discharged, all liabilities of the deceased, of any kind or nature, not included in one of the preferred classes, are entitled to be paid *pro rata*, except that in some of the States a further classification is introduced, giving claims * presented [* 781] to the administrator within a given period of the administration preference over those presented at a later period. Thus, in Kansas, all claims presented within the first year of administration are assigned to one of the first five classes; all presented after the first and within the second year, to the sixth; and all presented after the second and within the third year, to the seventh class of claims. In Arkansas, Missouri, and Texas, claims presented during the first year after the grant of letters are placed in a class preceding that to which claims presented during the second year are assigned. So in Iowa and Wyoming demands presented within six months take the precedence over those presented subsequently.

Where the time of presentation constitutes an element determining the classification of claims, the failure to present a preferred claim within the period after expiration of which claims presented take a postponed class, necessarily puts an end to its preference in every respect.² Claims presented after the first period designated by the statute equally take the postponed class, no matter what class it would have been entitled to if presented before. The reason for this is obvious, and of binding force; to enable the court to determine whether the assets are sufficient to pay any class of demands in full, and if not, to determine the dividend payable, it is indispensable that the aggregate of the debts to be paid be known to the court. But neither the court nor the administrator can take notice of the existence of a debt except in the manner pointed out by law for the exhibition or presentation of such debt or claim;³ hence, in the order of payment of debts required to be made at the end of the period during which they may be exhibited, all claims not so exhibited, of whatsoever dignity or grade they be, must be ignored.⁴ And if the order of payment so made should exhaust the estate, the administrator cannot be held liable for a debt subsequently brought to his notice. For this reason, a judgment presented for classification after the expiration of the first year of administration must be assigned to the sixth

¹ Code, Utah, 1898, § 3870.

² *Post*, § 403.

³ *Spaulding v. Suss*, 4 Mo. App. 541,

affirmed in *Pfeiffer v. Suss*, 73 Mo. 245, 251.

⁴ *Williams v. Penn*, 12 Mo. App. 393, 394. *Post*, § 403.

class, instead of the fourth, to which it would be entitled if presented during the first year.¹ The effect of the fraud of the administrator in hindering a presentation within the period giving the claim priority, is mentioned later.²

[* 782] It is to be observed, that * for the purpose of securing to a claim its proper class, so far as this may depend upon the time of presentation, it is not necessary that it be proved or established at the time of the presentation; it is sufficient if due notice be given of its existence, or if it be filed within the time and in the manner pointed out by statute. A claim so filed or presented may be proved subsequently without detriment to its dignity, if a continuance be necessary,³ provided it be established before the time fixed for the final settlement of the estate.⁴ It need hardly be mentioned, that, in States whose statutes do not create this distinction, the time of presentation does not affect the dignity of the claim.⁵

A distinction is recognized at common law between *bona fide* debts, for a valuable consideration, and mere voluntary bonds or covenants, which, though constituting a valid demand against the executor or administrator, are yet to be postponed to the Voluntary obligations. former.⁶ But under the system of classification fixed by the statutes of most States, it is not perceived how any practical distinction can be made.

¹ *State Bank v. Tutt*, 44 Mo. 366; *Keith v. Parks*, 31 Ark. 664. See *Buckhartt v. Helfrich*, 77 Mo. 376, 379.

² *Post*, § 387, p. * 806.

³ *Large v. Large*, 29 Wis. 60 (in a question of limitation); *Wile v. Wright*, 32 Iowa, 451; *Chandler v. Hockett*, 12 Iowa, 269. In Iowa the filing of the claim in the district court fixes the class regardless of when the notice of hearing is served on the administrator: *Phelps v. Greenbaum*, 87 Iowa, 347. In Missouri presentation without suit within the time giving priority is sufficient to fix the class: *Wally v. Gentry*, 68 Mo. App. 298. So the pri-

ority secured by bringing an action against the administrator is held not to be lost if a nonsuit be taken, and the suit renewed after the expiration of the year: *Tevis v. Tevis*, 23 Mo. 256.

⁴ *Noble v. Morrey*, 19 Iowa, 509, 511; *Goodrich v. Conrad*, 24 Iowa, 254; *Hicks v. Jamison*, 10 Mo. App. 35, 38; *Amb v. Caspari*, 13 Mo. App. 586.

⁵ *Greenough's Appeal*, 9 Pa. St. 18.

⁶ *Stephens v. Harris*, 6 Ired. Eq. 57, 60; *Wms. Ex.* [1015]; 3 Redf. on Wills, 259, pl. 2; *Watson v. Parker*, 6 Beav. 283, 287, citing *Lomas v. Wright*, 2 Myl. & K. 769.

OF THE COMMON-LAW SYSTEM OF PAYING DEBTS OF
DECEASED PERSONS.

§ 375. **Payment of Debts according to their Priority.**— We have already seen,¹ that executors and administrators are bound, in the payment of the debts of their testators and intestates, to observe the order of priority established by law. It is easily understood, that unless this requirement is strictly adhered to, and executors and administrators held to personal liability on their bonds for its violation, the rights of creditors would be imperilled and the policy of the law subverted. It is unnecessary to cite any of the numerous authorities so holding; it is sufficient to say, that such is the law in every State of the Union, as well as in England.²

It may not be out of place, however, to remark, that the violation of this rule of law is rarely attributable to bad faith, or a conscious disposition to unduly favor one creditor to the prejudice of another; it arises sometimes out of sheer ignorance of the law, and at other times in consequence of thoughtlessness and lack of caution and foresight. It happens but too often that the assets of an estate fall far short of the expectations of heirs and personal representatives, even after the inventory and appraisement have been filed; and more often still, that the liabilities turn out to be much greater than they supposed. Many estates prove insolvent, which are at first looked upon as ample to pay all debts and leave handsome portions to the heirs; yet executors and administrators often close their eyes to the possible, in many cases imminent, consequences of paying debts indiscriminately. Widows, in particular, zealous to vindicate the good name of departed husbands, *eagerly [* 784] pay all debts as fast as presented, and as long as they have anything to pay with, frequently involving loss to other *bona fide* creditors, themselves, or their bondsmen.

¹ *Ante*, § 364.

² As to credit for disbursements in payment of debts of deceased persons, under the American system, see § 520.

Simple obedience to the law is sufficient to avoid such danger. Provisions exist in most American States, whereby the amount payable to each creditor is adjudged by the probate court having jurisdiction of the estate. Payment under such order is a protection to the administrator, and simple prudence requires that no debts be paid until such order is obtained.

* CHAPTER XL.

[* 785]

OF THE PAYMENT OF DEBTS AT COMMON LAW.

§ 376. **Preference among Creditors of Equal Degree.**—The consequences of paying a debt of lower degree with notice of the existence of one of superior dignity have already been pointed out.¹ As among creditors of equal degree the executor or administrator is entitled, at common law, to pay whom he will first;² but if one of several creditors of equal degree sue the executor or administrator and obtain judgment, he must be satisfied before the others who have not obtained judgment;³ and after notice to the executor of an action commenced against him, he is restrained from making a *voluntary* payment to any other creditor of equal degree.⁴ Still, the executor may give preference, even after action commenced by one, to another creditor of equal degree by confessing judgment,⁵ although such creditor has not taken out process.⁶ So, after action commenced by one, another creditor of equal degree may gain preference by greater vigilance in obtaining, in an action subsequently commenced by him, a prior plea confessing assets to a certain amount.⁷ If a creditor file a bill in equity in his own behalf only, and proves his debt and obtains a decree, he must be first satisfied, as if he had obtained a judgment at law;⁸ and although the decree cannot be pleaded at law, yet the executor will be protected in paying it, and proceedings against him at law stayed by injunction.⁹ If a * creditor bring a [* 786] suit in equity, not for himself alone, but for himself and all other creditors, a decree for an account and distribution will be considered in the nature of a judgment for all

¹ *Ante*, §§ 364, 375.² *Lyttleton v. Cross*, 3 B. & C. 317, 322.³ *Ashley v. Pocock*, 3 Atk. 208; *Abbis v. Winter*, 3 Swanst. 578, note.⁴ *Wms. Ex.* [1033], note (o), and authorities there cited; *Gregg v. Boude*, 9 Dana, 343.⁵ *Prince v. Nicholson*, 5 Taunt. 665; so held in *Wilson v. Wilson*, 1 Cr. C. C. 255.⁶ *Mackreth v. Jackson*, in note to *Graham v. Grill*, 1 Mau. & Sel. 409.⁷ *Per* Butler, J., in *Waters v. Ogden*,⁸ *Doug.* 45; *Gregg v. Boude*, 9 Dana, 343.⁹ *Joseph v. Mott*, Prec. Ch. 79. A mere decree for an account, however, does not prevent the executor from paying a judgment: *Perry v. Phelps*, 10 Ves. 34, 41.⁹ *Morrice v. Bank of England*, Talb. Cas. 218, 226.

the creditors;¹ and although the legal priority of creditors will not be affected thereby,² the power of preference no longer exists, because no payment to any creditor, made after notice of the decree, will be allowed.³ It must be observed, that where an executor or administrator, before suit commenced, has paid some of the creditors a certain proportion of their debts, a court of equity will allow no further payment to them, out of either legal or equitable assets, until all the other creditors are paid proportionally.⁴

§ 377. **Right of Retainer at Common Law.**—The doctrine of retainer, as known to the common law, is still recognized to some extent in some of the States, although of little significance in most of them,⁵ because the conditions which made it necessary at common law do not there exist.

Administrator's right to retain for his own debt.

The common-law doctrine is therefore repudiated, to a greater or less degree, in the several States of the Union, and a discussion of the claims of executors and administrators in this country against the estates under their charge is deferred to a later section.⁶ Retainer is the legitimate result of the doctrine of priority to the creditor who first brings action, together with the right of preference in the administrator, before action brought. An action by an administrator, in his capacity as creditor of the intestate, against himself, in his capacity as representative of the deceased, would be absurd;⁷ the right to prefer, then, necessarily takes the shape of retainer, otherwise he would lose the amount of his own debt, if other creditors brought suit and the estate turned out insolvent.⁸ But where the right to prefer creditors does not exist in the administrator, and creditors gain no preference

Retainer where right of preference does not exist.

[*787] according to the time of bringing their *actions, the doctrine of retainer means nothing more than the satis-

¹ *Goate v. Fryer*, 3 Bro. C. C. 23.

² *Nunn v. Barlow*, 1 Sim. & Stu. 588.

³ *Mitchelson v. Piper*, 8 Sim. 64. In accounting, however, the administrator may stand in the place of the creditor paid: *Jones v. Jukes*, 2 Ves. 518; *Darston v. Orford*, Pr. Ch. 188, 189; *Parker v. Dee*, 3 Swanst. 529, note. But see *Wms. Ex.* [1037], and authorities.

⁴ Because equality is equity; all creditors are entitled to receive equal proportions: *Wilson v. Paul*, 8 Sim. 63; *Mitchelson v. Piper*, *supra*.

⁵ "This insult to justice," says an indignant writer on probate law in Illinois, "sustained by a process of legal jugglery, was remedied by our legislature as early as 1829": *Horner's County Court Prac-*

tice, § 192, citing *Paschall v. Hailman*, 9 Ill. 285, 298.

⁶ *Post*, § 395.

⁷ *Perkins v. Se Ipsam*, 11 R. I. 270; *Thomas v. Thomas*, 3 Lit. 8; 3 Bla. Comm. 18; *Woodward v. Darcy*, 1 Plowd. 184; *Phillips v. Phillips*, 18 Mont. 305; *per Field, J.*, concurring in *Bryan v. Kales*, 134 U. S. 126, 136. See also *Morton v. Walsh*, 94 Cal. 564; *Byrne v. Byrne*, 94 Cal. 576. So the allowance of a claim owned beneficially by an administrator, though in the name of another person, is void: *Smith v. Downey*, 3 Ired. Eq. 268, 278.

⁸ The doctrine of retainer is also deduced from the maxim, *In æquale jure potior est conditio possidentis*: Fonbl. Eq. bk. 4, pt. 2, ch. 2, § 2.

faction of the claims of executors and administrators under the same conditions which determine the rights of other creditors.¹

The privilege of retainer extends to specific personal property due or belonging to the executor or administrator, as well as to the assets, to extinguish a debt due him.² It is not affected by a decree for an accounting in a suit by other creditors; nor because the assets out of which the administrator seeks to retain came to his hands after the decree;³ nor by having paid into court the money received for assets; and if the fund is insufficient to discharge the debt, the executor's right to retain will prevail over the plaintiff's right to costs.⁴ But he can in no case retain against a debt of superior degree.⁵

The administrator may retain, not only for debts which he claims beneficially, but also for those to which he is entitled as trustee,⁶ and for debts due to him jointly with others;⁷ and, conversely, for debts due another in trust for him,⁸ — a doctrine recognized at law as well as in equity.⁹ But in equity all debts are equal, and it is said that equity will not assist a retainer; hence the executor or administrator can retain out of equitable assets only a share proportionate with that of other creditors.¹⁰

§ 378. Application of the Doctrine of Retainer to the Several Classes of Administrators. — The right of retainer exists not only

in favor of executors and general administrators, but also for temporary or limited administrators. An administrator *durante minore etate* may retain not only for his own debt,¹¹ but also for that of the infant.¹² [* 788] So, also, an administrator *durante dementia*.¹³ A creditor to whom administration is granted as such, which is afterward repealed, may retain as against the rightful administrator;¹⁴ but on the petition

¹ Nelson v. Russell, 15 Mo. 356, 359; Williamson v. Anthony, 47 Mo. 299; Taylor's Estate, 10 Cal. 482; Shortridge v. Easley, 10 Ala. 450; Hubbard v. Hubbard, 16 Ind. 25; Henderson v. Ayres, 23 Tex. 96, 102; Lenoir v. Winn, 4 Desaus. 65; Berry v. Graddy, 1 Met. (Ky.) 553, 557; Smith v. Bryant, 60 Ala. 235, 238.

² Saunders v. Saunders, 2 Lit. 314, 322.

³ Nunn v. Barlow, 1 Sim. & Stu. 588.

⁴ Langton v. Higgs, 5 Sim. 228.

⁵ Hancocke v. Prowd, 1 Saund. 328, 333, note (6).

⁶ Plumer v. Marchant, 3 Burr. 1380, 1384; Miller v. Irby, 63 Ala. 477, 484.

⁷ Hosack v. Rogers, 6 Pai. 415, 429; Burge v. Brutton, 2 Hare, 373, 376.

⁸ Cockroft v. Black, 2 P. Wms. 298; Franks v. Cooper, 4 Ves. 763.

⁹ Roskelley v. Godolphin, T. Raym. 483; Marriott v. Thompson, Willes, 186.

¹⁰ Hopton v. Dryden, Pr. Ch. 179, 181; Harrison v. Henderson, 7 Heisk. 315, 329, holding that the doctrine of retainer applies to legal assets strictly, so that there can be no retainer out of the proceeds of the sale of real estate: Personette v. Personette, 35 N. J. Eq. 472.

¹¹ Roskelley v. Godolphin, T. Raym. 483.

¹² Franks v. Cooper, 4 Ves. 763.

¹³ Franks v. Cooper, *supra*.

¹⁴ Blackborough v. Davis, 1 Salk. 38.

of other creditors, the appointment of a creditor as administrator will be made upon the condition that he will pay debts of equal degree in equal proportions.¹ The executor of an executor is allowed to retain for his own debts as well as for those of the deceased executor;² and executors of administrators for the debts of their principals.³ So the husband of a *feme executrix* for a debt due him by the testator;⁴ and if the husband be executor, he may retain for a debt contracted by the testator with the wife *dum sola*.⁵ If the same person be the representative of the debtor and of the creditor, he may retain out of the effects of the debtor's estate to satisfy the debt of the creditor.⁶

Retainer by executor of executor.

Executor of administrator.

Husband of executrix.

When administrator of debtor and of creditor.

That an executor *de son tort* cannot be permitted to protect himself against liability by a retainer for his own demand, although of superior dignity, is self-evident, and has already been shown.⁷ It is also evident, that there can be no retainer, by a lawful executor or administrator, for damages unliquidated or arbitrary in their nature, such as for a tort.⁸ Whether an administrator may retain for a debt due to himself, which is within the bar of the Statute of Limitations, is held differently. In England it is held, though not without intimations to the contrary, that he may;⁹ in the United States the preponderance is strongly the other way, arising out of the statutory changes in the system of administration securing [*789] greater equality among creditors;¹⁰ this * point will therefore be more fully considered in connection with the statutory provisions for the allowance of debts due to executors or administrators.¹¹

No retainer by executor *de son tort*.

Retainer for debt barred.

It is proper to mention, in connection with the doctrine of retainer, that it may be invoked against the executor or administrator as raising a presumption of the discharge of his claim upon proof of having been in possession of assets.¹² Since his is at once "the hand to pay and the hand to receive,"

Right of retainer extinguishes debt.

¹ Wms. Ex. [1045], and authorities there cited.

² Hopton v. Dryden, Pr. Ch. 179.

³ Weeks v. Gore, 3 P. Wms. 184, note.

⁴ Toller, 359.

⁵ Atkinson v. Rowson, 1 Mod. 208.

⁶ Fox v. Garrett, 28 Beav. 16; Miller v. Irby, 63 Ala. 477, 484; Green v. Thompson, 84 Va. 376, 389, holding that he may assign and transfer a *chose in action* for the same purpose.

⁷ Ante, § 193.

⁸ Loane v. Casey, 2 W. Bl. 965, 968.

⁹ Stahlshmidt v. Lett, 1 Sm. & Giff 415, 419; Hill v. Walker, 4 Kay & J. 166, 169.

¹⁰ But there are cases holding that such right exists. See Knight v. Godbolt, 7 Ala. 304; Glenn v. Glenn, 41 Ala. 571, 589; Payne v. Pusey, 8 Bush, 564. But not as against other creditors or so as to subject real estate to sale for the payment of debts: see Trimble v. Fariss, 78 Ala. 260, 269.

¹¹ Post, § 395.

¹² Wankford v. Wankford, 1 Salk. 299, 305; Evans v. Evans, 1 Desaus. 515, 520; Ross v. Wharton, 10 Yerg. 190; Smith v. Watkins, 8 Humph. 331, 341; Chaffin v. Hanes, 4 Dev. L. 103; Dickie v. Dickie, 80 Ala. 57, 60.

the possession of assets operates as an extinguishment of the debt due him, by altering the property and vesting the goods in himself.¹ It is held to be well settled, that he has no volition or election in the matter, the law, by its own operation, making the application of assets in his hands, the ownership of which he can legally transfer, to the payment of a debt due him.² But the appointment of a member of a creditor firm as administrator of the debtor does not extinguish the debt by operation of law;³ and the presumption of payment arising from the administrator's possession of assets may be rebutted by proof of the application of the assets to the payment of other debts;⁴ and it is clear, that in all the States in which the administrator's right is placed upon an equal footing with other creditors the simple possession of assets, not converted into money nor applied by him to his own satisfaction, cannot extinguish his claim.⁵

§ 379. Consequence of Paying Legatee before Notice of Debt.

—The common-law principle subjecting all personal property in the hands of the executor or administrator to liability for the payment of debts of the deceased gave rise to very grave complications, and until the matter was remedied in equity, and subsequently by statutory provisions, produced great hardship to executors and administrators, whenever the question of paying legacies, or delivering the residue, arose in cases where the testator or intestate had entered into covenant, or bond with condition, or the like, upon which liability might or might not arise. It was held, as early as the reign of Queen Elizabeth, that the payment of a legacy was compellable, notwithstanding a bond which had not been forfeited;⁶ but, on the *other hand, [*790] Lord Hardwicke held that payment of a legacy, after notice of the specialty, but before breach, was not a good payment.⁷ So,

¹ Woodward v. Darcy, 1 Plowd. 184; Page v. Patton, 5 Pet. 304, 314.

² Hence, where an executor or administrator, having had sufficient assets to pay his claim, turned over the assets to a succeeding administrator under an agreement that any balance in his favor should be paid out of the first moneys collected, it was held that he could only look to such successor personally: Beadle v. Steele, 86 Ala. 413.

³ Davis v. Milligan, 88 Ala. 523, 526.

⁴ Per McLean, J., in Page v. Patton, *supra*. The majority of the court held that, upon the application of personal assets to the payment of other debts, the right of action for his own debt is gone, but the right of retainer, out of equitable assets,

to be credited to the equitable fund, is not destroyed: *Ib.* pp. 314 *et seq.*

⁵ Harrison v. Henderson, 7 Heisk. 315, 334, overruling earlier cases to the contrary; Johnson v. Gillett, 52 Ill. 358, 363; Hall v. Pratt, 5 Ohio, 72, 81; Miller v. Irby, 63 Ala. 477, 484, with numerous citations of authorities.

⁶ Nector v. Gennett, Cro. Eliz. 466.

⁷ Hawkins v. Day, 1 Amb. 160. So in Pierson v. Archdeaken, 1 Alc. & Nap. 23, an action of covenant, by the assignee of a reversion against an administrator *de bonis non* with the will annexed, for breach of covenant in a lease, twenty years after the testator's death, and twenty-four years after he had assigned the lease to a party who paid rent until four years before the action. In Newcastle Banking Co. v. Hy-

even where the administrator had no notice of the existence of the bond, he was allowed for payments to simple contract creditors, but not to legatees.¹ The hardship of this rule of law, holding executors and administrators liable upon remote contingencies, gave rise to the rule in equity, that they could not be compelled to part with the assets, either to legatees or distributees, without sufficient indemnity, or impounding a sufficient part of the residuary estate for that purpose.² It was also intimated, that where an executor passes his accounts in the court of chancery, he is discharged from further liability, and the creditor is left to his remedy against the legatees;³ and that, to encourage this practice, no costs in such case will be visited upon them.⁴ But the most effectual remedy is provided by the statute known as Lord St. Leonards' Act,⁵ enabling executors and administrators to distribute the assets without order of court, and without liability for breaches of covenant in any lease which they may have sold and assigned, or for rent or rent charge thereon,⁶ by giving notice, such as would be given by the court of chancery in an administration suit, for creditors and others to send in their claims against the estate.⁷ The act expressly provides that creditors may nevertheless pursue the assets in the hands of the distributees.

Equitable right to demand bond before paying legacies.

Notice to compel creditors to prove their debts.

[*791] *It will appear later, that in most of the American States the same result is accomplished by the statutory requirement to publish notice of the grant of administration in all cases;⁸ and the effect of paying legacies before an order of distribution,⁹ as well as under what circumstances executors and administrators can recover for overpayments to legatees and creditors, will be mentioned hereafter.¹⁰

§ 380. Defences against Actions for Debts of the Deceased.—It

mers, 22 Beav. 367, payment of legacies was held not to sustain the plea of *plene administravit* against the claims of the creditors arising twenty years after satisfaction of the legacies.

¹ Norman v. Baldry, 6 Sim. 621; Knatchbull v. Fearnhead, 3 Myl. & Cr. 122; Hill v. Gomme, 1 Beav. 540, 550.

² Simmons v. Bolland, 3 Meriv. 547, 554; Cochrane v. Robinson, 11 Sim. 377, 378; Fletcher v. Stevenson, 3 Hare, 360, 370; Higgins v. Higgins, 4 Hagg. 242; Vernon v. Egmont, 1 Bligh (N. S.), 554, 572.

³ Knatchbull v. Fearnhead, 3 Myl. & Cr. 122, 126.

⁴ Low v. Carter, 1 Beav. 426, 430.

⁵ 22 & 23 Vict. c. 35, §§ 27, 28.

⁶ This act was held retrospective in its operation: Smith v. Smith, 1 Dr. & Sm. 384, 386; In re Green, 2 DeG. F. & J. 121, 123.

⁷ An executor making distribution, after issuing the advertisements and taking the steps pointed out by the statute, will have the same protection as if he had administered under a decree of the court: Clegg v. Rowland, L. R. 3 Eq. Cas. 368. *Aliter* if the publication of the notice be not in accordance with the act: Wood v. Weightman, L. R. 13 Eq. Cas. 434.

⁸ Post, § 385.

⁹ Post, §§ 519, 562; also § 451.

¹⁰ Legacies and distributive shares, § 561, p. *1229; creditors, p. *1155.

Administrators liable to be sued for any debt or damages for injuries to property.

appears from what has been stated in connection with the subject of choses in action,¹ that executors and administrators may be sued for any personal claim founded upon an obligation, contract, debt, covenant, or other duty of the testator or intestate upon which the latter might have been sued in his lifetime, except on contracts *personal* to him, which by the intervention of the death of the contractor have become impossible of performance; but that in regard to the *tortious* acts of the deceased, for which damages only would be recovered, the rule of the common law was that the action died with the person by whom the wrong was committed. A brief outline of the actions and defences given by the common law will be necessary to an understanding of the statutory provisions on this subject in the several States.

Administrator may plead anything which the deceased might have pleaded; deny his representative capacity; that he has assets;

retainer;

debts of superior degree.

Must plead so as to protect creditors.

May plead want of service upon one of several administrators.

Several may plead different pleas.

In defence of an action against him, the executor or administrator may, in addition to pleading any matter which the deceased might have pleaded, deny the representative character in which he is sued, or, admitting it, he may plead that he has no assets, or not assets sufficient to satisfy the plaintiff's demand; or he may plead a retainer of his own debt of equal or superior degree; or debts of superior degree to third persons.² It is his duty so to plead as to protect all creditors of whose claims he has notice in their rights, according to the dignity of their debts as established by law, and if he fails to do so he becomes personally liable.³ Since there must be service upon all of several executors or administrators,⁴ one served may plead in * abatement that there are others who should be [* 792] joined.⁵ They may plead different pleas, and that which is most to the testator's advantage shall be received.⁶ So there may be different judgments where the pleas are several,⁷ and even where they all plead alike.⁸

¹ *Ante*, §§ 290 *et seq.*

² *Wms. Ex.* [1941].

³ *Davis v. Smith*, 5 Ga. 274, 291; *Hutchcraft v. Tilford*, 5 Dana, 353, 360.

⁴ But the authorities are not uniform on this point. It is obvious that the safety of the estate requires such a rule, because matters may be within the knowledge of one which are entirely unknown to the others, such as payment, set-off, full defence: *Barnes v. Jarnagin*, 12 Sm. & M. 108; *Owen v. Brown*, 2 Ala. 126; *Jones v. Wilkinson*, 3 Stew. 44, 46. See on this point, *post*, § 397. A non-resident co-executor or co-administrator need not be

joined: *Williams v. Sims*, 8 Port. 579, 583; *Tappan v. Bruen*, 5 Mass. 193, 196; *Beach v. Baldwin*, 9 Conn. 476.

⁵ *Lomax on Ex.* 650, and English authorities there cited.

⁶ *Lyon v. Allison*, 1 Watts, 161, 162; *App v. Dreisbach*, 2 Rawle, 287, 301.

⁷ *Kavanaugh v. Thompson*, 16 Ala. 817, 822; *Bellew v. Jockleden*, 1 Roll. Abr. 929, B. pl. 5.

⁸ For instance, under a plea of *plene administravit*, some may be proved to have assets, others not: *Parsons v. Hancock*, 1 Moody & Malk. 330.

If the administrator has no assets to satisfy the debt upon which the action is brought against him, he must plead *plene administravit*, or *plene administravit præter*, etc.; for a judgment against him, whether by default or on demurrer, or on verdict upon any plea except *plene administravit*, or admitting assets to such a sum and *rien ultra*, is conclusive upon him that he has assets to satisfy such judgment.¹ If he pleads either a general or special *plene administravit*, he will be held liable only to the amount of assets proved to be in his hands.² It may happen that "the assets in his hands are destroyed or depreciated by circumstances over which he has no control, or that a deficiency arises by the payment of claims in full, and subsequently other claims, unknown at the time, turn up and require to be paid, or there occurs some mistake of fact originating in ignorance or forgetfulness, or the belief in the existence of a thing which does not exist, material to the transaction, and in all such cases, if he has acted in entire good faith, and his conduct is free from negligence, equity will interpose and afford relief from the inequitable loss or injury which would otherwise befall him."³ But if an executor confesses judgment against himself, upon a miscalculation of the amount of the assets, which afterwards appear insufficient to satisfy it, he will not be relieved in equity;⁴ nor will equity aid him if he could, by reasonable diligence, have ascertained the condition of the estate.⁵ The essential part of the plea of *plene administravit* is, "that the said defendant has no goods which were of the said testator, at the time of his death, in the hands of said defendant as executor, or had at the time of the commencement of the suit," or ever since," and the omission of any

Plene administravit;

administravit præter.

Equitable relief for mistaken plea

if without fault or negligence.

Essence of the plea.

¹ Phipps v. Alford, 95 Ga. 215, 217; Ramsden v. Jackson, 1 Atk. 292, 294; Wheatley v. Lane, 1 Saund. 216, 219 b, note; Erving v. Peters, 3 Durnf. & E. (T. R.) 685, 693; Higgins's Trust, 2 Giff. 562, 565; Mason v. Peter, 1 Munf. 437, 455; Dickson v. Wilkinson, 3 How. (U. S.) 57, 61; People v. Judges of Erie, 4 Cow. 445, 447; Mosier v. Zimmerman, 5 Humph. 62; Baracliffe v. Griscom, 1 N. J. L. 165; Newcomb v. Goss, 1 Met. (Mass.) 333; Glenn v. Maguire, 3 Tenn. Ch. 695; Simons v. Page, 96 Tenn. 718; Brown v. McKee, 108 N. C. 387, 392. In Pennsylvania this rule is denied; the existence of assets must there be proved: Hussey v. White, 10 Serg. & R. 346; Moore v. Kerr, 10 Serg. & R. 348, 350. The same seems to have been the case in Alabama: Bank of Alabama v. Hooks, 2 Port. 271, 275.

² Cousins v. Paddons, 2 Cr. M. & R. 547, 558; Coleman v. Hall, 12 Mass. 588, 590; Jameson v. Martin, 3 J. J. Marsh. 330; Siglar v. Haywood, 8 Wheat. 675, 679.

³ Per Lord, C. J., in Brennor v. Alexander, 16 Oreg. 349, 353. "The reason is," says the judge, "that the defence arises subsequently to the judgment, and without any fault of the administrator."

⁴ Brennor v. Alexander, *supra*. Whether under the American system an executor or administrator can recover for overpayments to creditors is considered *post*, § 520, p. * 1155, and note; as to overpayment of legatees, see *post*, § 561, p. * 1229.

⁵ Whiddon v. Williams, 98 Ga. 310.

⁶ Rees v. Morgan, 5 B. & Ad. 1035, 1039; Nixon v. Bullock, 9 Yerg. 414.

of these averments will be fatal in a general, as well as in a special, *plene administravit*.

Under the plea of retainer the executor or administrator may show that he retains assets to a certain amount for funeral expenses, or expenses of administration, or to reimburse himself for payments in discharge of debts not inferior to the debt of the plaintiff, before the commencement of the * suit. But a retainer for unsatisfied debts of a higher [* 793] degree must be pleaded.¹

If, in an action against an executor or administrator, which can be supported against him only in that character, he pleads any plea which admits that he has acted as such (except a release to himself), the judgment against him must be that the plaintiff recover the debt and costs, to be levied *out of the assets of the testator*, if the defendant have so much; but if not, then *the costs* out of the defendant's own goods.² If the judgment be entered *de bonis propriis*, instead of *de bonis testatoris*, by mistake, it will be amended on motion, or corrected in the appellate court.³ In Tennessee it was held that the administrator is allowed to prove loss of assets after judgment, hence the judgment in the first place should be *de bonis testatoris* only.⁴ But if the defendant pleads *ne unques executor* or *administrator*, or a release to himself, and it is found against him, the judgment is that the plaintiff recover *both debt and costs*; in the first place, *de bonis testatoris* (or *intestatis*), *si*, etc.; and next, *si non*, etc., *de bonis propriis*.⁵ The liability of the administrator for costs grows out of his *wilfully* pleading a *false* plea, subjecting the plaintiff to unnecessary cost; it does not arise upon a finding against him of the plea of *non assumpsit*, or *non assumpsit infra sex annos*.⁶ The subject of liability of executors and administrators for costs, and when they are entitled to credit for costs

¹ *Ante*, § 364.

² *Gorton v. Gregory*, 3 B. & S. 90, 99 (stating the law on the authority of *Williams*); *Hancocke v. Prowd*, 1 Saund. 328, 336 (giving, in note 10, the substance of the text in *Wms. on Ex.*); *Hapgood v. Houghton*, 10 Pick. 154, 156; *National Bank v. Stanton*, 116 Mass. 435, 438; *Justices v. Sloan*, 7 Ga. 31, 37; *Quicksall v. Quicksall*, 2 N. J. L. 457 (p. 346 of 2d ed. Penn. Rep.); *Phipps v. Addison*, 7 Blackf. 375; *Crane v. Hopkins*, 6 Ind. 44; *Phillips v. Sanchez*, 35 Fla. 187, 195.

³ *Piper v. Goodwin*, 23 Me. 251, 255; *Atkins v. Sawyer*, 1 Pick. 351, 353; *Ware v. St. Louis Bagging Co.*, 47 Ala. 667, 674; *Schroeder's Estate*, 46 Cal. 304, 316.

⁴ *Massingale v. Meredith*, 3 Hayw. 36.

⁵ *Wms. Ex.* [1974] *et seq.* The author suggests that there is not much substantial difference between these two kinds of judgments, since the judgment *de bonis testatoris* is in law a proof that he has assets to satisfy it; hence, to a *scire facias* on the judgment, or action of debt suggesting a *devastavit*, of which the judgment and the sheriff's return *nulla bona testatoris* are almost conclusive evidence, there must be judgment *de bonis propriis*.

⁶ *Osterhout v. Hardenbergh*, 19 John. 266; *Evans v. Pierson*, 1 Wend. 30; *Moore v. Foster*, 1 Bai. 370; *Nicholson v. Showerman*, 6 Wend. 554; *Gordon v. Justices*, 1 Munf. 1, 14; *Smith v. Goggans*, Harp. 52; *Terry v. Vest*, 11 Ired. L. 65, 67.

paid out, in their administration accounts, is treated in a later chapter.¹

If the defendant pleads *plene administravit*, and is not proved to have assets in his hands, the plaintiff may confess the plea and have judgment immediately of assets *quando acciderint*, or,

as it is sometimes called, judgment of assets *in quando acciderint*.
[*794] *futuro*,² which may be either an interlocutory *or

a final judgment; if interlocutory, there must be writ of inquiry, or other proceeding to complete it. But if the plaintiff *take issue* on the general or special plea of *plene administravit*, and it be proved against him, he cannot have judgment of assets *quando*.³ By taking judgment of assets *quando*, the plaintiff admits that the defendant has fully administered to that time; and since the judgment is to recover of the goods of the testator which shall *thereafter* come to the hands of the executor, proof of the executor's receiving assets is always, at the trial in debt or *scire facias*, confined to a period subsequent to the judgment,⁴ or, more accurately, perhaps, to a period subsequent to the issue of the writ.⁵ But the executor having thereafter received assets is liable therefor to the creditor, and cannot plead retainer of debts paid before the judgment *quando*, which were not pleaded in that suit.⁶ If the plaintiff, admitting the truth of the plea of *plene administravit*, or outstanding judgments, etc., and *plene administravit præter*, takes judgment of assets *quando*, or judgment of assets admitted in part and for the residue of assets *quando*, the executor is not liable to costs *de bonis propriis*; but it is said to be now settled that judgment may be entered for them to be recovered *de bonis testatoris quando acciderint*.⁷

¹ *Post*, § 517, p. *1149 *et seq.*

² *Noell v. Nelson*, 2 Saund. 226; *Botts v. Fitzpatrick*, 5 B. Mon. 397, 398; *Skinner v. Friersen*, 8 Ala. 915, 919; *Miller v. Towles*, 4 J. J. Marsh. 255, 256; *Wilt v. Bird*, 7 Blackf. 258, 260; *Brown v. Whitmore*, 71 Me. 65, 68; *South v. Carr*, 7 T. B. Mon. 419, 420. See *Keith v. Molineux*, 160 Mass. 499, where there was an agreed statement that the only issue was whether there were assets applicable to the payment of an undisputed claim.

³ *Wms. Ex.* [1980], and authorities cited there.

⁴ *McDowell v. Branham*, 2 Nott & McC. 572, 574; *Allen v. Matthews*, 7 Ga. 149, *arguendo*, 150 *et seq.*; *Orcutt v. Orms*, 3 Pa. 459, 462, *et seq.*; *Rosborough v. Mills*, 35 S. C. 578.

⁵ Because there must be an interval be-

tween the issue of the writ and judgment: *Mara v. Quin*, 6 T. R. 1, 10. In *Smith v. Tateham*, 2 Exch. 205, it was said that the judgment *quando* reaches not only such assets as were received after the judgment, but all such as shall, after that time, actually exist. This view is disapproved by *Williams*, on the ground that the plaintiff, having admitted that there were no assets at the time of the plea, should not afterward be allowed to deny it: *Wms. Ex.* [1982], note (a), citing *Parker v. Dee*, 3 Swanst. 529, note (a).

⁶ *Willis v. Tozer*, 44 S. C. 1.

⁷ *Wms. Ex.* [1983], and authorities there cited; *Terry v. Vest*, 11 Ired. L. 65; *Lewis v. Johnston*, 69 N. C. 392 (giving costs to the administrator); *Pope v. Delavan*, 1 Wend. 68.

§ 381. **Effect of Admissions and Promises by Executors or Administrators.**—Admissions made by one who subsequently qualifies as executor or administrator cannot be given in evidence against him in an action by a creditor,¹ and do not bind him in his representative capacity,² nor are admissions or promises made by an administrator admissible against a co-executor or co-administrator,³ or an heir or devisee,⁴ or a subsequent administrator *de bonis non*,⁵ or against the estate, unless made while engaged in his representative capacity in the performance of a duty to which the admission was pertinent, so as to constitute it a part of the *res gestæ*.⁶ Declarations, admissions, and promises made in their fiduciary character have been admitted in actions by or against them.⁷ Thus it is held in New Jersey, that the promise * by an executor to pay what without such [* 795] promise is an equitable obligation converts it into a legal obligation, enforceable at law;⁸ and in Indiana, that the admission of a former administrator of payments made to him are properly admissible.⁹ In other States the wisdom of allowing such admissions in evidence is doubted,¹⁰ or negatived.¹¹ The liability of an executor or administrator arising out of his own promise to pay the debt of the decedent may, if supported by a sufficient consideration, or if otherwise valid, be enforced against him personally.¹² But he cannot, by his own act, create a debt against the estate; having no power to bind the estate, he can by such a promise bind only himself, although he promise as executor.¹³ The naked promise of the executor or ad-

¹ *Thomasson v. Driskell*, 13 Ga. 253, 258, citing English and American authorities; *Gaines v. Alexander*, 7 Gratt. 257, 261; *Webster v. Le Compte*, 74 Md. 249, 259.

² *Wiswell v. Wiswell*, 35 Minn. 371; *Webster v. LeCompte*, *supra*.

³ *Fox v. Waters*, 12 Ad. & E. 43; *Hammon v. Huntley*, 4 Cow. 493, 494.

⁴ *Crandall v. Gallup*, 12 Conn. 365, 373.

⁵ *Pease v. Phelps*, 10 Conn. 62, 68; *McArthur v. Carrie*, 32 Ala. 75.

⁶ *Davis v. Gallagher*, 124 N. Y. 487, 491. He may consent in open court to send a case against the estate to a referee: *Shepard v. Shepard*, 108 Mich. 82. See also *infra*, near end of this section, distinguishing between the American and common-law doctrine.

⁷ *Lawson v. Powell*, 31 Ga. 681, 682; *Floyd v. Wallace*, 31 Ga. 688, 692; *Matoon v. Clapp*, 8 Oh. 248, 249; *Hill v. Buckminster*, 5 Pick. 391, 393; *Church v. Howard*, 79 N. Y. 415, 419; *Planters' Bank v. Neel*, 74 Ga. 576.

⁸ *Rustling v. Rustling*, 47 N. J. L. 1, 7.

⁹ *Eckert v. Triplet*, 48 Ind. 174.

¹⁰ *Allen v. Allen*, 26 Mo. 327. The majority of the court in this case admitted the admissions of an administrator who was also a distributee.

¹¹ *Wright v. Wright*, 2 Brev. 125; *Ciples v. Alexander*, 3 Brev. 558; *Rhodes v. Seymour*, 36 Conn. 1, 7.

¹² *Claghorn's Estate*, 181 Pa. St. 600, 606; *Baker v. Fuller*, 69 Me. 152, relying on earlier Maine cases; *Christian v. Morris*, 50 Ala. 585.

¹³ See *ante*, § 356, and authorities there cited; *Claghorn's Estate*, 181 Pa. St. 608; *Davis v. French*, 20 Me. 21, 23; *Sumner v. Williams*, 8 Mass. 162, 199; *Myer v. Cole*, 12 John. 349; *Burke v. Terry*, 28 Conn. 414; *Wilton v. Eaton*, 127 Mass. 174; *Braman's Appeal*, 89 Pa. St. 78, 84; *East Tennessee Iron Co. v. Gaskell*, 2 Lea, 742, with numerous cases cited; *Reihl v. Martin*, 29 La. An. 15; *Smith v. Pattie*, 81 Va. 654, 659; *Re Dunn*, 5 Dem. 124.

ministrator to pay the debt of his testator or intestate, where there are no assets, is void, like any other *nudum pactum*,¹ although the promise be in writing so as to escape the Statute of Frauds;² nor does a promise to pay out of the assets, or an acknowledgment of the justice of the claim, create a personal liability.³ But the surrender of a note made by the intestate,⁴ forbearance for a certain or reasonable time to the prejudice of the creditor,⁵ the possession of assets,⁶ and, *a fortiori*, any services rendered for or goods furnished to the executor at his request,⁷ have been held sufficient to support the promise, and make him liable personally. Although the verbal promise of the administrator to pay the debt of the deceased

Promise of administrator without consideration void.

Verbal promise to pay may defeat limitation.

[*796] is void under the Statute of Frauds of most *States, it is held in some to operate a defeat of the Statute of Limitations, if supported by sufficient consideration.⁸ But in others such effect does not follow such a promise;⁹ and even the executor's recognition of a claim by a partial payment thereon will not extend the period of limitation as against the estate.¹⁰ The duty of the representative in actions against the estate to plead, or his right to waive the general Statute of Limitations, and the special Statute of Non-

¹ Walker v. Patterson, 36 Me. 273, 276; Ten Eyck v. Vanderpool, 8 John. 120; Bank of Troy v. Topping, 9 Wend. 273, 275; s. c. 13 Wend. 557; Snead v. Coleman, 7 Gratt. 300, 303; Hester v. Wesson, 6 Ala. 415.

² Germania Bank v. Michaud, 62 Minn. 459; Sidle v. Anderson, 45 Pa. St. 464, 467.

³ Allen v. Graffins, 8 Watts, 397; Ciplès v. Alexander, 2 Const. R. (S. C.) 767; Ricketts v. Ricketts, 4 Lea, 163; Stirling v. Winter, 80 Mo. 141.

⁴ Wilton v. Eaton, 127 Mass. 174; Erwin v. Carroll, 1 Yerg. 145.

⁵ Mosely v. Taylor, 4 Dana, 542.

⁶ Faxon v. Dyson, 1 Cr. C. C. 441. But as between the original parties, the executor's personal liability, even if he has given a note for the testator's debt, is limited to the creditor's *pro rata* of the assets, where he intends to incur no personal liability: Boyd v. Johnston, 89 Tenn. 284.

⁷ Ante, § 356; Sims v. Stilwell, 3 How. (Miss.) 176, 181; Nehbe v. Price, 2 Nott & McC. 328; Cronan v. Cotting, 99 Mass. 334, 336; but a *devastavit* committed by the administrator does not imply a promise to pay so as to support a personal action against the administrator: Wil-

son v. Long, 12 S. & R. 58; Sidle v. Anderson, 45 Pa. St. 464.

⁸ Preston v. Cutter, 64 N. H. 461; Pole v. Simmons, 49 Md. 14, 20; Sevier v. Gordon, 21 La. An. 373; Chesnutt v. McBride, 1 Heisk. 389; Hord v. Lee, 4 T. B. Mon. 36; Northcut v. Wilkinson, 12 B. Mon. 408; Emerson v. Thompson, 16 Mass. 429; Shreve v. Joyce, 36 N. J. L. 44; Briggs v. Starke, 2 Mill Const. R. 111. See also *post*, § 402, p. *846, in connection herewith.

⁹ See, on this subject, *post*, § 401; also cases cited *post*, § 402, p. *846, and note; also Claghorn's Estate, 181 Pa. St. 600.

¹⁰ Claghorn's Estate, 181 Pa. St. 608. It is otherwise, however, where the will expressly authorizes the executor to make such payment: Waughop v. Bartlett, 165 Ill. 124, 135. And where a creditor is fraudulently deceived and thus prevented from bringing timely suit by the executor, who is the sole beneficiary, the latter may be estopped from pleading the general Statute of Limitation, if no other creditor or party not implicated in the fraud will be affected, although mere request for delay will have no such effect: *post*, § 387, p. *806; nor is the special Statute of Non-claim affected by the administrator's fraud: *post*, § 402.

claim, is considered in connection with the subject of establishing claims against the estates of decedents.¹

It must not be understood, however, that the personal liability of the executor or administrator in any such case operates of itself as a discharge or exoneration of the estate from such debt. As between the administrator and the estate, the debt is still owing; and if the latter properly pay it, he may recover the amount paid from the estate.²

The subject of admissions and promises by executors and administrators, as evidence in proceedings to establish claims against the estates of deceased persons, is necessarily affected by the change of the procedure wrought by statutes in the American States. "This," says Buck, J., alluding to the statutory jurisdiction of probate courts in the matter of allowing claims, "has changed the rule under the old probate system, where the whole matter of allowing and paying claims against an estate rested with the personal representative, and where, if he did not pay, the remedy of the creditor was to sue him, and where, after he became clothed with the trust, and made admissions in the execution thereof, they were admissible against the estate."³

But admissions made in a pending suit to which the executor or administrator is a party as such may be binding, even to the extent of confessing judgment, especially in the absence of fraud in the transaction.⁴

§ 382. Enforcing Judgments de Bonis Testatoris at Common Law.

— Judgment against an executor or administrator may be enforced in two ways: *first*, by *fieri facias*, or *scire fieri* inquiry;⁵ *next*, by an action of debt suggesting *devastavit*. If the sheriff returns not only *nulla bona*, but also *devastavit*, to a *fieri facias de bonis testatoris*, the plaintiff may sue out execution by *capias ad satisfaciendum*, or *fieri facias de bonis propriis*.⁶ If he return *nulla bona* generally, the ancient course was to issue a special writ to the sheriff, to inquire by a jury whether defendant had wasted the goods of deceased, and, if *devastavit* were found, a *scire facias* issued to show cause why the plaintiff should

¹ *Post*, § 401, on the general Statute of Limitations, and § 402 on the Statute of Non-claim.

² *Hill v. Buford*, 9 Mo. 869, 871; *Peter v. Beverly*, 10 Pet. 532, 567; *Douglass v. Fraser*, 2 McC. Ch. 105, 111. See *ante*, § 362, and *post*, § 520.

³ *Johanson v. Hoff*, 63 Minn. 296, 300.

⁴ *Per* Buck, J., in *Johanson v. Hoff*, 63 Minn. 296, 299. As to the administrator's permitting a judgment by default or con-

fessing judgment, see *ante*, § 324, near end of section.

⁵ In Pennsylvania the *scire facias* must issue to the heirs as well as to the personal representatives, if the real estate of the decedent is to be subjected to the payment of the judgment: *Murphy's Appeal*, 8 W. & S. 165. See also *Braxton v. Wood*, 4 Gratt. 25; *People v. Judges of Erie*, 4 Cow. 445, 449.

⁶ Note 8 to *Wheatley v. Lane*, 1 Saund. 219.

not have execution *de bonis propriis*; now, however, the inquiry and *scire facias* are made out in one writ, called a *scire fieri* inquiry.¹ To the *scire fieri* inquiry the administrator cannot plead *plene administravit*, because the judgment against him is conclusive that he has assets; nor can he give in evidence the want of assets.* The jury are bound to find a *devastavit* upon the judgment being [* 797] put in evidence, together with * the *fieri facias* and the return, unless the executor can show that there were goods of the testator, and that he showed them to the sheriff.³

The action of debt on the judgment, suggesting a *devastavit*, may be brought without a writ of *fieri facias* first taken out;⁴ but the usual course is to first sue out a *fieri facias*, and upon the sheriff's return of *nulla bona* to bring the action, stating the judgment, the writ, and return in the declaration, evidence of which, on the trial, will be sufficient to prove the case.⁵ The action is in form in *debet* and *detinet*, and the judgment *de bonis propriis*, and will not lie upon a judgment obtained against the testator, because that is no admission of assets by the executor, wherefore it is necessary to revive the judgment against the executor, and make him a party to it.⁶ So, too, the administrator *de bonis non* is not liable in *scire facias* on the judgment against his predecessor, for he is chargeable only with the unadministered assets that came into his hands; hence he may plead the insufficiency of such assets.⁷ It was held in Arkansas, that a judgment *de bonis testatoris* could not be enforced by execution after the death of the administrator until revived against a new administrator, or party interested in the property of the estate.⁸

Upon a judgment *quando acciderint* the plaintiff cannot have execution until some assets come into the hands of the defendant, when he may bring an action of debt.⁹ There is a difference be-

¹ Wheatley v. Lane, 1 Saund. 219 a.

² Ante, § 380, p. * 792.

³ Leonard v. Simpson, 2 Bing. N. C. 176, 180; Palmer v. Waller, 1 M. & W. 689; Merchant v. Driver, 1 Saund. 303, 308; note 8 to Wheatley v. Lane, 1 Saund. 219 c; Blackmer v. Mercer, 2 Saund. 402 a; Peaslee v. Kelley, 38 N. H. 372, 378.

⁴ Wheatley v. Lane, 1 Sid. 397, cited in 1 Saund. 219 c. It is based upon the judgment *de bonis testatoris*, and is not, therefore, supported by a general judgment against the administrator: Cope v. McFarland, 2 Head, 543; Van Horn v. Teasdale, 9 N. J. L. 379, 380; Mead v. Kilday, 2 Watts, 110.

In States requiring administrators to make report of insolvency of estates in

their charge, their omission to do so is followed by the same result as upon omission to plead *plene administravit* at common law; they cannot show the want of assets in answer to an action on their bond: Newcomb v. Goss, 1 Met. (Mass.) 333. See also Handley v. Fitzhugh, 3 A. K. Marsh. 561; Gwin v. Latimer, 4 Yerg. 22, 28.

⁵ Bell, J., in Peaslee v. Kelley, 38 N. H. 372, 380; note *supra*.

⁶ Crossby v. Geering, cited in Berwick v. Andrews, 2 Ld. Raym. 972, 973; *supra*, note 4.

⁷ Kearney v. Sascor, 37 Md. 264, 277.

⁸ Meredith v. Scollion, 51 Ark. 361.

⁹ Or, since the Act of 15 & 16 Vict. c. 76, proceed by the writ of survivor in

Execution on judgment *quando* on proof of assets. between the consequences of a general plea of *plene administravit* and those of a special plea of *plene administravit præter*, as to the future assets; for if the * plaintiff take judgment, under the latter plea, of assets [* 798] in future, they shall be in the first place applied to such judgment.¹

§ 383. **Liability of Executors and Administrators in Equity.**—The liability of executors and administrators to be proceeded against in courts of equity is discussed elsewhere,² in connection with the subject of accounting. It may suffice to remember, in this connection, that they are liable, in their representative capacity, to all equitable demands with regard to personal property which existed against the deceased at the time of his death. They are regarded in almost every respect, in courts of equity, as trustees; hence these courts will compel them, in the due execution of their trust, to apply the property to the payment of debts, and to discover and set forth an account of the assets and their application of them.³ And this notwithstanding an account before taken in the spiritual court,⁴ and before the will is proved, or during the litigation thereof in the probate court.⁵ A single creditor may sue in equity for his demand out of the personal assets, and thus, at law, gain a preference over other creditors in the same degree who have not used equal diligence;⁶ but one entitled with others to a share in a sum of money must sue in behalf of himself and all the other persons entitled, or make them parties to the suit.⁷ The usual course in England, previous to the statute of 15 & 16 Vict.

lieu of *scire facias*. In actions upon judgments "when assets," the judgments take the same rank which the original judgments had: *Lidderdale v. Robinson*, 2 Brock. 159, 165.

¹ *Parker v. Atfield*, 1 Salk. 311, 312. In North Carolina previous to the change of the administration system in 1869, the creditor who first proceeded upon his *quando* judgment, and fixed the administrator with assets, must be first paid, without regard to the priority of judgments: *McLean v. Leach*, 68 N. C. 95, 99; but *quando* judgments on specialties took precedence of those obtained on simple contracts: *Dancy v. Pope*, 68 N. C. 147, 152. And, conversely, since the *quando* judgment did not fix the administrator with assets, he might show, on *scire facias* upon it, that he used the assets in payment of a superior debt of which he had notice; hence payment of a judgment *quando* on simple contract debt was no protection against his liability for the superior

debt: *Roundtree v. Sawyer*, 4 Dev. L. 44.

² *Post*, § 500.

³ *Brooks v. Oliver*, 1 Amb. 406; *Gibbons v. Dawley*, 2 Ch. Cas. 198. But only upon averment and proof of some wilful neglect or default: *Sleight v. Lawson*, 3 Kay & J. 292; *Walker v. Cheever*, 35 N. H. 339; *Thompson v. Brown*, 4 John. Ch. 619, 643; *McKay v. Green*, 3 John. Ch. 56, 58; *Colt v. Colt*, 32 Conn. 422, 451.

⁴ *Bissell v. Axtell*, 2 Vern. 47. But where an estate has been finally settled in the probate court, equity will take jurisdiction only upon such allegations as would enable it to set aside a judgment at law: see *post*, § 508.

⁵ *Dulwich College v. Johnson*, 2 Vern. 49.

⁶ See *ante*, § 376.

⁷ *Alexander v. Mullens*, 2 Rus. & Myl. 568.

c. 86, was for one or more creditors to file a bill for himself [* 799] or themselves * and all other creditors who should come in under the decree for an account of the assets and a settlement of the estate;¹ or, if assets are admitted, and the debt admitted or proved, to make an immediate decree for payment.² Upon admission of assets, the court will immediately order the executor or administrator to pay so much as he admits having in his hands into court.³ The general rule is, that an admission of assets by an executor or administrator can never be retracted in a court of equity, unless a case of mistake be most clearly established;⁴ and if the allegation in the creditors' bill to this effect be sustained, the plaintiff will be entitled to a decree for payment at once.⁵

¹ A creditor having *debitum in presenti solvendum in futuro*, may maintain such suit: *Whitmore v. Oxborrow*, 2 Y. & Coll. C. C. 13; as well as a claimant under voluntary covenant: *Watson v. Parker*, 6 Beav. 283, 287.

² *Woodgate v. Field*, 2 Hare, 211.

³ *Strange v. Harris*, 3 Bro. C. C. 365;

McKim v. Thompson, 1 Bland, 150, 157, *et seq.*; *Clarkson v. De Peyster*, Hopk. 274; *Eppinger v. Canepa*, 20 Fla. 262, 290.

⁴ *Drewry v. Thacker*, 3 Swanst. 529, 548.

⁵ *Wms. Ex.* [2049].

* PART THIRD.

[* 800]

OF THE SYSTEM OF PAYING DEBTS OF DECEASED PERSONS UNDER AMERICAN STATUTES.

§ 384. Contrast between Common Law and American System.

— It appears from the foregoing brief sketch of the common law applicable to the payment of debts of deceased persons, that executors and administrators are thereby burdened with a grave responsibility, calling for close watchfulness and the exercise of enlightened judgment upon nice and often doubtful points arising upon demands or suits by creditors. A mistake as to the proper plea to be made, or the line of defence to be adopted, or whether defence ought to be made at all, may be fraught with mischievous results not only in the shape of costs and counsel fees, but entailing personal liability, even though there be no assets, or assets not sufficient to meet the judgment rendered. It has also been remarked, that the highly artificial and perplexing system of the common law has been supplanted in most States by statutory regulations, promoting by their simplicity and directness the safe, speedy, and inexpensive settlement of estates, particularly in the matter of paying debts.¹ The power conferred upon probate courts, in most States, to apportion among creditors the assets of the estate, after a sufficient period has elapsed to enable them to establish their claims, and barring them from further proceeding against the executor or administrator subsequently thereto, simply and efficiently secures creditors, heirs and distributees, and executors and administrators in their rights, doing away with the abstruse theory of pleading, and enabling the several issues that may arise in respect of the liability of the deceased, as well as of that of the personal representative, to be tried * separately. Persons of ordinary intelligence and [* 801] business capacity will generally find but little difficulty in complying with the duties imposed by law upon executors and administrators; and if confronted with questions which they are not able readily to decide, touching the rights of creditors, or the course of their own duty, they should avail themselves of professional advice, at once to protect themselves and their bondsmen, and to secure

¹ *Ante*, § 355.

the rights of creditors and distributees according to law.¹ The compensation to counsel and practitioners in probate matters, for advice and services which may be necessary in the course of administration, is payable out of the estate or fund to be protected; and while most estates may be administered by competent business men without professional assistance, yet it would be wrong for any person to dispense with such assistance in any matter or question concerning which he is not perfectly sure of the requirement of the law. Instances, not rare, of loss and financial ruin to executors and administrators, to their sureties, and to the creditors and distributees of the estate, attest the folly of parsimonious executors and administrators in saving counsel fees to the estates under their charge.²

§ 385. **Notice to Creditors of the Grant of Letters.**—As the first step toward the satisfaction of the claims against the estate of a deceased person, the statute requires, in nearly, if not quite, all of the States, the publication of notice of the grant of letters testamentary to the executor, or of administration to the administrator. The duty to cause publication to be made is generally imposed upon the administrator, and in some States it is made the duty of the probate court to order him to do so; the period within which the publication must be commenced ranges from ten days to four months. The purpose of this notice is to enable creditors to present their demands to the administrator or court, as the case may be; in some of the States, the notice is required to recite the consequences of a failure to exhibit the claims within a given period, and also to state the period when

Executors and administrators required to give notice of their appointment,

so that creditors may speedily present their claims.

all claims against the estate will be barred.³ Generally, [* 802] however, it is sufficient to call the * attention of creditors to the fact of appointment, and that they will be required to present their claims as directed by law.⁴ In Indiana, the administrator is required to state whether the estate will probably be solvent or insolvent.⁵ In several of the States, the notice must indicate the place of the residence or business of the administrator, at which claims must be exhibited.⁶ The publication is usually required to

¹ Acting under advice of counsel is a protection to the administrator in the performance of a duty within the scope of his authority; but there is no protection for him when he oversteps the defined boundaries of duty and authority: *Pryor v. Davis*, 109 Ala. 117.

² As to the right to reimbursement for counsel fees, paid out, see *post*, §§ 515, 516.

³ So required, for instance, by the statutes of Alabama, Arkansas, Florida, Kan-

sas, Missouri, Mississippi, Wyoming, and formerly of Texas.

⁴ *Fillyau v. Laverty*, 3 Fla. 72, 105; *Amos v. Campbell*, 9 Fla. 187, 197; *Gilbert v. Little*, 2 Oh. St. 156, 159; *May v. Vann*, 15 Fla. 553.

⁵ Ann. St. 1894, § 2414.

⁶ In California, Idaho, Montana, Washington, North Dakota, Nevada, New York, and Texas. In Maine, where an executor who is non-resident at the time of giving notice, is required to insert

be by posting the notices in two or more public places, to be designated, in some States, by the probate judge; or by publication in one or more newspapers for three consecutive weeks or more, or by both these methods. Proof of publication by the publisher's affidavit has been held to be *prima facie* only;¹ and a statute which provides for the manner in which proof of the giving of such notice may be made is held not to exclude proof by other evidence, if the statutory method is disregarded.²

The omission to publish the notice to creditors is attended by serious consequences. In most of the States, though the general Statute of Limitations is not affected,³ the special bar by limitation in favor of executors and administrators cannot be pleaded by them, when they have failed to publish this notice.⁴ In Indiana⁵ and New York⁶ the administrator becomes himself liable for costs, if he omits to publish the notice, under circumstances in which he would not be liable if publication had been made. In North Carolina, the administrator could not, unless he had complied with the statute in this respect, sustain his plea of fully administered.⁷ In Alabama, he forfeits his right of compensation, besides being liable to creditors for the amount which they might have received from the estate if the notice had been given.⁸ In California,⁹ Nevada,¹⁰ Montana,¹¹ Washington,¹² and Idaho,¹³ if the notice is not given within two months, it becomes the duty of the probate court to revoke the letters granted. In Texas, executors and administrators are liable on their bonds, for failure to give the notice, for the damages which any person may suffer in consequence; and on complaint of any person in interest their letters shall be revoked.¹⁴ So in North Dakota¹⁵ and Utah,¹⁶ the statute provides that they are liable to creditors on their bonds.

the name and address of an agent in the State, it is held that where there are two executors, one of whom only is non-resident, this statute applies, the notice having been jointly given: *Dyer v. Walls*, 84 Me. 143.

¹ *Wial v. Williams*, 88 Cal. 30, 34.

² *Henry v. Esty*, 13 Gray, 336; *Dyer v. Walls*, 84 Me. 143, 145; *Dingle v. Pollick*, 49 Mo. App. 479, 485.

³ *McMillan v. Hayward*, 94 Cal. 357, 361; *Toby v. Allen*, 3 Kans. 399, 413; *Knowles v. Whaley*, 15 R. I. 97, 99. See *post*, § 400.

⁴ See *post*, § 400, as to the Statute of Non-claim, or of Special Limitation.

⁵ *Floyd v. Miller*, 61 Ind. 224, 239.

⁶ *Harvey v. Skillman*, 22 Wend. 571.

⁷ *Lee v. Patrick*, 9 Ired. L. 135, 137.

⁸ Code, 1896, § 124.

⁹ Code Civ. Pro. § 1511; and the administrator is liable on his bond for such amount as the creditor might have recovered if notice had been given: *Ib.* § 1650.

¹⁰ Rev. St. 1885, § 2815.

¹¹ Code Mont. 1895, § 2621.

¹² Code Wash. 1896, § 5482.

¹³ Rev. St. Idaho, 1887, § 5481.

¹⁴ *Sayles' Civ. St.* 1897, § 2067.

¹⁵ Code N. D. 1895, § 6427.

¹⁶ Code Utah, 1898, § 3663.

[* 803]

* CHAPTER XLI.

OF THE EXHIBITION OF CLAIMS TO, AND THEIR ALLOWANCE BY,
THE EXECUTOR OR ADMINISTRATOR.

§ 386. **Creditors required to exhibit Claims.** — If the executor's or administrator's notice has been duly published, creditors are required to exhibit their claims against the estate to the executor or administrator within the time specified in the notice, or fixed by law, before they can proceed by action. One of the purposes of this requirement is to enable the administrator to adjust the claim without the expense of compulsory proceeding in court; hence, creditors bringing suit before exhibiting their claim to the administrator, or making demand for payment, are liable for the cost of such proceeding.¹ In some States, the plaintiff will be nonsuited, or his action dismissed, if no notice of the claim had been given to, or demand made of, the administrator. Cases substantially so holding are met with in the reports from Alabama,² Arkansas,³ California,⁴ Connecticut,⁵ Delaware,⁶ Iowa,⁷ Kentucky,⁸ Maine,⁹ * Ohio,¹⁰

Creditors must exhibit their claims against the estate before they can bring action thereon.

¹ *Saunders v. Rudd*, 21 Ark. 519; *Corbett v. Rice*, 2 Nev. 330; *Baggott v. Boulger*, 2 Duer, 160, 169; *McNulty v. Hurd*, 72 N. Y. 518, 520; *Keyser v. Kelly*, 11 Jones & Sp. 22; *Hamblin v. Hook*, 6 La. 73; *Wallace v. Gatchell*, 106 Ill. 315, 320.

² The claim may be exhibited to the executor or administrator, or filed in the court of probate: Code, 1896, § 133; *Fliun v. Shackleford*, 42 Ala. 202, 204; but a claim filed against *Ethelwood Halfman* will not be taken as the exhibition of one against *Ethelbert*, dec.: *Halfman v. Ellison*, 51 Ala. 543, 546.

³ *Hudson v. Breeding*, 7 Ark. 445; *Meyer v. Quartermous*, 28 Ark. 45, 48.

⁴ *Coleman v. Woodworth*, 28 Cal. 567; *Pico v. De La Guerra*, 18 Cal. 422, 427; *Eustace v. Jahns*, 38 Cal. 3, 23. The defence is said to be in the nature of a plea in abatement: *Preston v. Knapp*, 85 Cal. 559; while in *Fratt v. Hunt*, 108 Cal. 288, a petition failing to state pre-

sentation and rejection was held not to state a cause of action: p. 294.

⁵ *Pike v. Thorp*, 44 Conn. 450, 452; *Hammett v. Starkweather*, 47 Conn. 439, 442; *Grant v. Grant*, 63 Conn. 530.

⁶ In this State the payment of claims after six months, without notice of debts of a higher degree, is a protection to the administrator: *Laws*, p. 547, § 26.

⁷ *Galloway v. Trout*, 2 G. Greene, 595, 597.

⁸ *Thomas v. Thomas*, 15 B. Mon. 178, 184; *Rogers v. Mitchell*, 1 Met. (Ky.) 22, 24.

⁹ *Millett v. Millett*, 72 Me. 117; *Marshall v. Perkins*, 72 Me. 343; *Rawson v. Knight*, 71 Me. 99, 103. But it is now held otherwise: the case will not be dismissed, but may be continued at claimant's costs, and by a tender the defendant may recover his costs: *Gould v. Whitmore*, 79 Me. 383.

¹⁰ *Kyle v. Kyle*, 15 Oh. St. 15; *Stam-*

Oregon,¹ New Hampshire,² New Jersey,³ Texas,⁴ and Wyoming.⁵ But in some of these States the statute is held not to apply to a demand for unliquidated damages,⁶ nor to a demand by the State for taxes on personalty after the decedent's death,⁷ nor for taxes on real estate assessed, due and payable before his death,⁸ nor for decedent's liability as surety on a cost bond,⁹ nor to a suit to be subrogated,¹⁰ nor for specific performance of a contract,¹¹ nor for the recovery, as owner, of a specific fund claimed by the executor as assets,¹² nor in an action by *cestui que trust* against the deceased as a trustee of specific trust funds,¹³ nor for a claim or debt secured by collateral or mortgage or lien if the security only is looked to by the creditor,¹⁴ nor in any case where the administrator cannot comply with the demand, but an order or judgment of the court is necessary;¹⁵ for it is obvious that in all such cases the exhibition would be but an idle ceremony.

§ 387. **What constitutes a Sufficient Exhibition.**—A literal compliance with the terms of the statute is the only course to secure absolute safety to the creditor, and to relieve the administrator from the perplexing doubt, and even personal hazard, which may arise if the sufficiency of the exhibition is not clearly apparent. For however liberally disposed he may be to waive technical defences and to deal with creditors on the basis of substantial justice, he stands as the representative of *all* creditors as well as of heirs, legatees, and distributees, whose technical rights he is not at liberty to disregard.¹⁶ It is by no means easy to determine how far literal compliance can be

Literal compliance with statute necessary in exhibiting demands.

baugh v. Smith, 23 Oh. St. 584, 594; Pepper v. Sidwell, 36 Oh. St. 454; Keenan v. Saxton, 13 Oh. 41.

¹ Zachary v. Chambers, 1 Oreg. 321, 324.

² Kittredge v. Folsom, 8 N. H. 98, 105; Mathes v. Jackson, 6 N. H. 105; Quigg v. Kittredge, 18 N. H. 137, 139.

³ Ryan v. Flanagan, 38 N. J. L. 161, 164.

⁴ Thompson v. Branch, 35 Tex. 21, 25; Jenkins v. Cain, 72 Tex. 88.

⁵ O'Keefe v. Foster, 5 Wyom. 343.

⁶ Evans v. Hardeman, 15 Tex. 480; Neis v. Farquharson, 9 Wash. 508; Hardin v. St. Claire, 115 Cal. 460.

⁷ State v. Tittmann, 119 Mo. 661; Gager v. Prout, 48 Ohio St. 89, 111; Bonaparte v. State, 63 Md. 465.

⁸ Findley v. Taylor, 97 Iowa, 420.

⁹ On the ground that by signing the bond the deceased surety consented to the

summary method of enforcing his liability, and because the decree against the principal was conclusive against the surety: McClasky v. Barr, 79 Fed. R. 408, 417.

¹⁰ Vandever v. Freeman, 20 Tex. 333.

¹¹ Bullion v. Campbell, 27 Tex. 653, 655.

¹² Red River Bank v. Higgins, 72 Tex. 66, 68; Gunter v. Janes, 9 Cal. 643, 658.

¹³ See on this point, *post*, § 402, near end of section.

¹⁴ *Post*, §§ 408 and 409, showing also that a claim for the deficiency, if any, must be presented as any other claim.

¹⁵ Gist v. Gans, 30 Ark. 285, 307, *et seq.*

¹⁶ Wilkes v. Cornelius, 21 Oreg. 348, 351; Douglas v. Folsom, 21 Nev. 441, 448.

insisted on, to what extent the administrator may waive it, and from what circumstances a waiver may be presumed.

The utmost strictness is essential where the time of the exhibition of the creditor's claim affects its priority over others. It is obvious that the administrator can exercise no discretion in such case, and that the sufficiency of the exhibition can be tested by the statute alone, because whatever indulgence is extended to a creditor who has not strictly complied with the statutory requirements may — in insolvent estates must — result to the injury of others, who have conformed to the law.¹

Technical compliance indispensable, if exhibition affects the dignity of the claim.

[* 805] * Where an exhibition is relied on to defeat the operation of the Statute of Non-claim, or of Special Limitation, it is held in some States that there must be actual presentation, or its equivalent; knowledge of the existence of the claim on the part of the executor or administrator, however full, will not dispense with presentation.² But the administrator may waive a literal compliance with the requirements, such as a copy of the demand in writing;³ and the cause of action need not be described with accuracy.⁴ Presentation, at the administrator's request, of a written copy to the administrator's attorney, was held sufficient.⁵ But it is held, that notice directing an exhibition to a general "attorney for the estate" is invalid⁶ (at least where the notice is not actually received by the administrator in

Mere knowledge by the administrator of the existence of the claim is held not sufficient in some States; but he may waive literal compliance in others.

¹ Spaulding v. Suss, 4 Mo. App. 541, 552; Pfeiffer v. Suss, 73 Mo. 245, 249, reversing s. c. in 5 Mo. App. 590; Ashton v. Miles, 49 Iowa, 564, 566.

² Farris v. Stoutz, 78 Ala. 130, 134; Jones v. Lightfoot, 10 Ala. 17, 24. So where the exhibition must be by the creditor to the probate court, the fact that the administrator states in writing that a certain claim is outstanding is not sufficient as an exhibition: Roberts v. Flatt, 142 Ill. 485.

³ Borden v. Fowler, 14 Ark. 471, 473; Grimes v. Booth, 19 Ark. 224, 226. To "present" the claim is in Oregon held to mean "a display or profert of the claim, accompanied with a proper voucher, and a reasonable opportunity to the administrator to examine into and determine for himself upon the justness or validity of the demand. Beyond this the claimant is entitled to the possession of the claim," and consequently may bring replevin to get it back: Willis v. Marks, 29 Oreg. 493, 504.

⁴ Information of the loss of a note was held sufficient to enable the creditor to recover on a money count: White v. Brown, 19 Conn. 577, 584.

⁵ Wells v. Miller, 45 Ill. 33, 35. If a notice directs creditors to present claims to the administratrix at her attorney's office, it has been held sufficient presentation that the claim was left with such attorney's clerk: Roddan v. Doane, 92 Cal. 555. So where presentation is made at the place designated, it is sufficient, though the administrator be absent from the State: Douglas v. Folsom, 21 Nev. 441. Presentation to the administrator's attorney was held insufficient in the absence of evidence showing that he was authorized to that effect by the administrator: Douglass v. Folsom, 22 Nev. 217; Rawson v. Knight, 71 Me. 99.

⁶ Hardy v. Ames, 47 Barb. 413. As to sufficiency and effect of publication of notice to creditors, see *post*, § 400, p. *841.

person within the statutory time), and the administrator's absence from the State makes no difference.¹

Knowledge of the claim is held sufficient to defeat the bar of the statute, and is sufficient to authorize a suit.

In other States it is held that knowledge on the part of the administrator of the existence of the claim is sufficient to prevent the bar of the statute,² and no written notice is necessary.³ So, where there must be a rejection of the claim by the administrator before an action can be brought against him, the knowledge of the administrator that the creditor holds a claim, and attempts or means to assert it, is sufficient.⁴

The revival of an action, abated by the death of the defendant, against his executor or administrator, is equivalent to the exhibition of the demand as of the day when notice of the revival or summons is served upon him;⁵ it has been so held even without statutory provision to that effect.⁶ Institution of suit against an administrator for a debt incurred by the deceased, although plaintiff suffer a non-suit therein, has been held sufficient as an exhibition with a view to fix the class of the claim;⁷ but not such a presentation of the claim as to take it out

* of the Statute of Non-claim;⁸ *a fortiori*, if there was notice [* 806] to but one of several executors or administrators.⁹

¹ The notice should be left at the place designated by the administrator's notice: *Douglas v. Folsom*, 21 Nev. 441.

² *Perry v. West*, 40 Miss. 233, citing and reviewing numerous Mississippi cases: *Puckett v. James*, 2 Humph. 565, 567; *Brown v. Brown*, 56 Conn. 249; s. c. 58 Conn. 85.

³ *Little v. Little*, 36 N. H. 224, 229; *Ayer v. Chadwick*, 66 N. H. 385.

⁴ *Gansevoort v. Nelson*, 6 Hill, 389, 391; *Calanan v. McClure*, 47 Barb. 206; *Gaston v. McKnight*, 43 Tex. 619.

⁵ *Doerge v. Heimenz*, 1 Mo. App. 238; *Rutherford v. Williams*, 62 Mo. 252; *Malone v. Hundley*, 52 Ala. 147, 150; *Clark v. Shelton*, 16 Ark. 474, 479; *Eddins v. Graddy*, 28 Ark. 500.

⁶ *O'Donnell v. Hermann*, 42 Iowa, 60; *Stewart v. Carr*, 6 Gill, 430, 444. See *Bush v. Adams*, 22 Fla. 177, 194; *Anderson v. Agnew*, 38 Fla. 30; *Garrow v. Carpenter*, 1 Port. 359, 375. So where pending an appeal the appellant dies, and his executor is substituted as defendant, on a reversal no new presentation is necessary: *Megrath v. Gilmore*, 15 Wash. 558. In California no presentation is required, if

the judgment is rendered in testator's lifetime, though a motion for a new trial be pending: *Brennan's Estate*, 65 Cal. 517; but if the action be still pending at decedent's death, the statute requires a presentation to the executor: *Derby v. Jackman*, 89 Cal. 1; unless it be for the foreclosure of a mortgage upon other than homestead premises, in which case no presentation is necessary: *Hibernia Savings Soc. v. Wackenrender*, 99 Cal. 503. Ordinarily and regularly, a supplemental complaint should be filed, alleging the death and due presentation of the claim; proof of the presentation in such cases is not a fact essential to the validity of the judgment, where no issue has been made on that question; but the failure to make the proof is ground for reversal when objection is made in the trial court: *Falkner v. Hendy*, 107 Cal. 49.

⁷ *Tevis v. Tevis*, 23 Mo. 256.

⁸ *Dilbone v. Moorner*, 14 Ala. 426; *Newbold v. Fenimore*, 53 N. J. L. 307; *Robins v. Arnold*, 42 N. J. Eq. 511; see also *Wernse v. McPike*, 100 Mo. 476, 491, and *Page v. Bartlett*, 101 Ala. 193.

⁹ *Boggs v. Branch Bank*, 10 Ala. 970.

It has also been held, that the request by the administrator for delay does not prevent the running of the general Statute of Limitations.¹ But when the executor by his fraud prevents the creditor from bringing suit in time, he will be estopped from pleading limitation in a case where he is the sole beneficiary, there being no other creditors to be affected; *i.e.*, to the extent that the executor as legatee is interested, the estoppel is effective in favor of the defrauded creditor, but not in so far as the rights of others not implicated in the fraud are affected.² The special Statute of Non-claim is not interrupted by the administrator's promise to pay the debt.³ So it was held in Missouri and Iowa, where in common with other States, as appears elsewhere, priority of the claim is affected by the time of presentation,⁴ that the ignorance of the creditor as to the requirements of the law touching the exhibition of the claim, — although he was misled by the administrator until it was too late, — does not entitle it to be placed in the class which it would have taken if presented earlier.⁵ The effect of the fraud of an administrator, who thereby, or by his promise to pay, prevails upon a creditor not to prove up his claim within the time allowed by the special Statute of Non-claim, will be discussed in connection with the time within which claims must be established.⁶

Administrator's request for delay does not suspend Statute of Limitation.

Exhibition not excused because of administrator's deceit.

Where the same person administers on the estate of the debtor as well as of the creditor, it is not necessary that a claim be presented to the administrator in one capacity to himself in the other;⁷ and so, on the same principle that the law will infer a presentation under such circumstances, it is held that no presentation is required where the same person is executor of a decedent who executed a note in favor of a corporation, and at the same time president of the corporation and holding the note as such.⁸

Exhibition unnecessary by administrator of debtor and creditor estate.

The presentation to one of several executors or administrators seems to be sufficient to satisfy the law requiring exhibition or notice

¹ *Bates v. Elrod*, 13 Lea, 156.

² *Claghorn's Estate*, 181 Pa. St. 608, 615, deducing this to be the law as announced in *McWilliams' Appeal*, 117 Pa. St. 111.

³ *Lewis v. Champion*, 40 N. J. Eq. 59; *Probate Judge v. Ellis*, 63 N. H. 366; and see cases *post*, § 402, where the Statute of Non-claim is considered.

⁴ *Ante*, § 374; *post*, § 403.

⁵ *Spaulding v. Suss*, 4 Mo. App. 541; *Kells v. Lewis*, 91 Iowa, 128. But see the

case of *Calanan v. McClure*, 47 Barb. 206, indicating a contrary policy.

⁶ *Post*, § 402.

⁷ *Thomas v. Chamberlain*, 39 Oh. St. 112. That the claim need not be allowed or proved up under such circumstances is mentioned in connection with the subject of time of proving claims, *post*, § 402.

⁸ *Brown v. Brown*, 56 Conn. 249; and a secret intention that the claim should not be presented is immaterial: *Brown v. Brown*, 58 Conn. 85.

Exhibition to one of several executors sufficient. of the claim before suit can be brought thereon;¹ but this exhibition must not be confounded with the summons or notice necessary to procure the allowance,² or to commence an action on the claim, which will be considered later on, in connection with the subject of establishing claims against estates.³

§ 388. **Time for the Exhibition of Claims.**—The time within which claims must be exhibited to the administrator begins to run from the date of publication of the notice to creditors, or from the date of the order requiring such publication,⁴ excluding the day of the first publication or * order,⁵ or from the last day of publication;⁶ [* 807] but may be exhibited before, or without, such

notice.⁷ Where the cause of action arises after the death of the debtor, the time is computed, generally, from its maturity.⁸ In some States a saving is also provided in favor of parties who could not be reached by the publication on account of absence from the State.⁹

Provision is made, in some of the States, requiring the administrator to notify all persons holding claims against the decedent to file their claims at a given time with the administrator,¹⁰ or commissioners appointed for that purpose,¹¹ or

¹ *Dean v. Duffield*, 8 Tex. 235; *Clark v. Parkville R. R.*, 5 Kans. 634; *Barnes v. Scott*, 29 Fla. 285, 294.

² *McLane v. Belvin*, 47 Tex. 493.

³ *Post*, § 397. As to pleading when service is made on one only of several executors or administrators, see *ante*, § 380.

⁴ *Wooden v. Cowles*, 11 Conn. 292, 298; *Spaulding v. Suss*, 4 Mo. App. 541, 550; *Cooley v. Smith*, 17 Iowa, 99. But in Missouri, where the time of exhibition of a claim also affects its class of priority, it was held that, while the *bar* of the statute may be reckoned from the publication of notice, yet the *priority* of the claim is to be reckoned from the time of the grant of letters: *Jones v. Davis*, 37 Mo. App. 69, 74.

⁵ *Dutcher v. Wright*, 94 U. S. 553; *Weeks v. Hull*, 19 Conn. 376, 381; *Kimm v. Osgood*, 19 Mo. 60; *Paul v. Stone*, 112 Mass. 27. If last day is Sunday, the claim must be presented the day before: *Allen v. Elliott*, 67 Ala. 432, 437.

⁶ *Henderson v. Hsley*, 11 Sm. & M. 9; *Ellison v. Allen*, 8 Fla. 206, 211.

⁷ *Ricketson v. Richardson*, 19 Cal. 330, 354; *McCann v. Pennie*, 100 Cal. 547;

Russell v. Lane, 1 Barb. 519; *Field v. Field*, 77 N. Y. 294, 296. In California the time for presenting claims must be specified at four months for estates under \$10,000, and at ten months for larger estates; it is held that the time given a creditor to present his claim is not necessarily limited by the estimate put on the estate by the administrator and his consequent publication, but in the absence of a decree of due publication on the actual value of the estate, if over \$10,000: *Pater-son v. Schmidt*, 111 Cal. 457.

⁸ *Allen v. Byers*, 12 Ark. 593, 595; *Gleason v. White*, 34 Cal. 258, 264. See on this point, *post*, §§ 394, 402, and cases there cited.

⁹ *Cullerton v. Mead*, 22 Cal. 95, 98. See *post*, § 402.

¹⁰ For instance, in Colorado, on some day within six months after grant of letters; if not so filed, the estate cannot be made liable for costs: *Mills Ann. St.* 1891, §§ 4781, 4782.

¹¹ As in Michigan: *How. St.* 1882, §§ 5888 *et seq.* In this State creditors must also be notified by publication of the expiration of the time limited for the presentation of claims, after which they will

the probate court.¹ In most of these States, the court may extend the time so limited, not exceeding, usually, eighteen months or two years. In a few of them, the time may, for good cause shown, be extended beyond two years.

The exhibition of claims, to bring them to the notice of executors and administrators, is to be distinguished from that notice to them the service of which performs the office of a summons, making them defendants in a proceeding to establish the claim, requiring their attendance in court, or before some tribunal having jurisdiction for that purpose. In many States quite a difference exists between the one and the other, as, for instance, where demand must be made upon the administrator before instituting litigation;² in others, [* 808] * the only notice required by statute performs the functions of both, operating at once to charge the administrator with notice of the debt, and to bring him into court, or other tribunal having jurisdiction to establish claims, as a defendant. The nature of the notice required in the latter view will be discussed in treating of the establishing of claims.

§ 389. **Affidavit of Creditors necessary.**—In all but two or three of the States the claimant must aver, under oath, that the amount claimed against the estate is justly due, that no payments have been made thereon, and that no set-offs exist against the same except as stated, before either the

claims to be given by administrator or commissioners.

Exhibition of claims must be distinguished from notice of suits.

Creditors must verify the justice of the claim, and

be barred: *Ib.* § 5931. Vermont: *St.* 1894, §§ 2496 *et seq.* Where a claim, presented to the commissioners without authority, is disallowed by them, the creditor may petition the probate court to renew the commission, as though his claim had never been presented: *Whitcomb v. Davenport*, 63 Vt. 656, 659. Wisconsin: *Brill v. Ide*, 75 Wis. 113, holding that the order limiting the time for creditors to present their claims is inoperative as a limitation unless it also "appoint convenient times and places when and where" such claims would be examined and adjusted; but the soundness of this ruling is questioned in the case of *Austin v. Saveland*, 77 Wis. 108, 112, in so far as it invalidated the order because it did not incorporate into the order itself the appointment of times and places for examining the claims. Nebraska: *Cons. St.* 1893, §§ 1273 *et seq.*

¹ As in Illinois: *Horner's Probate Law*, § 185. The giving of the notice for the adjustment of claims confers on the court jurisdiction of the person of the administrator, and he is bound to take notice

of an order of continuance; the filing of a claim is a presentation to the court: *Wand v. Dunham*, 134 Ill. 195, 201; but not unless properly sworn to: *Smith v. Goodrich*, 167 Ill. 46, 50. If not so presented, claimant cannot recover costs: *Russell v. Hubbard*, 59 Ill. 335, 338; if not presented within two years, they can be satisfied out of subsequently discovered assets only: *Shepard v. National Bank*, 67 Ill. 292; *Russell v. Hubbard*, *supra*. Indiana: *Chidester v. Chidester*, 42 Ind. 469. Maryland: *Hinkley's Test. L.* § 905. Minnesota: *St.* 1891, § 5715. The court may for good cause receive a claim after the time limited (if presented within a year and six months from the time the notice of the order is given, and before final settlement): *Gibson v. Brennan*, 46 Minn. 92 (the appellate court refusing to review the discretionary action of the probate court). As to the power of the court to extend the time for enforcing claims against estates, see *post*, § 400, p. * 841.

² *Ante*, § 387.

negative set-offs and payment.

administrator, the commissioners, the probate court, or any court of competent jurisdiction can allow the same.

The statutes generally give the form or indicate the contents of such affidavit, varying as to the details, but all to the effect above set out.¹ If the substance of the required averments be given, the affidavit will be sufficient although not in the language of the statute;² or, if deficient, it may be amended before final decree.³ It has been held that the omission of the word "dollars" was not fatal, where the body of the claim supplied the omission;⁴ but the omission of the word "discount," required by the statute, was held fatal,⁵ and the word "credits" does not include "set-offs," the existence of which must be negatived.⁶ In some of the States the affidavit is necessary only if the administrator requires it;⁷ in others, costs cannot be recovered by the claimant who omits to make it,⁸ but it is not held a jurisdictional prerequisite to an action against the estate,⁹ and need not negative a set-off.¹⁰ In some States the affidavit must be made by the * creditor,¹¹ and if the claim is [* 809] held by several jointly, then by all of them in person;¹² in others, and if the claimant be a corporation, it may be made by an agent having personal knowledge of the facts required to be sworn to.¹³ If the claim is held by assignment after

¹ *Lay v. Clark*, 31 Ala. 409; *Lafferty v. Lafferty*, 10 Ark. 268; *Saunders v. Rudd*, 21 Ark. 519; *Merchants' Bank v. Ward*, 45 Mo. 310; *Gillmore v. Dunson*, 35 Tex. 435, 438; *Converse v. Sorley*, 39 Tex. 515, 527; *Worthley v. Hammond*, 13 Bush, 510, 513; *Clawson v. McCune*, 20 Kans. 337, 345; *Green v. Brooks*, 25 Ark. 318; *Nutall v. Brannin*, 5 Bush, 11, 15; *Brown v. Brown*, 45 S. C. 408.

² *Crosby v. McWillie*, 11 Tex. 94; *Lenk Wine Co. v. Caspari*, 11 Mo. App. 382; *In re Swain*, 67 Cal. 637, 641. But see *Perkins v. Onyett*, 86 Cal. 348.

³ *Walker v. Wigginton*, 50 Ala. 579, 583; *Chadwell v. Chadwell*, 98 Ky. 643, 647.

⁴ *Hall v. Superior Court*, 69 Cal. 79.

⁵ *Trabue v. Harris*, 1 Met. (Ky.) 597.

⁶ *Walters v. Prestidge*, 30 Tex. 65, 69.

⁷ As in Maine: *Rev. St.* 1883, p. 546, § 62. In New York: *Russell v. Lane*, 1 Barb. 519. In New Jersey: *Kinnan v. Wight*, 39 N. J. Eq. 501, 504.

⁸ *Hannum v. Curtis*, 13 Ind. 206, 210.

⁹ *Campbell v. Young*, 3 How. (Miss.) 301; *Smith v. Denman*, 48 Ind. 65, 67. But in Arkansas a nonsuit will be directed if the authentication be not made: *Ross v. Hine*, 48 Ark. 304.

¹⁰ *Smith v. Denman*, 48 Ind. 65.

¹¹ *Beirne v. Imboden*, 14 Ark. 237; *Ma-coleta v. Packard*, 14 Cal. 178; now otherwise in California: see note 13, *infra*; *McWhorter v. Donald*, 39 Miss. 779, 782; *Zachary v. Chambers*, 1 Oreg. 321.

¹² *Hahnlin's Appeal*, 45 Pa. St. 343, 344; *Cecil v. Rose*, 17 Md. 92, 104; but see *Gregory v. Bailey*, 4 Harr. 256, 263, holding that retired and dormant partners need not join in the affidavit; also *Ashley v. Gunton*, holding that the affidavit of one of several joint claimants is sufficient: 15 Ark. 415, 422.

¹³ *Peter v. King*, 13 Mo. 143; *Bank of Mobile v. Smith*, 14 Ala. 416, 418; *State v. Collins*, 16 Ark. 32; *Hansell v. Gregg*, 7 Tex. 223, 228; *McIntosh v. Greenwood*, 15 Tex. 116; *Mason v. Bull*, 26 Ark. 164, 166; *Howard v. Leavell*, 10 Bush, 481; *Heath v. Garrett*, 46 Tex. 23. In California the reason why the claimant does not make the affidavit must be given: *Perkins v. Onyett*, 86 Cal. 348, holding the omission a fatal defect. See *Deringer v. Deringer*, 6 Houst. 64, when the affidavit was allowed to be made by the proper officer of a corporation acting as administrator, in a claim against an estate.

the death of the debtor, the affidavit must be made by both the assignor and assignee.¹ If required in a proceeding before a court, it need not be in writing, but may be made *ore tenus*, or by the claimant as a witness.² So, if properly made and authenticated, the omission of the signature of the claimant to the affidavit in writing will not affect its validity.³ And an allowed claim cannot be disregarded on account of a defective verification.⁴ An affidavit made during the lifetime of a decedent will not authorize the allowance of a claim, since it might have been true when made and not true at the death of the decedent.⁵ The affidavit must be made as well when a judgment obtained against the decedent in his lifetime is presented for classification against the estate as in the case of an ordinary debt;⁶ and also where a suit is brought on a judgment rendered in a foreign State against the same estate.⁷ And in Kentucky also when a suit pending against the deceased at the time of his death is revived against his executor or administrator;⁸ but in other States this is not required.⁹ The affidavit may be sworn to before any person competent to administer oaths,¹⁰ if the official authority is sufficiently authenticated.¹¹

Assignee and assignor must both make affidavit.

May be *ore tenus*.

Must be after decedent's death.

On judgment same as on other claims.

[* 810] * In Kentucky it is held that the statute does not apply to the Commonwealth, because there is no one to make the oath.¹² But it was held that the affidavit must be made when a claim by the State or municipality for unpaid taxes is presented.¹³

§ 390. **Allowance or Rejection of Claims by the Administrator.** — In many of the States, the administrator, being satisfied of the justice of a claim by his own knowledge, or by the affidavit of the claimant, or such evidence as he may deem sufficient, may allow the same without formal judgment or proceeding in court. It is so provided in Arkansas,¹⁴ Connecti-

Administrator may allow claims without trial in court;

¹ McWhorter v. Donald, 39 Miss. 779, 783; Laws Del. 1874, p. 547, § 29. In *Winningham v. Holloway* it was held that no authentication was required where the assignors of the judgment were the distributors of the creditor's estate, since they were not authorized to collect and are not presumed to know what was paid: 51 Ark. 385, 389.

² *Kincheloe v. Gorman*, 29 Mo. 421; *Merchants' Ins. Co. v. Linchey*, 3 Mo. App. 587; *Overly v. Overly*, 1 Met. (Ky.) 117, 122. On the trial *denovo* of an appeal, it will be presumed that the affidavit had been made in the lower court *ore tenus*: *Million v. Ohnsorg*, 10 Mo. App. 432, 437.

³ *Mahan v. Owen*, 23 Ark. 347, 389.

⁴ *Consolidated N. Bank v. Hayes*, 112 Cal. 75.

⁵ *Wilkerson v. Gordon*, 48 Ark. 360.

⁶ *Scroggs v. Tutt*, 20 Kans. 271, 275; *Curry v. Bryant*, 7 Bush, 301; *Bayless v. Powers*, 62 Iowa, 601, 603.

⁷ *Smith v. Goodrich*, 167 Ill. 46.

⁸ *Matthews v. Jones*, 2 Met. (Ky.) 254.

⁹ *Goodrich v. Fritz*, 9 Ark. 440; *Walker v. Byers*, 14 Ark. 246; *Quivey v. Hall*, 19 Cal. 97, 100.

¹⁰ *Stone v. Kaufman*, 25 Ark. 186, 188; *Greenwood v. Woodward*, 18 Tex. 1, 2.

¹¹ *Alter v. Kinsworthy*, 30 Ark. 756.

¹² *Arnold v. Commonwealth*, 80 Ky. 135.

¹³ *Gay v. Louisville*, 93 Ky. 349.

¹⁴ Dig. of St. 1894, §§ 121-123.

cut,¹ Delaware,² Georgia,³ Kansas,⁴ Maryland,⁵ New Jersey,⁶ New York,⁷ North Carolina,⁸ Pennsylvania, Rhode Island, South Carolina, and Tennessee. In a number of States, the approval of the probate court is necessary, in addition to that of the administrator, before it is payable out of the estate;⁹ in most of them, however, there must be the judgment of some court of ordinary jurisdiction, * or of the [* 811] probate court, before payment of a claim can be compelled. The previous exhibition to the administrator is, as already shown, a prerequisite to such judgment.¹⁰

¹ Gen. St. 1888, § 583 (Solvent Estates).

² Laws, 1874, p. 547, § 96.

³ Code, 1895, § 3423.

⁴ Claims not exceeding \$50.00: Gen. St. 1897, ch. 107, § 101.

⁵ But he pays at his peril: Publ. Gen. L. 1888, ch. 93, § 83; *Zollickuffer v. Seth*, 44 Md. 359, 370.

⁶ *Kinnan v. Wight*, 39 N. J. Eq. 501.

⁷ *Schutz v. Morette*, 146 N. Y. 137, on p. 144.

⁸ Code, 1883, §§ 1425, 1426.

⁹ Thus it is held in California that the allowance by one of several administrators is the act of all: *Willis v. Farley*, 24 Cal. 490, 500; the allowance by the administrator, when approved by the probate judge, has the effect of a judgment: *In re Hidden*, 23 Cal. 362; but payment cannot be enforced without a decree of the probate court: *Magraw v. McGlynn*, 26 Cal. 420, 430; *Nally v. McDonald*, 66 Cal. 530. Where part of an equitable claim is allowed, its acceptance will not estop the claimant from suing in equity for the balance: *Walkerly v. Bacon*, 85 Cal. 137. In Texas the allowance by the administrator, together with the approval of the chief justice of the county court, likewise constitutes a judgment: *Pitner v. Flanagan*, 17 Tex. 7; which may, however, be impeached by distinct and clear proof of error in a suit to set the same aside: *Hillebrant v. Burton*, 17 Tex. 138. If the claim is rejected, the creditor may bring an action thereon in a court of general jurisdiction, within ninety days: *Swan v. House*, 50 Tex. 650, 653. In reckoning the ninety days the day of execution is excluded: *Hunter v. Lanins*, 82 Tex. 677. When the indebtedness is secured by a lien, the administrator can only pass upon the ques-

tion of indebtedness; the probate court will pass upon the effect of the lien and its enforcement: *Mortgage, &c. v. Jackman*, 77 Tex. 622. In Illinois the probate court may give judgment upon the claimant's affidavit, if not objected to by the administrator or other person in interest: *Horner's Pr. L.* § 185. In Iowa the claim may be allowed by the court having probate jurisdiction, upon the written approval of the administrator: *Rev. Code*, § 2408; but may also be rejected by the court without evidence: *Ordway v. Phelps*, 45 Iowa, 279, 281. In Nevada, Montana, Utah, Idaho, Washington, and North Dakota, the claim must be allowed by the administrator and approved by the probate judge, and may then be filed as an acknowledged debt; but either the administrator or the court may reject it: *Rev. St. Nev.* 1885, § 2801, *et seq.*; *Code Mont.* 1895, §§ 2606 *et seq.*; *Code Utah*, 1898, § 3853; *R. S. Idaho*, 1887, § 5466; *Code Wash.* 1896, § 5468; *Code N. D.* 1895, § 6408. In Louisiana the approval of a claim by the administrator, and its delivery to the judge to be ranked among the acknowledged debts of the succession, makes a judgment on it unnecessary, and suspends prescription: *Renshaw v. Stafford*, 30 La. An. 853; *Succession of Richmond*, 35 La. An. 858, 862. The creditor is required to appear in court upon notice of a tableau of distribution filed by the administrator: *Succession of Harkins*, 2 La. An. 923; *Succession of Gautier*, 8 La. An. 451. Although recognized by the administrator, claims against the succession must be proved up when objection is made by heirs and creditors: *Romero's Estate*, 38 La. An. 947.

¹⁰ *Ante*, § 387.

If the administrator does not deem the claim a just one, or if some person having a legal right to do so objects to its allowance,¹ or if, for any reason, he is unwilling to allow the claim, Or may reject he should reject it, and remit the claimant to his action, claims. at law, or other proceeding allowed by statute, to establish it,² and the claimant must then bring his action upon the claim as it was when rejected by the administrator.³

At common law the administrator may submit to arbitration any contest touching the claim of a creditor against the estate;⁴ and in some of the States, for instance, in California,⁵ Connecticut,⁶ Georgia,⁷ Idaho,⁸ Iowa,⁹ Maine,¹⁰ Maryland,¹¹ Massachusetts,¹² Mississippi,¹³ Montana,¹⁴ Nevada,¹⁵ New Hampshire,¹⁶ New Jersey,¹⁷ New York,¹⁸ North Carolina,¹⁹ Ohio,²⁰ Oregon,²¹ Rhode Island,²² Utah,²³ Vermont,²⁴ Washington,²⁵ and West Virginia,²⁶ this power is likewise awarded to administrators, — in some of them with, in others without, an order of the probate court. But in other States they seem to have no [* 812] such authority.²⁷ If the administrator *neither allow nor

Power to submit claims to arbitration.

¹ Horner's Pr. L. § 185; Egerton v. Egerton, 17 N. J. Eq. 419, 423; Johnson v. Brown, 25 * Tex. 120, 128; Hottenstein's Appeal, 2 Grant's Cas. 301; McLane v. Belvin, 47 Tex. 493, 500.

² Allowing or passing the claim by the probate court against the objection of the administrator does not bind the estate, unless the allowance is the result of a regular trial between the creditor and the administrator: Bowie v. Ghiselin, 30 Md. 553, 557; Yingling v. Hesson, 16 Md. 112, 118.

³ Defects cannot be supplied at the trial: Wilkes v. Cornelius, 21 Oreg. 348, 352; the claimant cannot recover on any other cause of action: Lichtenberg v. McGlynn, 105 Cal. 45.

⁴ Ante, § 327.

⁵ Code Civ. Proc. § 1507.

⁶ Alling v. Munson, 2 Conn. 691; Gen. St. 1888, § 595.

⁷ Code, 1895, § 3428, allowing him to submit to arbitration or compromise.

⁸ R. S. Ida. 1887, § 5477.

⁹ Code, 1897, §§ 3393, 3344, allowing trial before referees.

¹⁰ Rev. St. 1883, p. 545, § 52; Kendall v. Bates, 35 Me. 357.

¹¹ Browne v. Preston, 38 Md. 373, 379.

¹² Bean v. Farnam, 6 Pick. 269, 271; Bacon v. Crandon, 15 Pick. 79.

¹³ Reed v. Wiley, 5 Sm. & M., 394, 406; Regan v. Stone, 7 Sm. & M. 104.

¹⁴ Code Mont. 1895, § 2617.

¹⁵ Code, 1885, § 2811.

¹⁶ Publ. St. 1891, ch. 191, § 26.

¹⁷ McKeen v. Oliphant, 18 N. J. L. 442, 448.

¹⁸ Woodin v. Baaley, 13 Wend. 453; White v. Story, 43 Barb. 124, 129; Wood v. Tunncliff, 74 N. Y. 38.

¹⁹ Code, 1883, § 1426.

²⁰ Childs v. Updyke, 9 Oh. St. 333, 335; Rev. St. § 6093.

²¹ Gen. L. 1887, § 1137.

²² Gen. L. 1896, p. 713, § 27.

²³ Code Utah, 1898, § 3864.

²⁴ Powers v. Douglass, 53 Vt. 471, under order of the probate court; and it is held in this case that, if an administrator submit a difference touching the estate to arbitration without such order, an action of assumpsit will lie against him personally upon the award. After the parties have consented in writing to the reference, the court may appoint as referee whom it pleases; the decree of the court on such a reference may be the basis of an action for debt: Noyes v. Phillips, 57 Vt. 229.

²⁵ Code Wash. 1896, § 5479.

²⁶ Wamsley v. Wamsley, 26 W. Va. 45.

²⁷ In some of them it has been so decided: Yarborough v. Leggett, 14 Tex. 677; Harrington v. Rich, 6 Vt. 666, 673; Clark v. Hogle, 52 Ill. 427, 431; Reitzell v. Miller, 25 Ill. 67.

Silence of the administrator equivalent to rejection. reject the claim exhibited to him, it is to be deemed rejected, and the creditor may bring his action, or, as the case may be, present the claim for allowance to the probate court.¹ In rejecting the claim, he should indorse the reason of his rejection upon it,² and notify the claimant in person,³ and in terms so unequivocal that the creditor may know with certainty when his claim, if not sued on, would be barred.⁴ A secret rejection and refusal to inform claimant, may operate as a fraud, and is invalid as a rejection.⁵ He will not be heard to object for the first time when sued upon the claim, that it was not properly authenticated,⁶ or in proper form.⁷ The rejection by one of several administrators is sufficient to authorize a suit upon the claim.⁸

¹ *Bellows v. Cheek*, 20 Ark. 424, 428; *Randolph v. Ward*, 29 Ark. 238; *Yarborough's Succession*, 16 La. An. 258; *Hoyt v. Bonnett*, 50 N. Y. 538, 542; *Barsalou v. Wright*, 4 Bradf. 164, 169; *Harter v. Taggart*, 14 Oh. St. 122; *Gaston v. McKnight*, 43 Tex. 619. In Nevada, Montana, Washington, Utah, and Idaho, the claimant may consider his claim rejected, if not acted on after the tenth day. So in California: *Steward v. Hinkel*, 72 Cal. 187, 189; but the claimant has his option whether to consider his claim rejected upon the tenth day after presentation, or not; and if he elects not to consider the same rejected, he may subsequently at any time before official action by the administrator elect to consider the same rejected: *Cowgill v. Dinwiddie*, 98 Cal. 481, 486. When the representative does not deny the correctness of a claim filed with him, in proper time, but presents his petition to make assets, this is strong proof that he admits the claim: *Woodlief v. Bragg*, 108 N. C. 571. In New York it is held that presentation of a claim, followed by the executor's inaction, neither admitting nor rejecting it, does not excuse the creditor from the operation of the statutory bar, if he delay

until too late. Says the court: "It may be justly claimed that the executor ought, in the fair discharge of his duty both to the creditor and to the estate, to examine the claim within a reasonable time, and make known his position with respect to it. But it would be hazardous, in view of the ignorance or inexperience of the persons called upon to act as executors or administrators, to construe mere silence as an admission that the claim was a valid one": *Schutz v. Morette*, 146 N. Y. 137, 144. And it is further held in this State that mere silence after the presentation of a claim accompanied by lapse of time will not in any case preclude the representative from thereafter contesting its validity: *Matter of Callahan*, 152 N. Y. 320, 326.

² *Shelton v. Berry*, 19 Tex. 154; *Hoyt v. Bonnett*, *supra*.

³ *Van Saun v. Farley*, 4 Daly, 165, 167.

⁴ *Bradley v. Vail*, 48 Conn. 375, 385; *Steward v. Hinkel*, 72 Cal. 187, 190. See note 1, *supra*.

⁵ *Cowgill v. Dinwiddie*, 98 Cal. 481.

⁶ *Keesee v. Beckwith*, 32 Tex. 731, 736.

⁷ *Aiken v. Coolidge*, 12 Oreg. 244.

⁸ *Dean v. Duffield*, 8 Tex. 235.

[* 813]

* CHAPTER XLII.

OF ESTABLISHING CLAIMS AGAINST THE ESTATES OF DECEASED PERSONS.

§ 391. When Claims may be established in Probate Court. —

Having exhibited his claim to the executor or administrator, and failed to obtain satisfaction thereof, either because there is no authority under the statute for him to make the allowance, or because, where he has such authority, he is not satisfied of the justice of the claim, the creditor's next step is to establish it in some court of competent jurisdiction¹ as a valid demand against the estate.² The procedure under American statutes differs in this respect from the common-law method of obtaining judgments or decrees against executors or administrators chiefly in the nature of the judgment rendered, which, if in favor of the claimant, is always against the personal representative in his representative character, simply fixing the amount of the demand without reference to the question of assets, and determining its class of priority; leaving the question of liability between the creditor and the administrator in his personal character to be determined by a later proceeding. "It is one thing to obtain an allowance and another thing to obtain a direction for the payment of the claim," pithily says Chief Justice Elliott, of the Supreme Court of Indiana.³

Claim must be established, if not voluntarily paid by the administrator,

by a judgment showing the creditor's right against the estate.

The procedure in America is still further simplified by vesting the probate courts with power to hear and determine all claims against the estates of deceased persons in a summary manner, without the formality of technical pleading, yet securing to litigants the full benefit of trial before courts of

Power of probate court to allow claims.

¹ In Illinois it is affirmatively decided that justices of the peace have jurisdiction in suits against administrators to the extent of their jurisdiction in ordinary cases, which may be established in probate by filing a certified copy thereof in the probate court: *Bradwell v. Wilson*, 158 Ill. 346, reversing s. c. 57 Ill. App. 162. In Missouri Justices of the Peace have no jurisdiction to allow claims: Rev. St. 1889, § 6124.

² Executors have no official residence, and may be sued in the county where they reside: *Thompson v. Wood*, 115 Cal. 301. But in North Carolina all actions against executors and administrators in their official capacity must be instituted in the county in which the bond was given; but if neither principal nor sureties live there, then in plaintiff's county: *Farmers' State Alliance v. Murrell*, 119 N. C. 124.

³ In *Fickle v. Snepp*, 97 Ind. 289, 293.

higher dignity by providing for appeals to courts of plenary jurisdiction and a trial there *de novo*.¹

* By these means the common-law right of preferring one [* 814] creditor of the same class over another; the right of retainer for the administrator's own debt; the artificial system of pleading the existence of a debt of superior dignity in bar of an inferior one, or *plene administravit*, or *rien ultra* in case of insufficiency of assets; the marshalling of assets or securities by courts of equity; the technical distinction between pleas admitting or denying assets, between judgments *de bonis propriis* and *de bonis intestatis* or *testatoris*, and judgments *quando acciderint*, as well as the complicated formalities of enforcing judgments against executors and administrators, are swept away.² The rights of creditors are thus secured; and executors and administrators relieved of all responsibility except faithfully to present any defence which they may be aware of, on the trial.

The general nature and extent of jurisdiction of probate courts have been discussed in an earlier chapter;³ it will be sufficient to refer to what is there stated touching the nature of the procedure in these courts, and to mention the following States in which the power to try claims has been conferred upon courts of probate jurisdiction: Alabama,⁴ Arkansas,⁵ California,⁶ Colorado,⁷ Connecticut,⁸ Illinois,⁹ Indiana,¹⁰ Iowa,¹¹ Kansas,¹² Massachusetts,¹³ Michigan,¹⁴ Min-

¹ The method of procedure and the informality of pleading in probate courts appear *ante*, § 149, p. * 339.

² Says the court in *Barnes v. Scott*, 29 Fla. 285, 298: "We think that the office and effect of these pleas has, by this legislation, become nugatory in this State, and no longer a legitimate defence in suits brought to reduce creditors' claims to judgment."

³ *Ante*, §§ 141 *et seq.*, treating of the nature of American probate courts; §§ 150 *et seq.*, treating of the scope of their jurisdiction.

⁴ Exclusive original jurisdiction in estates which have been reported insolvent: Code, 1896, § 306.

⁵ Dig. of St. 1894, §§ 123, 125, *et seq.*

⁶ If allowed by the administrator, the claim may be approved or rejected by the probate judge; if approved by both, payment cannot be refused: *McKinley's Estate*, 49 Cal. 152; if rejected by either, creditor may sue in a court of ordinary jurisdiction: Code Civ. Proc. § 1498.

⁷ *Mills' Ann. St. 1891*, § 4787.

⁸ On the report of commissioners of insolvent estates: *Vail's Appeal*, 37 Conn. 185.

⁹ St. & Curt. St. 1896, p. 293, ¶ 60. In this State the court, in the exercise of its equity powers, may set aside the allowance of a claim at a subsequent term, for fraud or mistake; and an heir has the right to contest claims when presented, and to institute such proceeding to set aside the allowance: *Schlink v. Maxton*, 153 Ill. 447.

¹⁰ Ann. Ind. St. 1894. Probate jurisdiction is conferred upon circuit courts, and claims must be originally brought in these courts, but change of venue may be had as in other civil actions: *Lester v. Lester*, 70 Ind. 201.

¹¹ Code, 1897, § 225. Probate jurisdiction is vested in district courts, which have power to try claims. See *Farmers' Bank v. Crecelius*, 84 Iowa, 677; *Davenport's Estate*, 85 Iowa, 293 (holding that on motion of an heir the court has power to set aside the judgment at the same term).

¹² Gen. St. Kans. 1897, ch. 107, § 93.

¹³ Insolvent estates must be reported, and claims tried before commissioners or the probate court: Pub. St. 1882, p. 777, §§ 2 *et seq.*

¹⁴ How. St. § 5895; *Aldrich v. Annin*, 54 Mich. 230.

[* 815] nesota,¹ Mississippi,² Missouri,³ Montana,⁴ Nebraska,⁵ * Nevada,⁶ New Hampshire,⁷ New Jersey,⁸ North Carolina,⁹ North Dakota,¹⁰ Oregon,¹¹ Pennsylvania,¹² Rhode Island,¹³ Tennessee,¹⁴ Vermont,¹⁵ Wisconsin,¹⁶ and Wyoming.¹⁷

It has already been stated, that in Maryland and New York it has been decided that they have no such power.¹⁸

§ 392. **What Actions and Defences are triable in Probate Courts.** — It appears from the discussion of the method of procedure in probate courts,¹⁹ that while they possess no original chancery powers, yet within the scope of the jurisdiction conferred upon them their powers are not confined to either legal or equitable rules, but are to be measured by the statutory grant alone.²⁰

It may be observed here, that the spirit of the administration law is foreign to the remedy by attachment against an executor or administrator for the debt of a deceased person; it is accordingly held that attachment will not lie against the assets of an estate for the decedent's debt;²¹ nor distress,

Attachment does not lie against an estate,

¹ Gen. St. Minn. 1891, § 5717; § 5726. But the probate court has jurisdiction only over claims arising on contract: *Clomstock v. Matthews*, 55 Minn. 111. The court may in its discretion vacate the allowance; but if this is done without showing of proper cause by the moving party, it is an abuse of discretion: *Kidder's Estate*, 53 Minn. 529.

² Miss. Ann. Code, 1892, pl. 1931 *et seq.* In 1870 probate jurisdiction was transferred to the chancery courts; but the mode of procedure in probate matters retained as prescribed for probate courts: *Bernheimer v. Calhoun*, 44 Miss. 426; *Wells v. Smith*, 44 Miss. 296.

³ Rev. St. 1889, § 191.

⁴ *Mouillera's Estate*, 14 Mont. 245.

⁵ *Stevenson v. Valentine*, 38 Neb. 902; *Yeatman v. Yeatman*, 35 Neb. 422.

⁶ Same as in California: Rev. St. 1885, § § 2799 *et seq.*

⁷ If the estate is insolvent, all claims must be examined by commissioners and reported to and approved by the probate court: Publ. St. N. H. ch. 192, § § 1 *et seq.* By the solvent course claims against the estate are settled by the administrator, or adjudicated in an action against him: *Judge v. Couch*, 59 N. H. 506.

⁸ In estates reported insolvent: Gen. St. N. J. 1895, p. 2374, § § 82 *et seq.*

⁹ Code, 1883, § § 102, 1374, *et seq.* The office of probate judge is abolished in this

State; the duties are performed by the clerk of the superior court, which has jurisdiction of actions.

¹⁰ Rev. Code N. D. 1895, § § 6399 *et seq.*

¹¹ The decision of a county court is a judgment rather than a decree: *Johnston v. Shofner*, 23 Ore. 111.

¹² *Phillips v. Allegheny R. R.*, 107 Pa. St. 465.

¹³ In insolvent estates: Pub. St. 1882, p. 487, § § 12, 15.

¹⁴ Code, 1884, § § 3180, 3181; *Peacock v. Wilson*, 9 Lea, 398.

¹⁵ It is the duty of the court to appoint commissioners, and creditors have the right to call for such appointment: *Powers v. Powers*, 57 Vt. 49.

¹⁶ Sanb. & B. Ann. St. 1898, § 3843.

¹⁷ Rev. St. Wyo. § § 2139, 2146.

¹⁸ *Ante*, § 153.

¹⁹ *Ante*, § 149.

²⁰ *McCall v. Lee*, 120 Ill. 261, 269.

²¹ *Bryant v. Fussell*, 11 R. I. 286; *Blass v. Hood*, 57 Ark. 13, 15; *Taliaferro v. Lane*, 23 Ala. 369; *Haight v. Bergh*, 15 N. J. L. 183; *Muller v. Leeds*, 52 N. J. L. 366; *Jackson v. Walsworth*, 1 Johns. Cas. 372; *Cheatham v. Carrington*, 14 La. An. 696; *Strouse v. Lawrence*, 160 Pa. St. 421. But an attachment regularly sued out in the lifetime of the debtor is held, "by the decided weight of authority, as well as the better reason,

nor a summary proceeding to recover rent by distress,¹ even in States where the realty goes to the executor;² nor the summary proceeding

nor summary
remedy against
stockholder.

Probate courts
have power to
try all claims
upon which a
money judg-
ment can be
rendered,

by execution to enforce the personal liability of a stockholder in an insolvent corporation.³ But the power to try claims against the estates of deceased persons includes all actions upon which a money judgment can be rendered, whether growing out of contract or tort, whether legal or equitable in their nature.⁴ Thus any action for a wrong to the property rights or interests of another,⁵ a false return by the sheriff,⁶ conversion of a slave,⁷ or of a trust fund,⁸ or for the breach of a bond with collateral conditions,⁹ is triable against the estate of a deceased person in the probate court. In Indiana¹⁰ and Wisconsin,¹¹ purely equitable powers are held to be vested in probate courts, such as compelling specific performance of a contract, enforcing a trust, etc.

A court of equity will not, therefore, * assume jurisdiction [* 816] of a claim against an estate until it has been shown that the probate court cannot afford the requisite relief.¹² The administrator may, *a fortiori*, make any defence, whether legal or equitable, against a demand presented against the estate.¹³

The allowance of a claim by the probate court is a judgment, and the same conclusive effect should be given it as to that of a judgment of any other court;¹⁴ the judgment against

not dissolved by death, unless some statute expressly so declares": *Mosely v. Mfg. Co.*, 4 Okla. 492, citing a number of cases on p. 495. As to attachment against a foreign executor, see *ante*, § 163, p. *369; and as to when an administrator or executor may be garnished by a creditor of a beneficiary of the estate, see *ante*, § 177, p. *390.

¹ *Lillard v. Noble*, 159 Ill. 311.

² *Martell v. Meehan*, 63 Cal. 47.

³ *Achenbach v. Coal Co.*, 2 Kans. App. 357. See also next note.

⁴ *Butler v. Lawson*, 72 Mo. 227, 245; *Hoffman v. Hoffman*, 126 Mo. 486; *Moore v. Rogers*, 19 Ill. 347; *Dixon v. Buell*, 21 Ill. 203; *ante*, § 149, and cases there cited. In Minnesota, however, the probate court has jurisdiction only over claims arising out of contract: *Comstock v. Matthews*, 55 Minn. 111; and no power to enforce the constitutional liability of a deceased stockholder for corporate debts: *Martin's Estate*, 56 Minn. 420; but it has power to allow a claim for the unpaid capital stock held by deceased in an insolvent corpora-

tion: *State v. Probate Court*, 66 Minn. 246.

⁵ *Mayberry v. McClurg*, 51 Mo. 256, 260.

⁶ *Jewett v. Weaver*, 10 Mo. 234.

⁷ *Moore v. Brown*, 14 Mo. 165.

⁸ *State v. Claudius*, 3 Mo. App. 561; *Hammons v. Renfrow*, 84 Mo. 332, 340.

⁹ *State v. Paul*, 21 Mo. 51, 55.

¹⁰ *Dehart v. Dehart*, 15 Ind. 167.

¹¹ *Brook v. Chappell*, 34 Wis. 405, 409.

¹² *Adams v. Adams*, 22 Vt. 50, 57; *Harris v. Douglas*, 64 Ill. 466, 469; *Blanchard v. Williamson*, 70 Ill. 647, 651; *Walker v. Diehl*, 79 Ill. 473; *Winslow v. Leland*, 128 Ill. 304, 339; *Kothman v. Markson*, 34 Kans. 542; *Goff v. Robinson*, 60 Vt. 633; *Joslin v. Wheeler*, 62 N. H. 169.

¹³ *Wilcox v. Powers*, 6 Mo. 145; *Foot v. Foot*, 61 Mich. 181, 192.

¹⁴ *Munday v. Leeper*, 120 Mo. 417; *Clark v. Bettelheim*, 144 Mo. 258, 270; *Yeatman v. Yeatman*, 35 Neb. 422; *Barber v. Bowen*, 47 Minn. 118; *Johnston v. Shofner*, 23 Oreg. 111; *Holt. Mfg. Co. v.*

the executor or administrator is conclusive as to the personalty, but not necessarily so on the heirs or devisees of the real estate to the extent of subjecting their realty to the payment of such judgment.¹

conclusive as
any other
judgment.

In connection with this subject, it seems necessary to notice the curious anomaly produced in the administration of the estates of deceased married women by the great difference in their status at law and in equity, not relieved from perplexing difficulty by the tendency of modern legislation and adjudications to emancipate them from their utter incapacity to contract, or dispose of their property. In the absence of statutory regulation, it is obvious that, without the intervention of a court of equity, no debt or personal liability of any kind can be enforced against a married woman, because at law she can contract none such. Upon her death, then, the question arises whether her equitable estate can be made liable to creditors without the intervention of equity. On principle, there seems to be no difficulty in subjecting such property to the control of the probate court; the reason requiring the interposition of equity courts during the existence of the coverture is no longer operative, since the probate court proceeds according to equity as well as law. But the authorities diverge; it is held in some States that the jurisdiction of probate courts is peculiarly adapted to deal with just such cases,²

Claims against
estates of married
women.

Jurisdiction of
claims against
married
women.

Ewing, 109 Cal. 353; Tate v. Norton, 94 U. S. 746. In Montana the claim may be allowed by the administrator and approved by the probate judge (as in a number of other States), but such allowance is held not to be a final judgment so as to protect it from attack: Moullierat's Estate, 14 Mont. 245. In Missouri a statute which might reasonably, under the ordinary rules of construing statutes, have been held to apply only to claims proved in the absence of the representative from the State, was nevertheless held to give the executor or administrator, or any creditor, heir, or legatee or person interested, the right to a new trial by filing within four months after the allowance of a claim an affidavit that the claim was improperly allowed: Martin v. Nichols, 63 Mo. App. 342. It is also held in this State, that where a claim is allowed, the judgment is conclusive of the amount then due, and the administrator cannot show thereafter, collaterally, that he had paid a portion of the claim before its allowance; Jamison v. Wickham, 67 Mo. App. 575; (Biggs, J., dissenting on the ground, that

such partial payment ought to be considered as an individual advancement on an implied agreement that the claimant would have the claim properly allowed). In Illinois the probate court has equitable power to set aside a claim at a subsequent term for fraud, and an heir has the right to contest claims when presented: Schlink v. Maxton, 153 Ill. 447. It is to be remembered that a claim which is established in its procurement by the fraud or collusion of the administrator, is invalid; its payment will not protect him, and it may be set aside in equity: *post*, § 520, p. *1155, note, and cases cited.

¹ Because the personal representative does not represent the owner of the realty in most States: *post*, § 466, showing that in some States, as against the heir or devisee, the allowance of the claim has not even *prima facie* validity.

² Oswalt v. Moore, 19 Ark. 257; Lip-trot v. Holmes, 1 Ga. 381; Sawtelle's Appeal, 84 Pa. St. 306, 310. See also Shelton v. Hadlock, 62 Conn. 143, where the court say, p. 154: "While she was living, the creditors would be compelled

while in others their organization is held inadequate to reach them.¹

The competency of probate courts to enforce liabilities against the estates of deceased married women follows, without special statutory authorization to that end, in all States in which the acts of a *feme covert*, with reference to her equitable property, are held to bind her personally: because an equitable liability during coverture becomes a legal liability upon discovery, either through death or divorce.² But the authorities are much divided * on this [* 817] point;³ and where it is held that a married woman can in no sense incur a liability personal to herself, probate courts can enforce such liability only in so far as they have power to try equitable demands.⁴ It would seem, however, that the debt of a deceased married woman, contracted before and not discharged during her coverture, may be enforced against her administrator in the probate court.

Where a wife possesses a separate personal estate, she can prove up a claim therefor against her husband's executor in the probate court.⁵

§ 393. **Claims not matured.**—In accordance with the policy of speedy settlements of the estates of deceased persons, aimed at in

most of the statutory provisions of the American States, most of them enable debts payable, according to the contract entered into by the deceased, at a future time, to be presented to the administrator and adjusted before their maturity.⁶ Provisions to this effect are found in the statutes of Alabama,⁷ Arizona,⁸ Arkansas,⁹ California,¹⁰ Colorado,¹¹ Florida,¹²

to resort to a court of equity to appropriate her estate in payment of their debts; after her death the creditors could reach the same end in the court of probate through the medium of commissioners on her estate."

¹ Watrous v. Chalker, 7 Conn. 224, 226; Parker v. Lambert, 31 Ala. 89, 90; Davis v. Smith, 75 Mo. 219, 227, followed in Boston v. Murray, 94 Mo. 175; Boatmen's Bank v. McMenamy, 35 Mo. App. 198; Brown v. Summer, 31 Vt. 671, 673.

² This has been recognized by English and American courts: Tullett v. Armstrong, 1 Beav. 1; Jones v. Cole, 2 Bai. 330, 332; Morgan v. Moore, 3 Gray, 319, 323; Steacy v. Rice, 27 Pa. St. 75, 81; Bush's Appeal, 33 Pa. St. 85, 87. That a married woman's liability may be enforced against her at law after coverture is directly held in King v. Mittelberger,

50 Mo. 182, 185 (in effect overruled by Davis v. Smith, *supra*); Hooton v. Ramsom, 6 Mo. App. 19; Liptrot v. Holmes, 1 Ga. 381, 389.

³ In Whitesides v. Cannon, 23 Mo. 457, 459, also in Davis v. Smith, *supra*, a number of the cases are reviewed.

⁴ Davis v. Smith, 75 Mo. 219.

⁵ Todd v. Terry, 26 Mo. App. 598; Comstock's Appeal, 55 Conn. 214; Hoffman v. Hoffman, 126 Mo. 486; Atkins v. Atkins, 69 Vt. 270.

⁶ See remarks of Scott, J., in Walker v. Byers, 14 Ark. 246, commenting upon the beneficial effects of legislation stimulating the speedy settlement of estates as being the unmistakable spirit of the administration law: pp. 260, 261.

⁷ Code, 1896, § 137.

⁸ Rev. St. Ariz. 1887, § 1237.

⁹ Bennett v. Dawson, 18 Ark. 334. In

¹⁰ *In re Swain*, 67 Cal. 637.

¹¹ Mills' Ann. St. 1891, § 4786.

¹² Walker v. Drew, 20 Fla. 908.

Idaho,¹ Illinois,² Indiana,³ Iowa,⁴ Kansas,⁵ Massachusetts,⁶ Michigan,⁷ Minnesota,⁸ Mississippi,⁹ Missouri,¹⁰ Montana,¹¹ Nebraska,¹² Nevada,¹³ New Jersey,¹⁴ New York,¹⁵ North Carolina,¹⁶ [* 818] North Dakota,¹⁷ Ohio,¹⁸ Oregon,¹⁹ Rhode Island,²⁰ South Dakota,²¹ Tennessee,²² Utah,²³ Vermont,²⁴ Washington,²⁵ Wisconsin,²⁶ and Wyoming.²⁷ Some of these statutes provide also for the treatment of contingent claims, which will be more fully considered later on.²⁸

To be proved and allowed as subsisting claims, they must constitute absolute debts running to certain maturity, such as promissory notes,²⁹ and the like.³⁰ In Missouri unaccrued rent under a covenant to pay rent is held to be a demand entitled to be proved against the lessee's estate as an unmatured claim;³¹ but elsewhere this is denied, unaccrued rent being held to be neither *debitum* nor *solvendum*,—never payable if the lessee should be evicted before the day on which

this case it is held that the Statute of Non-claim required the presentation of all claims subsisting at the time of the decedent's death, whether matured or not, at law or in equity, as well as all claims coming into existence at any time after the death and before the end of the two years,—without regard to questions of hardship, inconvenience, or diligence, citing former Arkansas cases.

¹ Rev. St. Idaho, §§ 5463, 5611.

² *Dunnigan v. Stevens*, 122 Ill. 396, 401. Under the statutes of this State the vendor's claim for unpaid purchase-money not yet due can only be probated if the estate is solvent, and if payment does not prejudice creditors and heirs: *Miskimen v. Culbertson*, 162 Ill. 236.

³ *Maddox v. Maddox*, 97 Ind. 537.

⁴ Code of Iowa, 1897, § 3342.

⁵ Gen. St. Kans. 1897, ch. 107, § 107.

⁶ In this State the administrator is to retain the money until the maturity of the debt, unless some person in interest will give bond to the creditor: *Publ. St. 1882*, ch. 136, § 13.

⁷ *How. St. 1882*, §§ 5899, 5900. *Osmun v. Judge*, 107 Mich. 27.

⁸ See *Hantzch v. Massolt*, 61 Minn. 361, on p. 368.

⁹ Ann. Code Miss. 1892, § 1938.

¹⁰ Rev. St. 1889, § 203; *Traylor v. Cabanné*, 8 Mo. App. 131, 135; *Garesché v. Lewis*, 93 Mo. 197.

¹¹ Mont. Const. Codes & St. 1895, § 2815.

¹² Cons. St. Nebr. 1893, §§ 1317 *et seq.*

¹³ Rev. St. 1885, § 2798, allowing ten months from time when due.

¹⁴ Gen. St. N. J. 1895, p. 368, § 61.

¹⁵ Rev. St. N. Y. 1889, p. 2561, § 29.

¹⁶ Code, 1883, § 1419.

¹⁷ Rev. Code N. D. 1895, §§ 6403, 6424.

¹⁸ *Bates' Ann. St. Ohio*, 1897, § 6104.

¹⁹ Gen. L. 1887, § 1189.

²⁰ Gen. Laws, 1896, ch. 218, § 7.

²¹ Comp. L. Terr. Dak. 1887, § 5811.

This statute simply enables the administrator to stop the running of interest on claims against the estate, whether presented or not.

²² Code Tenn. 1884, § 3176.

²³ Code, Utah, 1898, §§ 3851, 3874.

²⁴ Vt. St. 1894, §§ 2517 *et seq.*

²⁵ Code Wash. 1896, § 5573.

²⁶ *Austin v. Saveland*, 77 Wis. 108.

²⁷ Rev. St. Wyo. 1887, § 2149.

²⁸ § 394.

²⁹ Including the liability of an indorser who has waived presentment and notice of non-payment by the principal: *Dunnigan v. Stevens*, 122 Ill. 396.

³⁰ The stipulated royalty for the exclusive use of a patented process for a number of years is a demand payable absolutely, at a definite time, and provable against the estate for the unexpired number of years: *Paving Co. v. Prather*, 58 Mo. App. 487.

³¹ *Traylor v. Cabanné*, 8 Mo. App. 131. This case was adhered to in *Kavanaugh v. Shaughnessy*, 41 Mo. App. 657, on the doctrine of *stare decisis*, but its soundness doubted.

it is payable.¹ Reason and the trend of authorities seem clearly to support this view. The consequences of failing to prove such a debt within the time prescribed for the presentation of claims will be mentioned in connection with the Statute of Non-claim.²

The terms upon which judgment is rendered on such claims are, usually, that they be allowed for their value at the time of rendering judgment,³ or upon rebating interest from the date of the judgment to the date of maturity;⁴ or the parties may agree either to rebate such interest or let the judgment take effect upon the maturity of the debt;⁵ or, if the rebate be not accepted, the court may take bond from the heirs to pay the debt when due.⁶ In Arkansas,⁷ the statute is construed as requiring presentation of demands not due, as well as those that are due.

§ 394. **Contingent Claims.**—Claims not absolute or certain, but depending upon some event after the debtor's death, which may or may not happen,⁸ are not enforceable against executors or administrators after they have fully administered, without notice that such claim has become absolute.

Contingent
claims cannot
be enforced

¹ *Deane v. Caldwell*, 127 Mass. 242, citing numerous authorities.

² *Post*, §§ 399 *et seq.*

³ As provided by statute in Alabama, Colorado, Michigan, Minnesota, Nebraska, Oregon, Vermont, and Wisconsin.

⁴ As in Arizona, Idaho, Illinois, Indiana, Montana, New Jersey, New York, Rhode Island, Tennessee, Utah, Washington, and Wyoming.

⁵ The fund to be safely invested meanwhile by the administrator, as provided in Iowa and Missouri. When a note not due and bearing no interest is allowed, and the parties do not agree to a rebate, the probate court can allow and classify the demand, with interest after maturity, but with an order that no execution be issued till the note matures: *Cassatt v. Vogel*, 94 Mo. 646. Provision for payment into court until the debt becomes due is found in many States, including most of those in the preceding note.

⁶ As in Kansas, Massachusetts, New Hampshire, and Ohio.

⁷ *Bennett v. Dawson*, 18 Ark. 334; if it accrues within the two years.

⁸ "A contingent claim is where the liability depends upon some future event, which may or may not happen, and therefore makes it now wholly uncertain whether there ever will be a liability": *Poland, C. J.*, in *Sargent v. Kimball*, 37 Vt. 320, 321. *Cassaday, J.*, in *Austin v.*

Saveland, 77 Wis. 108, 114; *Start, C. J.*, in *Hantzch v. Massolt*, 61 Minn. 361, 364. In Mississippi the claim of an attaching creditor against a garnishee pending garnishment proceedings, and before judgment thereon, was held to be not such a claim as would be barred if not presented against the estate within the time prescribed for the presentation of claims against an insolvent estate: *Harris v. Hutcheson*, 3 South Rep. (Miss.) 34. So also where the right to sue depends upon the result of a pending suit: *Jones v. Bank*, 71 Miss. 1023. And in Wisconsin the claim of a surviving partner against the estate of the deceased partner for contribution for losses sustained by the firm is contingent until the business of the firm is settled, the assets converted, and debts paid: *Logan v. Dixon*, 73 Wis. 533. It is held that a claim based on a bond where the default does not occur until after the time to prove claims is contingent: *State v. Buck*, 63 Ark. 218; *Hantzch v. Massolt*, 61 Minn. 361; see also *Woerner on Guardianship*, § 42. So where the claim is on a bond for costs: *McCaskey v. Barr*, 79 Fed. R. 408; and also where an assessment is called for on unpaid capital stock after the estate has been fully administered, where it was uncertain before such time whether such assessment would ever become necessary, and, if so, when: *Lake Phalen v. Lindeke*, 66 Minn. 209.

Such claims may generally be enforced against distributees [* 819] and legatees to the extent of the property received by * them from the estate, either in equity or at law, and the subject will be treated elsewhere.¹ But if such claims become absolute, by the happening of the event upon which they depend, before the executor or administrator has fully administered, they may be presented for allowance, and enforced like other debts of the decedent. It was held in Arkansas, that if such a claim became absolute within the time limited for the presentation of claims, then, if not presented within such time, it would be barred;² but the law in most other States is, that the Statute of Non-claim, or Special Limitation, begins to run from the happening of the event which fixes the decedent's liability; if the debt is not established against the estate within such time, it will be forever barred.³ It is so enacted or held in Alabama,⁴ Connecticut,⁵ Illinois,⁶ Michigan,⁷ Missouri,⁸ Nebraska,⁹ Nevada,¹⁰ Tennessee,¹¹ Wisconsin,¹² and probably in some of the other States. Such was also the law in Minnesota¹³ and California¹⁴ until the enactment of the amendments requiring *all* claims arising on contract, including contingent claims, to be presented to the administrator within the period of the Statute of Non-claim, or be barred.¹⁵ In a number of States the

until they become absolute.

Limitation by Statute of Non-claim runs from maturity, and will bar the claim if not presented within its period.

In some States *all* claims, even if contingent, must be presented, or be barred.

Or they may be presented before maturity.

¹ *Post*, §§ 574 *et seq.*, especially § 578.

² *Bennett v. Dawson*, 18 Ark. 334, affirming former Arkansas cases. See on this point, *post*, § 578, and authorities.

³ See *post*, § 578.

⁴ Code, 1896, § 130; *Neil v. Cunningham*, 2 Port. 171; *Fretwell v. McLemore*, 52 Ala. 124, 146.

⁵ A right of action accruing after decedent's death must be exhibited within four months after it accrues; but it was held that where the demand does not accrue until after the administrator's discharge, time does not begin to run until after the appointment of an administrator *de bonis non*, in the absence of *laches*: *Gay's Appeal*, 61 Conn. 445.

⁶ *People v. Brooks*, 22 Ill. App. 594.

⁷ How. St. 1882, §§ 5932-5940.

⁸ *Greenabaum v. Elliott*, 60 Mo. 25, 32; *Burton v. Rutherford*, 49 Mo. 255, 258; *Finney v. State*, 9 Mo. 227, 229; *Tenny v. Lasley*, 80 Mo. 664. And the cause of action does not accrue until there is a right to recover substantial damages, though there may sooner be a right to mere nominal damages: *State v. Tittman*,

54 Mo. App. 490; s. c. affirmed 134 Mo. 162.

⁹ Cons. St. Neb. 1893, §§ 1317 *et seq.*

¹⁰ Rev. St. 1885, § 2798.

¹¹ *Marshall v. Hudson*, 9 Yerg. 57, 62; *Atkins v. Scarborough*, 9 Humph. 517.

¹² Gary, § 409; see *Mann v. Everts*, 64 Wis. 372, 377.

¹³ *McKeen v. Waldron*, 25 Minn. 466.

¹⁴ *Gleason v. White*, 34 Cal. 258, 263; *Hibernian Sav. Soc. v. Conlin*, 67 Cal. 178.

¹⁵ In California it is held that such a claim is barred against the estate even when the amount is unascertainable at the time: *Verdier v. Roach*, 96 Cal. 467 (see *Frat v. Hunt*, 108 Cal. 288, 292; *Madrox v. Russell*, 109 Cal. 417, 425). The liability of the heirs was not discussed in these cases. But in Minnesota the court did not deny all remedy to the creditor in such case, holding that, if the claim does not become absolute before the time expires, it may be enforced against the heirs and devisees, though it has not been presented to the probate court: *Hantzsch v. Massolt*, 61 Minn. 361, in which the court says: "This section means that all contin-

rity, and money retained to pay them if they become absolute. statute authorizes or requires the presentation of contingent claims before they have become absolute, to the administrator, and the court may, if sufficient cause appear, direct the retention of a sufficient sum in the hands of the administrator to pay such claim, either in full, if the assets are sufficient, or according to its *pro rata* share, with the proviso in some of them that the contingency shall happen in a reasonable time; such is the law, for instance, in Arizona, California,¹ Idaho,² Maine,³ Maryland,⁴ Massachusetts,⁵ Minnesota, Montana,⁶ *Nebraska,⁷ New Hampshire,⁸ North Dakota, [* 820] Utah,⁹ Vermont,¹⁰ Virginia,¹¹ and Wyoming.¹² If a claim which

gent claims which become absolute and capable of liquidation, whether due or not before the expiration of the time limited for proving claims, must be so presented, or they are barred; but that all contingent claims may be presented to the probate court, . . . and those which become absolute and capable of liquidation within the time limited for proving claims are to be allowed and paid as other claims, but those that do not thus become absolute cannot be allowed or paid, and the settlement and distribution of the estate proceeds as if they had never been filed. When such claim becomes absolute, if ever, an action to recover the amount from the heirs, legatees, and distributees, under Gen. St. 1894, ch. 77, is not barred." While in another case decided at the same term it is held that a contingent claim (within the meaning of the section requiring such to be presented to the court or be barred) is one upon which the probate court can make an order stating the amount allowed or disallowed, and if this cannot be done, it is not such a contingent claim as will be barred; and that if, after the time for presentation of claims has expired, and before the discharge of the administrator, such claim becomes fixed and due, an action may be brought against the representative without waiting until the estate is assigned to the heirs, in order to bring an action against them: *Oswald v. Pillsbury*, 61 Minn. 520 (Candy, J., dissenting on the ground that such a holding nullifies the provisions of the statute). And in a later case the court holds that a claim contingent until after final settlement can be enforced against the heirs and distributees though never presented in the probate court: *Lake Phalen v. Lindeke*, 66 Minn.

209. (The court makes no reference to the distinctions made in the prior cases.)

¹ But the creditor must nevertheless make full proof when the claim has matured: *Pico v. De La Guerra*, 18 Cal. 422, 430.

² R. S. Idaho, 1887, § 5463.

³ Within four years after grant of letters; if not then matured, other creditors are to be paid in full. Rev. St. 1883, p. 557, §§ 10, 11; *Greene v. Dyer*, 32 Me. 460, 463.

⁴ Publ. Gen. L. 1888, art. 93, pl. 103; but such retainer does not imply an acknowledgment that anything is due, or deprive the administrator of the right to contest the claim: *Pole v. Simmons*, 49 Md. 14, 20.

⁵ *Cobb v. Kempton*, 154 Mass. 266; *Sturtevant v. Sturtevant*, 4 Allen, 122, denying the right, however, to a non-resident creditor who has brought a bill against the debtor during his lifetime in the foreign State: *Ames v. Ames*, 128 Mass. 277. But the statute cannot be held to bar every claim not so provided for, without regard to the probability of ultimate liability, and when it is yet impossible to form an estimate of the probable amount to be retained to meet such contingency: *Bullard v. Moor*, 158 Mass. 418, 428.

⁶ Code Mont. 1895, § 2600.

⁷ Within two years after the time limited for the presentation of claims by other creditors: Comp. St. 1887, ch. 23, §§ 258 et seq.

⁸ *Wheeler v. Joslin*, 63 N. H. 164.

⁹ Code, Utah, 1898, § 3851.

¹⁰ *Curley v. Hand*, 53 Vt. 524.

¹¹ Code, 1887, § 2703.

¹² Code, 1887, Wyom., § 5463.

has become absolute within the time for presenting claims before commissioners be presented as a contingent claim, it will be disallowed, because it should be presented to the commissioners as an absolute claim.¹ Provision is also made, in some States, enabling the distributees to expedite the settlement of an estate by giving bond for the payment of an inchoate or contingent debt, thus relieving the administrator from further responsibility on account thereof, as in Kansas,² Massachusetts,³ and New Hampshire;⁴ and in others, contingent claims accruing after the time fixed for the presentation of debts against the estate may be satisfied out of assets subsequently received by the administrator; which, however, imposes no obligation upon him to provide for their payment if not exhibited to him before completing the administration. It is so provided, for instance, in Connecticut,⁵ Iowa,⁶ Massachusetts,⁷ and Ohio.⁸ In Illinois the Statute of Non-claim does not run against claims accruing more than two years after the death of the debtor, and the grant of letters and settlement of his estate.⁹

Or distributees may give bond to pay them.

Or they may be paid out of after-discovered assets.

§ 395. **Claims of Executors and Administrators.**—The common-law rule allowing executors and administrators to retain for their own debts in preference to other creditors of equal degree, is repudiated, it is believed, in all the States. In some, it is modified only to the extent of requiring them to retain an amount proportioned to what other creditors in the same class may receive; * as, for instance, in Florida,¹⁰ Georgia,¹¹ Pennsylvania,¹² and Virginia.¹³ In others, they cannot retain without making proof of the validity of their demand before the court, as in Arkansas,¹⁴ California,¹⁵ Idaho, Indiana,¹⁶ Maryland,¹⁷

Retainer abolished

or so modified as to permit administrators to retain a *pro rata* share.

Cannot retain without due proof of claim.

¹ *Lytle v. Bond*, 39 Vt. 388. See also *Bullard v. Perry*, 66 Vt. 479.

² *Dassler*, 1885, ch. 37, § 108.

³ *Cobb v. Kempton*, 154 Mass. 266, 268.

⁴ *Publ. St. N. H.* 1891, ch. 191, § 5, and ch. 193, § 16. Heirs and legatees are made liable for such debts whenever they accrue, but the administrator will be discharged: *Hall v. Martin*, 46 N. H. 337.

⁵ *Gen. St.* 1888, § 581.

⁶ *Code*, 1897, § 3343.

⁷ *Sturtevant v. Sturtevant*, *supra*; such claims are not payable out of money paid upon a debt due the estate which had been previously inventoried.

⁸ *Bates' Ann. St.* 1897, § 6113. Proceeds of sale of real estate left by the deceased debtor, received after the expiration of the time limited, constitute no

new assets in the sense of this provision: *Favorite v. Booher*, 17 Oh. St. 548.

⁹ *Dugger v. Oglesby*, 99 Ill. 405, 410.

¹⁰ *Sanderson v. Sanderson*, 17 Fla. 820, 848.

¹¹ *Code*, 1895, § 3423.

¹² *Ex parte Meason*, 5 Bin. 167, 174.

¹³ See *Va. Code*, 1887, title 35, ch. 119.

¹⁴ *Dig. of St.* 1894, § 109.

¹⁵ *Taylor's Estate*, 10 Cal. 482; *Code Civ. Proc.* § 1510.

¹⁶ *Jenkins v. Jenkins*, 63 Ind. 120.

¹⁷ 2 *Publ. Gen. L.* 1888, art. 93, § 96. *Semmes v. Young*, 10 Md. 242, 246; *Nicholls v. Hodges*, 1 Pet. 562, 566; *Watson v. Watson*, 58 Md. 442, 446. One who desires to resist the passing of such a claim, proved as required by law, may appeal, or have issues sent to a court of law, but in neither

Massachusetts,¹ Mississippi,² Montana, Nevada,³ New Hampshire,⁴ New York,⁵ North Carolina,⁶ North Dakota, Ohio,⁷ Oregon,⁸ Rhode Island,⁹ Tennessee,¹⁰ Texas,¹¹ Utah, and Washington, while in still others, if they wish to enforce a claim against the estate Upon appointment of administrator *ad litem*. in their charge, it must be exhibited to a co-executor or co-administrator, and if there be none, to the court having jurisdiction, with the affidavit required of other creditors, in which latter case it becomes the duty of the judge to appoint some discreet person to act as administrator *ad litem* of the estate and manage the defence. It is so provided in Alabama,¹² Colorado,¹³ Illinois,¹⁴ Indiana,¹⁵ Iowa,¹⁶ Kansas,¹⁷ Maine,¹⁸ Missouri,¹⁹ Montana,²⁰ and Wyoming. And in a number of other States before cited, if the court reject the claim, the statute provides for the appointment of an attorney by the court to defend the estate. Claims allowed in disregard of such statutes are treated as void.²¹ In Vermont, it has been held that the claim must be presented to commissioners like that of any other creditor, notwithstanding there is no one to represent the estate.²² In the absence of statutory provision to the contrary, the jurisdiction of courts of equity to entertain actions by administrators against co-administrators is clear.²³

* Whether the administrator may retain for a debt barred [* 822] by the Statute of Limitation, or by the Statute of Non-claim,

case can such a contestant be allowed costs or attorney's fees out of the estate: Bell v. Funk, 75 Md. 368.

¹ Not before commissioners of insolvent estate, but before the court: Green v. Russell, 132 Mass. 536, 540; Pub. St. 1892, p. 772, § 6. Even after resignation: Newell v. West, 149 Mass. 520, 528.

² Miss. Ann. Code, 1892, § 1935.

³ Nev. St. 1885, § 2814.

⁴ McLaughlin v. Newton, 53 N. H. 531, 536.

⁵ Williams v. Purdy, 6 Pai. 166; Treat v. Fortune, 2 Bradf. 116; the surrogate has jurisdiction to adjudicate on the claim of an administrator only on the judicial settlement of his account: Ryder's Estate, 129 N. Y. 640.

⁶ Code, 1883, § 1420.

⁷ Bates' Ann. St. 1897, §§ 6099 *et seq.* As to former law on this point, in Ohio, see Hall v. Pratt, 5 Oh. 72, 81.

⁸ Gen. L. 1887, § 1139.

⁹ Fenner v. Manchester, 6 R. I. 140, 143.

¹⁰ Batson v. Murrell, 10 Humph. 301. Since 1889 the chancery court has power to appoint an administrator *ad litem* where

the interest of the regular representative is adverse to that of the estate: Newman v. Schwerin, 22 U. S. App. 393.

¹¹ Sayles' Tex. Civ. St. 1897, §§ 2086, 2087. Puckett v. McCall, 30 Tex. 457.

¹² Code, 1896, § 352; such claim may be verified by affidavit, and any defect therein amended.

¹³ Mills' Ann. St. 1891, § 4788.

¹⁴ Simms v. Guess, 52 Ill. App. 543; Paschall v. Hailman, 9 Ill. 285, 300; Johnson v. Gillett, 52 Ill. 358.

¹⁵ In the discretion of the court: Bentley v. Brown, 123 Ind. 552.

¹⁶ Code, 1897, § 3346.

¹⁷ Gen. St. 1897, ch. 107, § 97. Shoemaker v. Brown, 10 Kans. 383.

¹⁸ Rev. St. 1883, p. 547, § 63. If the estate is insolvent, it must be examined by the judge: *Ib.*, p. 557, § 8.

¹⁹ Rev. St. 1889, § 204; Williamson v. Anthony, 47 Mo. 299, 301.

²⁰ Philips v. Philips, 18 Mont. 305.

²¹ State v. Biedlingmaier, 26 Mo. 483; State v. Reinhardt, 31 Mo. 95.

²² Riley v. McInlear, 61 Vt. 254, 261.

²³ Petty v. Young, 43 N. J. Eq. 654, 658.

is held differently in different States. In Tennessee, the courts apply both statutes very strictly against administrators, who may waive the statute in a suit against the estate by a stranger, but have no such discretion in respect to their own demands; hence they cannot retain for any debt barred by either of the statutes.¹ So, where an administrator *ad litem* is appointed to defend against an administrator's claim, it is clear that either of the statutes may be invoked against such claim.² In a number of States, for instance, Oregon, the statute provides that no claim barred by the statute shall be allowed in favor of the administrator.³ So in California it seems to be held that an executor is in no better position than any other creditor; * as is also the case in West Virginia.⁵ In Pennsylvania the parties adversely interested should have an opportunity to defend against the executor's claim, and have, apparently, a right to insist on the statute as a defence.⁶ But in many States neither the general Statute of Limitations, if it had not run its course during the lifetime of the creditor, nor the Statute of Non-claim, is held to run against executors or administrators.⁷ In New York the statute is suspended in favor of the executor or administrator, from the decedent's death until the first judicial settlement of an account;⁸ and it has been held that when an executor has duly assigned his claim to another, his assignee is not confined to the remedy provided by statute to enable the executor himself to enforce it, but may maintain an action thereon like any other creditor.⁹

Limitation
bars their
claims.

When a claim in favor of the administrator is allowed in the probate court, it is then entitled to the same presumptions of validity as any other claim;¹⁰ nor can it be set aside by a court of chancery in the absence of proof of fraud, accident, or mistake;¹¹ but the circumstances may be such that a concealment from those in interest, on the part of the administrator, of his claim against the estate, and of its allowance, may constitute a fraud for which equity will set aside the allowance of the claim.¹² It has been said that the claim of an executor, particularly if a relative of the deceased, is viewed with suspicion,¹³ and when the claim is based on a note overdue at the time

¹ *Batson v. Murrell*, 10 Humph. 301; *Byrn v. Fleming*, 3 Head, 658, 662; *Wharton v. Marberry*, 3 Sneed, 603, 607; *Hamner v. Hamner*, 3 Head, 398, 403; *Shields v. Alsop*, 5 Lea, 508, 517; not even if the will specially authorize them to waive the statute: *Williams v. Williams*, 15 Lea, 438, 447.

² *Williamson v. Anthony*, 47 Mo. 299.

³ Code, 1887, § 1140.

⁴ *In re Hildebrandt*, 92 Cal. 433.

⁵ *Cann v. Cann*, 40 W. Va. 138, 142.

⁶ *Kuhlman's Estate*, 180 Pa. 109.

⁷ *Sanderson v. Sanderson*, 17 Fla. 820,

848; *McLaughlin v. Newton*, 53 N. H. 531; *Piper v. Clark*, 18 N. H. 415; *Knight v. Godbolt*, 7 Ala. 304, 307; *Semmes v. Young*, 10 Md. 242; *Preston v. Cutter*, 64 N. H. 461; *Matthews v. Matthews*, 66 Miss. 239, 246.

⁸ *Matter of Powers*, 124 N. Y. 361; *O'Flynn v. Powers*, 136 N. Y. 412.

⁹ *Snyder v. Snyder*, 96 N. Y. 88, 92.

¹⁰ *Shafer v. Shafer*, 85 Md. 554.

¹¹ *Dyer v. Jacoway*, 50 Ark. 217.

¹² *Link v. Link*, 48 Mo. App. 345.

¹³ *Kydd v. Dalrymple*, 2 Dem. 630.

of testator's death, the executor must show clearly that he held the note by a title hostile to that of the deceased; unexplained possession being insufficient.¹

§ 396. **Claims by Relatives — Evidence in Proving Claims against Estates.** — Although not strictly pertaining to the scope of this treatise, it will hardly be deemed out of place to devote a paragraph to the subject of claims frequently preferred against the estates of deceased persons by their children, parents, brothers, and sisters, or other relatives or members of their families. This class of cases often perplexes executors and administrators, because the relations sustained by the claimants to the decedents were such as to weaken, in many cases to destroy, the ordinary presumption of the law, which implies a promise to pay for services or goods received.

This presumption is based upon the supposition that parties * dealing with each other have made those stipulations [* 823]

Presumption of promise to pay for value received. which as honest, fair, and just men they ought to have made. Not that the law makes a contract for them, or varies, or introduces new terms into, existing contracts; it simply declares that certain acts, unexplained by compact, impose certain duties, which, in the absence of an express contract, it presumes the parties to have stipulated.² This involves the distinction between gratuitous services, which men constantly render to one another, and services rendered in the expectation of pecuniary

Not applicable where compensation was not in the mind of either party. compensation or reward.³ If, therefore, it is deducible from the circumstances under which the services were rendered, and received, that neither of the parties understood them to be rendered for pecuniary compensation, the law implies no such promise, and will enforce no such compensation.⁴ Many transactions between men, and particularly between the members of a family, grow out of a relation between the parties very different from that of debtor and creditor; to apply the ordinary presumption of a promise to pay in such cases would not be within the spirit of the rule, but, on the contrary, a direct violation of it; it would hinder both parties in regulating their actions according to their free will.⁵ This

Services between father and minor child pre- is forcibly illustrated by the familiar presumption that services rendered by a minor for his father, or goods furnished by a father to his minor child, are, in the

¹ Kuhlmann's Estate, 178 Pa. St. 43, 48; Hoffer's Estate, 156 Pa. St. 473.

² Per Marshall, C. J., in *Ogden v. Saunders*, 12 Wheat. 213, 341.

³ *Daly, C. J.*, in *Hewett v. Bronson*, 5 Daly, 1, 6.

⁴ *Dawdy v. Nelson*, 12 Ill. App. 74. Says the court in *Wright v. Senn*, 85

Mich. 191, 197: "The law will not associate with the discharge of a purely filial duty an implied obligation to pay for the same."

⁵ *Bartholomew v. Jackson*, 20 John. 28; *Dunbar v. Williams*, 10 John. 249; *Evarts v. Allen*, 12 John. 352.

absence of an express contract, gratuitous, and will support no action. So it is held, in some States, that, as between brothers or other near relatives, an action for boarding or clothing, on the one hand, or for services rendered while living together, on the other, can be sustained only by proof of an express contract.¹

sumed to be gratuitous.

Relatives cannot recover without proof of express agreement ;

[* 824] This rule seems * unwise, however ; it must often work injustice in cases where there was an express contract which cannot be proved by direct testimony, but which may be inferable from circumstances, or where there was a mutual understanding, but not reduced to the form of an express contract. The true rule seems to be, and it is so held in most of the States in which this question has been decided, that there may be a recovery upon an implied contract, if the evidence shows the services to have been rendered, or the goods, boarding, etc., to have been furnished upon the mutual understanding by the parties that compensation should be made by the party receiving the services, boarding, etc.² Thus, while the fact of relationship may be sufficient to cancel the presumption, which would obtain between strangers, of a promise to pay for services accepted, it is not sufficient to raise a contrary presumption ;³ and while the mere expectation of compensation

or implied contract, if so understood by both parties.

But relationship affords no presumption of gratuitous services.

¹ Hall v. Finch, 29 Wis. 278, 286 ; State v. Connaway, 2 Houst. 206, 208 ; Morris v. Morris, 3 Houst. 568, 570 ; Cannon v. Windsor, 1 Houst. 143, 146 ; Cantine v. Phillips, 5 Harr. 428 ; Williams v. Stone-street, 3 Rand. 559, 562 ; Young's Appeal, 26 N. W. Rep. (Mich.) 643 ; s. c. nom. Robinson v. McAfee, 59 Mich. 375 ; Wilcox v. Wilcox, 48 Barb. 327 ; Williams v. Hutchinson, 3 N. Y. 312, 318 ; Hallock v. Teller, 2 Dem. 206 (citing numerous New York cases) ; Faloon v. McIntyre, 118 Ill. 292 ; Bostwick v. Bostwick, 71 Wis. 273 ; Tyler v. Burrington, 39 Wis. 376, distinguishing circumstances from which a contract might be implied from circumstantial evidence of an express contract ; and to same effect, Pritchard v. Pritchard, 69 Wis. 373, 377. An express contract is binding, though no rates of wages be agreed upon ; Geary v. Geary, 67 Wis. 248 ; Perkins v. Hasbrook, 155 Pa. St. 494 ; and if, when proved, the contract be avoided by the Statute of Frauds an action *quantum meruit* is maintainable : Ellis v. Cary, 74 Wis. 176.

² Guild v. Guild, 15 Pick. 129, 131 ; Smith v. Myers, 19 Mo. 433 ; Guenther v. Birkicht, 22 Mo. 439 ; Koch v. Hebel, 32

Mo. App. 103 ; Magarell v. Magarell, 74 Iowa, 378 ; Swires v. Parsons, 5 W. & S. 357 ; Fitch v. Peckham, 16 Vt. 150 ; Andrus v. Foster, 17 Vt. 556 ; Ashley v. Hendee, 56 Vt. 209 ; Westcott v. Westcott, 69 Vt. 234 ; Ginders v. Ginders, 21 Ill. App. 522, 526 ; Kilpatrick v. Hellston, 25 Ill. App. 127 ; Mills v. Joiner, 20 Fla. 479, 493 ; Sammon v. Wood, 107 Mich. 506 ; Bell v. Rice, 50 Neb. 547.

³ Estate of McCarty, 9 Phila. 318 ; Hart v. Hart, 41 Mo. 441, 444 ; Cowell v. Roberts, 79 Mo. 218, 221. Says the court in Disbrow v. Durand, 54 N. J. L. 343 : "The proof of services, and as well of the family relation, leaves the case in equipoise from which the plaintiff must remove it, or fail." In this latter case it is also stated that this exception to the general rule of presumption of intended compensation "stands upon a reason which logically and properly must extend it to all members of a household, however remote their relationship may be, and, indeed, even to those who, though not next of kin, stand in the situation of kindred in one household." The relationship of son-in-law is in Pennsylvania held not to be so intimate as to take the case

on the part of one rendering services, in the absence of a corresponding intention to make the compensation expected on the part of the recipient of them, either expressed or inferable from his statements

There may be a contract without a promise to pay. or conduct, does not constitute a contract, and cannot be enforced,¹ yet there may be a contract without a direct promise to pay. It is sufficient to bind the party

receiving the services, if he induces them by any statement or conduct reasonably indicating such intention.² But the evidence

State demands in all such cases should be clear, distinct, and

not favored. * positive.³ Where a claim of this kind is not [*825]

asserted until after the alleged debtor's death, and particularly where it covers a long period of time, the staleness of the claim is calculated to awaken suspicion as to its validity; hence nothing short of unequivocal evidence of its truth will satisfy the plainest demands of justice and good faith.⁴ For the same

out of the general rule implying a promise to pay: *Perkins v. Hasbrouck*, 155 Pa. St. 494. So it has been held that mere consanguinity is insufficient except in case of parent and child to rebut the presumption of a promise to compensate, unless there be proof that the parties lived together in the family relation: *Curry v. Curry*, 114 Pa. St. 367, 371; *Mayer's Appeal*, 112 Pa. St. 290, 293; *Gerz v. Demarra*, 162 Pa. St. 530. And where an adult son was found insane, after having left his home, and then was taken to his mother's house, and there nursed and cared for by her, with the understanding that she would be compensated therefor, he being unfit to render any services in return, it was held that the presumption that the services were rendered gratuitously by the mother did not arise: *Jessup v. Jessup*, 17 Ind. App. 177, 185. But in some States the mere relationship is held to be itself strong negative proof, and raises a presumption that no compensation was to be made: *Hall v. Finch*, 29 Wis. 278, 286; *Spitzmiller v. Fisher*, 77 Iowa, 289; *Bell v. Rice*, 50 Neb. 547; *In Phillips v. Sanchey*, 35 Fla. 187, 194, the court says: "The presumption that services rendered by one near relative to another, he being an inmate of the family, are rendered gratuitously, is strong or weak in proportion to the nearness of the relationship."

¹ *Little v. Dawson*, 4 Dall. 111.

² Thus a promise by an uncle to his nephew, to do by him as by his own child

if he would live with him, was held sufficient as a promise to pay for his services; *Jacobson v. LeGrange*, 3 John. 199, 201; and see cases *supra*, note 2.

³ *Candor's Appeal*, 5 Watts & S. 513, 515; *Wilkes v. Cornelius*, 21 Oreg. 348. "Juries cannot be too cautious in scrutinizing claims of this nature; they are daily made, and juries should be careful, and weigh all the facts": *Brock v. Slaten*, 82 Ill. 282, 291; *Hunt's Estate*, 15 Phil. 511. But "in a contest between the heirs, where one child has sacrificed his own interests to promote the comfort and well-being of his parents, while others have stood by and permitted him to do it without effort on their part to assist him, the claim . . . should not be looked upon with disfavor": *Riddler v. Riddler*, 93 Iowa, 347, 350.

⁴ *Raynor v. Robinson*, 36 Barb. 128, 131; *Bowen v. Bowen*, 2 Bradf. 336; *Weir v. Weir*, 3 B. Mon. 645, 649; *Moore v. Moore*, 21 How. Pr. 211, 219, *et seq.*; *Koch v. Hebel*, 32 Mo. App. 103; *Zimmermann v. Zimmermann*, 129 Pa. St. 229; *Reynolds v. Reynolds*, 92 Ky. 556. "Claims against a dead man's estate, which might have been made against himself while living, are always the subject of just suspicion, and our books are full of expressions by this court of the necessity of strict requirement of proof and the firm control of juries in such cases"; *Sterrett, C. J.*, in *Mueller's Estate*, 159 Pa. St. 590, quoting from a prior decision.

reason, it is said that the law regards the claim of an executor with suspicion.¹

The kindred subject of the validity of claims where services have been rendered under a promise or an understanding that compensation therefor should be made by a legacy has been considered in connection with wills.²

Claims depending on promise to give legacy.

It has also been mentioned in considering the duties of the representative respecting actions by and against the estate, that an executor or administrator is not required to attempt the defeat of a claim known by him to be a just one.³

Administrator need not defend against a just claim.

The method of procedure in the probate court, as we have seen, is summary, permitting a claimant to present his demand for adjudication in a simple statement, without reference to technical rules of pleading;⁴ and while a jury trial is generally provided for,⁵ yet the probate court has not the power (at least in the great majority of States) to instruct the jury upon the law, or grant a new trial after verdict.⁶

Pleading and evidence in probate court.

No instructions to the jury.

The rules of evidence are, of course, the same in the probate as in other courts,⁷ but it may not be out of place to mention here that in actions by or against the estate, admissions and declarations of the deceased made against his interest are admissible against the estate if testified to by a competent witness,⁸ but when verbal should be received with caution,⁹ especially when affecting title to land.¹⁰ So also admissions of the ancestor against interest are admissible against heirs, distributees, and devisees claiming under or through him.¹¹ The extent to which the estate is bound by, and the effect to be given to, the admissions and promises of the executor or administrator, has been heretofore considered.¹²

Admissions of deceased are admissible.

¹ *Kydd v. Dalrymple*, 2 Dem. 630.

² *Ante*, § 37.

³ *Ante*, § 324.

⁴ *Ante*, § 149, on "Method of Procedure in Probate Courts."

⁵ If no provision therefor by statute exists, there can be no jury trial, since the probate court has only such powers as are conferred by statute: *Bradley v. Woerner*, 46 Mo. App. 371; *ante*, § 142.

⁶ *Bartling v. Jamison*, 44 Mo. 141.

⁷ *Ante*, § 149.

⁸ *Stewart v. Glenn*, 58 Mo. 481; *Bennett v. Fulmer*, 49 Pa. St. 163; *Heywood v. Heywood*, 10 Allen, 105; *Pritchard v. Pritchard*, 69 Wis. 373; *Fellows v. Smith*, 130 Mass. 378; *Dale v. Gower*, 24 Me. 563; *Penn v. Oglesby*, 89 Ill. 110, 113.

A memorandum or entry made by the decedent against his interest and found in his papers or books is admissible against his estate in favor of one seeking to establish the fact stated: *Matter of Gallagher*, 153 N. Y. 364.

⁹ "Such evidence by all authority is weak and unsatisfactory without corroboration:" *Pritchard v. Pritchard*, 69 Wis. 373, 376, but holding it competent.

¹⁰ *Ringo v. Richardson*, 53 Mo. 385; *Carney v. Carney*, 95 Mo. 353.

¹¹ *Hunt's Appeal*, 100 Pa. St. 590; *Spaulding v. Hallenbeck*, 35 N. Y. 204; *Baker v. Haskell*, 47 N. H. 479; *Plimpton v. Chamberlain*, 4 Gray, 320; *Lewis v. Adams*, 61 Ga. 559; *Hodges v. Hodges*, 2 Cush. 455; *Bush v. Barron*, 78 Tex. 5.

¹² *Ante*, § 381.

The competency of parties to testify in actions against executors or administrators, or where the adverse party is dead, is a question of frequent occurrence in probate courts and is deferred to a subsequent section.¹

It may also be observed, that statutes providing that in an action brought on a note or other instrument in writing, its execution and signature are to be deemed admitted unless denied under oath, have no application where the party alleged to have signed the instrument has since died; proof of its genuineness must be made.² So also where the signature is by mark.³

§ 397. Notice to the Administrator of Claims to be established.

— The distinction must be kept in sight between the exhibition of claims to the executor or administrator, and the notice to him of the creditor's intention to establish them as valid demands in the shape of a judgment or allowance by the court or other tribunal having power to that effect. The former, as already pointed out,⁴ performs the office of bringing the existence of the claim to the notice of the personal representative, so that he may have an opportunity of satisfying himself of its validity, and acting accordingly, or in some States, of fixing the class of the claim in so far as this may depend upon the time of presentation; ⁵ while the latter is equivalent to the service of process upon a defendant, so as to subject the executor or administrator to the jurisdiction of the court or other tribunal, and give validity to the judgment or allowance that may follow.⁶ Without such notice a judgment or allowance against the estate is therefore void.⁷ The original presentation to the administrator, without the notice that application would be made in court for its allowance, [* 826] is not sufficient.⁸ A claim represented by a judgment obtained against the debtor during his lifetime constitutes no exception; the same notice must be given as required for other claims.⁹ But this must not be

¹ *Post*, § 398.

² Most of the statutes so provide; see also *Schulte v. Coulehurst*, 94 Iowa, 418.

³ *Chadwell v. Chadwell*, 98 Ky. 643.

⁴ *Ante*, § 387.

⁵ As to determining the priority of claims by the time of presentation, see *ante*, § 374, and cases; also *post*, § 403.

⁶ *Crabb v. Atwood*, 10 Ind. 322; *Foley v. Wallace*, 2 Ind. 174; *Boyce v. Foote*, 19 Wisc. 199, 204; *Wallace v. Gatchell*, 106 Ill. 315, 319; *Phelps v. Greenbaum*, 87 Iowa, 347, 351; *Fritz v. Fritz*, 93 Iowa, 27.

⁷ *Hales v. Holland*, 92 Ill. 494, 499; *Wernse v. McPike*, 76 Mo. 249, 252; *Baskins v. Wylds*, 39 Ark. 347.

⁸ *Pennington v. Gibson*, 6 Ark. 447, 450.

⁹ *Ready v. Thompson*, 4 St. & P. 52, 55; *Converse v. Sorley*, 39 Tex. 515, 528; *Birdwell v. Kauffman*, 25 Tex. 189, 193; *Scroggs v. Tutt*, 20 Kans. 271; *Bayless v. Powers*, 62 Iowa, 601; *Ewing v. Taylor*, 70 Mo. 394, overruling prior Missouri cases, but in turn overruled by *Wernse v. McPike*, 100 Mo. 476, holding that a claim based on a judgment need only be filed for

understood as if the probate court could go back of the judgment: its jurisdiction is limited to assigning to it its proper class, and passing upon such defences against it as may have originated after its rendition.¹ Where there are several executors or administrators of the same estate in the same State, service of notice should be made upon all;² but it is held in some States that service upon one of several is sufficient;³ in New York it is so provided by statute.⁴ Appearance by the administrator, although he has not been served with notice, is construed as a waiver, and confers jurisdiction on the court.⁵

Notice upon
all of several
executors.

The notice need not be couched in artificial or technical terms; but will be sufficient if it convey to the administrator the information that the claimant demands allowance for the cause of action, which he must set forth with sufficient certainty; and if on a running account, he must attach a detailed copy of the account.⁶

Where proper notice has once been given and the claim properly docketed, it will not be barred by the Statute of Non-claim, although the clerk did not keep it on the docket, and the motion to reinstate is not made until after the statutory period has expired;⁷ and in such case the appellate court may, on trial after appeal, allow amend-

classification; this last-cited case is followed in *Stephens v. Bernays*, 119 Mo. 143, 147, in which the court says that the service of the summons in another court of record takes the place of the notice otherwise required in the probate court. In *McGinnis v. Loring*, 126 Mo. 404, it is held that the "administrator had a perfect right to appear in the probate court and plead payment as a defence to the judgment," which was there sought to be classed; but how an administrator is to avail himself of such right (or rather how to perform such duty) if he is not to be notified of the intended filing of such claim is not indicated. See on this point § 369, p. *775, note to Missouri.

¹ *Carondelet v. Desnoyer*, 27 Mo. 36, 38; *Ewing v. Taylor*, *supra*; *McNulty v. Hurd*, 72 N. Y. 518, 521. As to when a judgment may be considered as having been obtained against the decedent in his lifetime, see *ante*, § 369, p. *777.

² See *ante*, § 380; *Owen v. Brown*, 2 Ala. 126; *Karl v. Black*, 2 Pittsb. 19; *Heisler v. Knife*, 1 Browne (Pa.), 319; *Hall v. Boyd*, 6 Pa. St. 267.

³ *Clark v. Parkville Railroad Co.*, 5 Kans. 654; *Wynn v. Booker*, 26 Ga. 553. In Tennessee it is held that, where one of two executors was summoned before and

the other after the Statute of Non-claim had run, neither of them could avail himself of the plea of the statute: *Burgie v. Sparks*, 11 Lea, 84, 88.

⁴ Code Civ. Pro. 1897, § 1817; *Lambert v. Craft*, 98 N. Y. 342, 351.

⁵ *State Bank v. Walker*, 14 Ark. 234; *McLeary v. Horan*, 79 Iowa, 210. So want of notice is waived if the administrator appears for the first time when the case is tried *de novo* in the appellate court and defends on the merits: *Stephens v. Bernays*, 119 Mo. 143.

⁶ *Lenk Wine Co. v. Caspari*, 11 Mo. App. 382; *Roethlisberger v. Caspari*, 12 Mo. App. 514; *McHugh v. Dowd*, 86 Mich. 412. In California, if the administrator is not satisfied with the general allegation of indebtedness, he may, within five days, demand a copy of the plaintiff's account: *Wise v. Hogan*, 77 Cal. 184; a claim in the form of an account, giving the number of days service in each month, the total for the years, the rate per day, and credits for the amounts received each year, is held sufficient: *Duncan v. Thomas*, 81 Cal. 56.

⁷ *Nicholls Co. v. Donovan*, 67 Mo. App. 286; *McCall v. Lee*, 120 Ill. 261, 265; *Barbero v. Thurman*, 49 Ill. 283.

ment of the claim, for the purpose of * avoiding the Statute [* 827] of Non-claim, by changing the name of the claimant.¹

Where, as is permitted in some of the States, the estate was administered by non-resident representatives, it was held that the probate court had the power to compel such representatives to subject themselves to the jurisdiction of any of the State courts in which it became necessary to bring an action to test the liability of the estate upon a claim asserted by a resident creditor.²

§ 398. **Set-offs in Probate Courts and Parties as Witnesses.** — The policy of the law, requiring the speedy and least expensive settlement of the estates of deceased persons, favors the trial of all matters in issue between the administrator and other persons interested in the estate in the simplest, most direct manner. The affidavit required of creditors before their claims can be entertained in the probate court compels them to disclose the existence of any set-off or counter-claim, and the amount for which they can obtain allowance is limited to the difference between the amount claimed and any sum

in which they may be indebted to the estate. Hence the judgment can be for the difference only, if there had been mutual dealings between the creditor and the decedent; and this whether the estate is solvent or insolvent,³ whether the debts are payable simultaneously, or the one *in presenti* and the other *in futuro*,⁴ or

whether there be other claims superior in dignity thereby affected or not;⁵ even if the debt to the estate would not have been the proper subject of set-off during the lifetime of the parties.⁶ Administrators, therefore, should, although not bound by law

to do so in all the States, exhibit or plead in set-off any debt or liability of the claimant to the deceased against

¹ McCall v. Lee, *supra*. But it is error, after the time for presenting claims has elapsed, to permit an amendment which substitutes a different demand: Dickey v. Dickey, 8 Col. App. 141.

² "It would be absurd," says the court, "to hold that, simply by absenting themselves from our State, they can defy our own citizens, creditors of the estate, and successfully resist all attempts to enforce the collection of all claims against the estate they represent, not collectible in the due course of the probate proceedings": State v. Probate Court, 66 Minn. 246. But the question was left undecided whether the proper remedy in case of a refusal to obey the order was by proceedings as for contempt, or by removal.

³ Ainsworth v. Bank, 119 Cal. 470, 475; 898

Knecht v. United States Savings Institution, 2 Mo. App. 563; Light v. Leininger, 8 Pa. St. 403; Skiles v. Houston, 110 Pa. St. 254; Martin v. White, 58 Vt. 398, 402; Quick v. Durham, 115 Ind. 302. In Missouri, if the balance is in favor of the estate, judgment may under the statute be rendered thereon against the claimant, though an independent action could not be maintained against him in the probate court: Mitchell v. Martin, 63 Mo. App. 560.

⁴ Ford v. Thornton, 3 Leigh, 695, 697; Bigelow v. Folger, 2 Met. (Mass.) 255; Skiles v. Houston, *supra*.

⁵ Austin v. Holmes, 1 Ired. L. 399.

⁶ Medomak Bank v. Curtis, 24 Me. 36, 38; Ellis v. Smith, 38 Me. 114, 118; Phelps v. Rice, 10 Met. (Mass.) 128, 131; Boyden v. Insurance Co., 153 Mass. 544, 547.

a claim presented for allowance against the estate.¹ In Vermont, a debtor, after being sued by the administrator, can only enforce his claim against the estate by set-off.² And when a claim is presented against the estate for allowance, the administrator must exhibit in offset all claims in favor of the estate, or they cannot subsequently be enforced,³ unless he had, prior to the filing of the claim against the estate, instituted an independent suit in behalf of the estate in a court of general jurisdiction.⁴

Contingent liabilities cannot, of course, be allowed in set-off; and in some States it is held that a debt, which was contingent at the time of the death of the creditor, but became absolute before the trial, cannot be pleaded in set-off.⁵ The distinction in these States is drawn between cases in

Contingent claims cannot be set off.

[* 828] which the contingency fixing liability upon a surety had * happened before the death of his principal, in which case he would be allowed to set off the amount if he paid it before the action of the administrator against him,⁶ and those in which the liability had not been perfected.

But the defendant in a suit by an administrator upon an indebtedness accrued after the grant of letters cannot be allowed to set off a claim which he may have against the deceased; because to do so would give him an undue advantage over other creditors, if the estate should prove insolvent.⁷ There have been intimations that, where an administrator has allowed a judgment against his intestate to be set off against his own claim, circumstances may warrant the interposition of a court of equity to relieve against great hardship and oppression;⁸ but the decisions seem to be the other way, holding that in

Debt due from the deceased cannot be set off to a claim of the administrator,

¹ *Green v. Probate Judge*, 40 Mich. 244, 246; *Stearns v. Stearns*, 30 Vt. 213, 217.

² *Martin v. White*, 58 Vt. 398.

³ It makes no difference that the claim against the estate be wholly disallowed: *Bliss v. Little*, 63 Vt. 86.

⁴ In which case the probate court has no jurisdiction; and a claimant, by withdrawing his claim against the estate, renders the court incapable of passing on a set-off in favor of the estate: *Kenny v. Howard*, 67 Vt. 375.

⁵ *White v. Henly*, 54 Mo. 592, 596; *Minor v. Minor*, 8 Gratt. 1, 3; *Mercein v. Smith*, 2 Hill (N. Y.), 210, 213.

⁶ *Rawson v. Copland*, 3 Barb. Ch. 166; *Reppy v. Reppy*, 46 Mo. 571; *Morrow v. Bright*, 20 Mo. 298 (the last two cases not in probate courts, but announcing the principle applicable).

⁷ *Bishop v. Dillard*, 49 Ark. 285; *Lee v. Lee*, 21 Mo. 531, 533; *Willis v. Loan*, 2 T. B. Mon. 141; *Smith v. Edwards*, 1 Houst. 427; *Dayhuff v. Dayhuff*, 27 Ind. 158; *Welborn v. Coon*, 57 Ind. 270, 273; *Shaw v. Gookin*, 7 N. H. 16; *Woltersberger v. Bucher*, 10 Serg. & R. 10, 12; *Aiken v. Bridgman*, 37 Vt. 249; *Thompson v. Whitmarsh*, 100 N. Y. 35; *Toerring v. Lamp*, 77 Iowa, 488, 492; nor claims against the estate purchased by the debtor after the death of the decedent: *Wikel v. Garrison*, 82 Iowa, 453. But an executrix *de son tort* cannot object to such a set-off against a note payable to her: *Harwood v. Andrews*, 71 Ga. 784.

⁸ *Hall v. Hall*, 11 Tex. 526, 553, repeated in *Guthrie v. Guthrie*, 17 Tex. 541, 543.

except for the dividend due out of the estate,

and expenses of administration paid by him.

paid by him

No set-off allowable of a cause of action acquired after the death of the decedent, when the estate is insolvent; nor of legacy against debt.

Nor of a debt due to or by several persons against one not due to or by the same parties.

Set-offs barred by limitation.

such case the administrator will not be heard to complain of the consequence of his own act.¹ He may, however, permit the *pro rata* dividend coming to a creditor to be set off against the amount due from him for property of the estate sold by the administrator ;² and, *a fortiori*, the debtor, in an action by the administrator for a debt due his intestate, may file in set-off a demand for money to defray the funeral expenses of the deceased.³ The same reason which makes the debt of the deceased an improper set-off to the demands of the administrator, growing out of transactions subsequent to the grant of letters, also holds good against a set-off based upon a cause of action against the decedent acquired after his death.⁴ A legatee, being sued for a debt due the testator, cannot set off his legacy before the time for proving up claims against the estate has expired.⁵ * Nor can a set-off [* 829]

be allowed of a debt due to or by several persons against one not due to or by the same parties, because probate courts have jurisdiction of administrators and claimants only.⁶ While it is clear that an administrator cannot, to the detriment of creditors or heirs,

discharge a debt due the estate by a cancellation of his individual liability to the debtor,⁷ yet it may be allowable as an equitable set-off where only the rights of the administrator will be affected, and justice be done between the parties,⁸ and it has been held in New York that, upon proof that all debts of the testator have been paid, an executor, who is also sole legatee, may counter-claim a chose in action belonging to the estate in an action against him individually.⁹

Whether a claim barred by the Statute of Non-claim can be set off to an action by the administrator for a debt due the deceased, is affirmed in Iowa,¹⁰ Massachusetts,¹¹ and Mis-

¹ Denny v. Moore, 13 Ind. 418, 421 ; Atchison v. Smith, 25 Tex. 228, 231.

² Grier's Appeal, 25 Pa. St. 352.

³ Adams v. Butts, 16 Pick. 343 ; Phillips v. Phillips, 87 Me. 324.

⁴ Irons v. Irons, 5 R. I. 264, 267 ; Root v. Taylor, 20 Johns. 137 ; Whitehead v. Cade, 1 How. (Miss.) 95 ; Dwight v. Carson, 2 La. An. 459 ; Union Bank v. Hicks, 67 Wis. 189, 192 ; Hatch v. Hatch, 60 Vt. 160.

⁵ Where the legacy has not been assented to by the executor : Latimer v. Sullivan, 30 S. C. 111, 116 ; or unless the legatee clearly shows that the legacy will not be required to pay debts : Dobbs v. Prothro, 55 Ga. 73 ; which, it is held in Missouri, is not susceptible of being abso-

lutely proved, so long as the time for proving claims has not expired : Powell v. Palmer, 45 Mo. App. 236 ; see on the latter point remarks of Bradley, J., dissenting, in Blood v. Kane, 130 N. Y. 514, on p. 522 ; ante, § 201, p. * 434.

⁶ Call v. Houdlette, 70 Me. 308, 314.

⁷ Sperb v. McCoun, 110 N. Y. 605, 610.

⁸ State v. Donegan, 94 Mo. 66, 70.

⁹ Blood v. Kane, 130 N. Y. 514 ; two judges dissenting.

¹⁰ Ware v. Howley, 68 Iowa, 633, 636.

¹¹ McDonald v. Webster, 2 Mass. 498, 499. But see the case of Lovell v. Nelson, 11 Allen, 101, 102, which seems to indicate a contrary view.

souri;¹ but negatived in Wisconsin,² Alabama,³ New Hampshire,⁴ and Vermont,⁵ and, it seems, in California.⁶ Statutes prohibiting set-off of claims barred by the Statute of Non-claim are also found in Michigan,⁷ Minnesota,⁸ Nebraska,⁹ North Dakota, and Wisconsin.¹⁰ In Indiana, on the other hand, the statute is construed as permitting a debtor who has had no opportunity to assert a claim in his favor as a set-off against a debt due by him, during the pendency of the administration, to do so after final settlement against one to whom the claim against the debtor was distributed as part of the estate.¹¹

The setting off of debts owing by heirs or legatees against their legacies or distributive shares is discussed in connection with the subject of distribution.¹²

In view of the frequent occurrence in probate courts of the question of competency of a party to establish his claim against the estate of a deceased person by his own testimony, a brief statement of the rules of evidence on this point may not be out of place here. The common-law disability of parties to testify in their own behalf having been removed by legislation in England and America, it became necessary to except from the operation of the enabling statutes all cases in which one of the parties had died, become insane, or was for

Enabling statutes removing disability of parties to testify, with certain exceptions;

any reason legally disabled from testifying.¹³ The object [* 830] of these exceptions is, in the language of * Judge Sherwood,

“to guard against false testimony by the survivor; and in order to do this [the statute] establishes a rule of mutuality by which, when the lips of one contracting party are closed by death, the lips of the other are closed by the law.”¹⁴ All questions arising in connection with the competency of a party to testify should, therefore, be solved in full recognition of the purpose of the enabling statute on the one hand, which is to increase the sources of light by which to discover the truth of the respective allegations,—not to diminish them by disabling any

but disable no one who was competent before.

¹ *Stiles v. Smith*, 55 Mo. 363, 367; *Lay v. Mechanics' Bank*, 61 Mo. 72.

² *White v. Fitzgerald*, 19 Wis. 480, 488.

³ *Bell v. Andrews*, 34 Ala. 538, 540, citing other Alabama cases; *Patrick v. Petty*, 83 Ala. 420, 423; *Parker v. Daughtry*, 111 Ala. 529.

⁴ *Jones v. Jones*, 21 N. H. 219.

⁵ *Ewing v. Griswold*, 43 Vt. 400, 402.

⁶ *Maddock v. Russell*, 109 Cal. 417, 425.

⁷ *How. St.* 1882, § 5901. In this State no set-off against a suit brought by the administrator will be allowed unless the claim upon which the set-off is based has been presented to the commissioners on

claims: *Quinn v. McGovern*, 97 Mich. 114.

⁸ *Gen. St. Minn.* 1881, ch. 53, § 9.

⁹ *Comp. L.* 1887, ch. 23, § 221.

¹⁰ 2 *Sanb. & B. Ann. St.* 1889, § 3844. See *Carpenter v. Murphy*, 57 Wis. 541, for a construction of the statute.

¹¹ *Huffman v. Wyrick*, 5 Ind. App. 183.

¹² *Post*, § 564.

¹³ Among the cases so holding may be mentioned *Pendill v. Neuberger*, 64 Mich. 220; *Hudson v. Houser*, 123 Ind. 309; *Cowan v. Musgrave*, 73 Iowa, 384; *Jacks v. Bridewell*, 51 Miss. 881, 887.

¹⁴ In *Williams v. Edwards*, 94 Mo. 447, 452. See *Whart. on Ev.* §§ 466 *et seq.*

one from testifying who was competent before,¹— and of the object of the exception on the other, which is to avoid the injustice that might follow the admission of testimony in his own behalf of one whose adversary in the proceeding can neither contradict, correct, nor explain it if false or erroneous, nor himself testify to countervailing facts.² It is necessary to bear these principles in mind in construing the several enabling statutes, which, though couched in various phraseology, will be found to differ but slightly in their scope and intention.

Thus, where a contract is made by one with several parties jointly, each of the latter being as deeply interested as the others, the death of one of them does not disqualify the plaintiff, in a suit against them, from testifying, because the living co-defendants may contradict him, or show other facts militating against the plaintiff's right to recover.³ But if the contract, though affecting several, was made by or with one in behalf of himself and the others, the death of the one acting for them renders the other party to the contract incompetent.⁴ So surviving *part- [* 831] ners are not competent witnesses for each other to prove the terms of a contract made by a deceased partner for their benefit.⁵ It is in recognition of these

Exceptions
aim to secure
mutuality.

Death of one
of several
joint contract-
ing parties
does not dis-
able the other
party,
unless contract
was made by
one who died.

Surviving
partners in-
competent to
prove contract,
except as to

¹ *Curry v. Curry*, 114 Pa. St. 367, 372; *Leggett v. Glover*, 71 N. C. 211; *American Life Ins. Co. v. Shulz*, 82 Pa. St. 46, 51; *Sheehan v. Hennessey*, 65 N. H. 101, 102; *McKay v. Riley*, 135 Ill. 586; *Strickland v. Wynn*, 51 Ga. 600, 601; *South Baltimore v. Muhlbach*, 69 Md. 395, 402; *Adams v. Board*, 37 Fla. 266; *Kuhn v. Ins. Co.* 71 Mo. App. 305, 308.

² *Sherwood, J.*, in *Meier v. Thieman*, 90 Mo. 433, 442; *Williams v. Edwards*, *supra*; *Hoar, J.*, in *Brown v. Brightman*, 11 Allen, 226, 227; *Read, J.*, in *Halyburton v. Dobson*, 65 N. C. 88, 90; *Brickell, C. J.*, in *Kumpe v. Coons*, 63 Ala. 448, 455. But some courts take a narrower view. Says the judge, rendering the opinion in *St. John v. Lofland*, 5 N. Dak. 140, 144: "We regard it as a sound rule to be applied in the construction of [these] statutes, that they should not be extended beyond their letter, when the effect is to add to the list of those rendered incompetent," &c. The judge states the "drift of the adjudications" to be "along the line of construction" followed by the court.

³ *McGehee v. Jones*, 41 Ga. 123, 125 (action against a surviving partner);

North Georgia Mining Co. v. Latimer, 51 Ga. 47, 63 (several contracting parties defendant); *Lawhorn v. Carter*, 11 Bush, 7, 10; *Wiley v. Morse*, 30 Mo. App. 266, 269. Where the substantial contracting party on one side is dead, though others, only nominally parties, survive, the other party cannot testify; as where the grantor of a deed in question is dead, the fact that his wife joined therein because of her inchoate dower does not make the grantee competent: *Messimer v. McCray*, 113 Mo. 382.

⁴ *Post*, p. *836. *Adams v. Eatherly Hardware Co.*, 78 Ga. 485; *Stanton v. Ryan*, 41 Mo. 510, 513; *Parker v. Edwards*, 4 South. R. (Ala.) 612; *Harris v. Bank of Jacksonville*, 22 Fla. 501, 506; *Butts v. Phelps*, 79 Mo. 302, 303; *Dean v. Warnock*, 98 Pa. St. 565, 568; *Wiley v. Morse*, *supra*.

⁵ *Godfrey v. Templeton*, 86 Tenn. 161; *Hook v. Bixby*, 13 Kans. 164, 169. In an action against the estate of a deceased partner for a debt due by a firm, the surviving partner is an interested party and cannot testify: *Giesecke v. Sievers*, 85 Iowa, 685. And so, where a person deposits money in the joint name of himself

principles that a number of States limit the incompetency of interested parties to matters or facts, the knowledge of which came to them from communications by or transactions with the deceased,¹ leaving their competency in all other respects unaffected by the exception.² Under such statutes it is held that occurrences out of the presence of the deceased, not constituting a transaction with him, may be testified to by the survivor,³ and he may also prove, by his own testimony, whether or not his knowledge of the facts to be proved was derived from a transaction or communication between himself and the deceased.⁴

In an action against an administrator for board, food, room-rent, washing, and necessaries furnished the intestate, the claimant was allowed to testify that the deceased boarded with him, how long he was absent, the kind of board he received; also the fact that claimant had in possession the note of the deceased, and that he had shown it to others; these facts being held independent, in no sense transactions with the deceased under the "ban" of the statute of Wisconsin.⁵ But evidence tending to show an implied contract is held incompetent in Iowa.⁶ So where two parties joined in instructing a scrivener to draw certain contracts which were afterwards lost, it was held that on the death of one of the parties the scrivener might prove the instructions,

Facts allowed to be proved.

Joint instructions to a scrivener.

but the surviving party could not testify as to the transactions with the deceased.⁷ And *in some States the party

and another, under a stipulation that either, or the survivor, may draw the fund, the claim of such other person after the owner's death is adverse to the owner and the claimant is not competent to prove a gift: *Flanagan v. Nash*, 185 Pa. St. 41.

¹ See collection of statutes by Rapalje, in his work on the Law of Witnesses, §§ 97-144, with their judicial interpretations.

² *Giles v. Wright*, 26 Ark. 476, 478; *Pinney v. Orth*, 88 N. Y. 447, 450; *Harrington v. Samples*, 36 Minn. 200, 202, relying on *Chadwick v. Cornish*, 26 Minn. 28; *McCall v. Wilson*, 101 N. C. 598 (allowing evidence of what the witness saw the decedent do); *Ellensburgh v. Ellensburgh*, 13 Wash. 554 (permitting evidence of what witness did); *Crow v. Heins*, 48 Neb. 690 (holding that by "transaction" is meant every variety of affairs which form the subject of actions between parties; citing cases from New York and other States, and disapproving Minnesota decisions).

³ *Lockhart v. Bell*, 86 N. C. 443, 453; *Wheeler v. Arnold*, 30 Mich. 304, 307

(under a statute disqualifying the survivor as to what "must have been equally within the knowledge" of the decedent); *Wolverton v. Van Syckle*, 57 N. J. L. 393; *Ripley v. Seligman*, 88 Mich. 177 (distinguishing between what is knowledge of the deceased, and information), 190; *Morris v. Norton*, 21 Cir. Ct. App. 553, 563 (under the federal statute); *Martin v. Jones*, 59 Mo. 181, 187. See, to similar effect, *Loftin v. Loftin*, 96 N. C. 94; *Denise v. Denise*, 110 N. Y. 562, 568. See *Miller v. Cannon*, 84 Ala. 59; *Knight v. Russ*, 77 Cal. 410, 413; *Irwen v. Patchen*, 164 Pa. St. 51, 71; *Goldthorpe's Estate*, 94 Iowa, 336.

⁴ *Sikes v. Parker*, 95 N. C. 232, 234; *Thompson v. Onley*, 96 N. C. 9, 13.

⁵ *Pritchard v. Pritchard*, 69 Wis. 373, 375, mentioning similar decisions in earlier Wisconsin reports.

⁶ *Peck v. McKean*, 45 Iowa, 18, approved in *Cowan v. Musgrave*, 73 Iowa, 384.

⁷ *Spencer v. Boardman*, 118 Ill. 553, 557.

may testify to a conversation between the deceased and a third person, in which he took no part;¹ but not if he participated therein, and it related to a transaction between him and the deceased.² So, too, a party may testify to transactions of the deceased with a third person to which the witness was not a party.³

That there can be no injustice in permitting surviving parties to testify to facts or matters occurring after the death of the other party seems self-evident, and has found expression in some of the statutes.⁴ Unless the statute in binding terms excludes such testimony,⁵ it is admissible on principle,⁶ even though it may in its effect tend to prove that the same facts existed prior to the death of the other party.⁷ Finding a deed among the papers of the deceased is such an occurrence after the death of the deceased as will enable the surviving party to testify thereto;⁸ but the relationship to a deceased person is not.⁹ So it has been held that a plaintiff is incompetent to testify to the actual signing of a paper by the deceased, but may prove his handwriting.¹⁰

The reason of the exclusion lying in the danger of false testimony from witnesses biassed by their interest, the rule itself is inapplicable if the interest does not exist. Hence it is held that to disqualify

¹ *Simmons v. Sisson*, 26 N. Y. 264, 276; *Hildebrand v. Crawford*, 65 N. Y. 107, 110; *Kroh v. Heins*, 48 Neb. 691. See *Tredwell v. Graham*, 88 N. C. 208, 211.

² *Kraushaar v. Meyer*, 72 N. Y. 602; *Pendill v. Neuberger*, 67 Mich. 562. It is held in New York that "transactions or communications include every method by which one person can derive any impression or information from the conduct, condition, or language of another:" *Holcomb v. Holcomb*, 95 N. Y. 316, 325; *Heyne v. Doerfler*, 124 N. Y. 505.

³ *O'Bryan v. Allen*, 95 Mo. 68, 73. In *Louisville R. R. Co. v. Thompson*, 9 N. East. R. (Ind.) 357, a widow was held a competent witness in an action by her for damages resulting from the death of her husband. See *Johnson v. Merithew*, 80 Me. 111.

⁴ In California, for instance: *Knight v. Russ*, 77 Cal. 410, 413; and in Maine: *Swasey v. Ames*, 79 Me. 483; and Mississippi: *McDonald v. McDonald*, 68 Miss. 689; in the latter two States the statute was amended to this effect.

⁵ As is held in some States: *Brown v. Brown*, 48 N. H. 90; *Kelton v. Hill*, 59 904

Me. 259 (under a statute since amended in this respect).

⁶ *Poe v. Domic*, 54 Mo. 119, 123; *Wade v. Hardy*, 75 Mo. 394, 400; *Witherspoon v. Blewett*, 47 Miss. 570, 575; *Dunn v. Deery*, 40 Iowa, 251, 252. It was held in North Dakota that the statute cannot be extended so as to exclude one who pleads payment to an administrator since deceased, in an action by the administrator's successor: *St. John v. Lofland*, 5 N. Dak. 140.

⁷ *Stephens v. Cotterell*, 99 Pa. St. 188, 191; *Foster v. Collner*, 107 Pa. St. 305, 311, affirming earlier cases; *Adams v. Edwards*, 115 Pa. St. 211, 216.

⁸ *Griffin v. Griffin*, 125 Ill. 430.

⁹ *Adams v. Edwards*, 115 Pa. St. 211, 215.

¹⁰ *State v. Maxwell*, 64 N. C. 318, approving a similar ruling in *Whitesides v. Green*, 64 N. C. 307; *Banking House v. Rood*, 132 Mo. 256; *Sankey v. Cook*, 82 Iowa, 125; *Sawyer v. Grandy*, 113 N. C. 42; *Bright v. Marcom*, 121 N. C. 86 (excluding evidence of the making of a mark).

a party from testifying as a witness, there must be an immediate conflict of interest involved in the issue on trial, the effect of the evidence being to diminish or enlarge the rights of the decedent's estate.¹ Indirect consequences to the witness do not constitute such an interest as will disqualify him.² An interest in the question is not enough; it must be an interest in the event.³

Rule inapplicable if party have no interest.

Some of the statutes are construed as excluding parties to the record only, so that one who is interested in the issue, but not a party thereto, is held to be a competent witness in an action against the executor of the party adversely interested.⁴ The test of competency is, in these cases, said to be "the contract or cause of action in issue *and on trial*," not the fact to which the party is called to testify;⁵ from which it would follow, that even a party to the record is competent, if he is not interested in the issue in favor of the party calling him.⁶ It is also in harmony with the principle of these cases to allow the assignor of a claim against a deceased person to testify in favor of his assignee, if the assignment was before the death of the decedent,⁷ or even if it was subsequent thereto.⁸ But an assignment of a cause of action by one who is

Parties of record only excluded,

and only when interested.

Assignor is in some States held competent;

¹ Hill v. Helton, 80 Ala. 528, 532; Garrett v. Trabue, 82 Ala. 227, 231; Hobart v. Hobart, 62 N. Y. 80.

² Nearpass v. Gilman, 104 N. Y. 506, 509.

³ Albany Bank v. McCarty, 149 N. Y. 71, 84; Adams v. Board, 37 Fla. 266, 292.

⁴ Potter v. National Bank, 102 U. S. 163, 164 (under the act of Congress, the Supreme Court holding that it is not bound by the interpretation of the State courts of the State statute, because the laws of a State can have no bearing upon a case embraced by the federal statute). See as to the competency of witnesses in the federal courts, note in 21 Cir. Ct. App. 278; Wright v. Gilbert, 51 Md. 146, 156; Looker v. Davis, 47 Mo. 140, 145 (following Granger v. Bassett, but in effect overruled by later Missouri cases); McBrien v. Martin, 87 Tenn. 13; Wager v. Barbour, 84 Va. 419 (approving the reasoning in Grigsby v. Simpson, 28 Gratt. 348, 352, in which, however, the witness was held incompetent). An administratrix, incompetent to testify because a party, may become a competent witness by resigning: Snyder v. Fiedler, 139 U. S. 478.

⁵ Granger v. Bassett, 98 Mass. 462, 468.

⁶ Bowers v. Schuler, 54 Minn. 99. So, for instance, a party defaulted: Scherer v. Ingermann, 110 Ind. 428, 443, citing earlier Indiana cases; or a widow concerning advancements: Scott v. Harris, 127 Ind. 520, 525; so a co-defendant against whom judgment has been rendered, and who has not appealed therefrom, is a competent witness in favor of the other defendant, who has appealed: Fuqua v. Dinwiddie, 6 Lea, 645; and see Good v. Martin, remarks of Hallet, J., 2 Colo. 218, 224. One sued as an individual for conversion, whose real interest was shown to be as executor, was allowed to testify: Penny v. Crone, 87 Mich. 15 (two judges dissenting). But the liability assumed by one partner to suffer judgment to go against him, does not render him competent to testify in favor of his co-partner: Worthington v. Miller, 85 Ky. 320; or where one of two obligors is defaulted: Moore v. Scofield, 96 Cal. 486, citing California cases holding that nominal parties are yet incompetent.

⁷ Snell v. Fewell, 64 Miss. 655.

⁸ Jones v. East Society, 21 Barb. 161, 173, holding an assignor for the benefit of creditors competent, under the New

incompetent to testify at the time does not render him competent. It is against the policy of the law to permit a party to a contract, on finding that he has not legal evidence to sustain an action on it, to make himself a competent witness by a transfer of his cause of action to another, which * would be to encourage champerty and maintenance. And [* 834] this whether the transfer be made in good faith or not;¹ and although one jointly interested with and represented by the deceased, but not in fact participating in the transaction, still survive.² The assignee is incompetent if he is interested or a party.³

The safer and more rational rule seems to be to exclude all parties to the original transaction which constitutes the cause of action, if the other party to such transaction is dead or incompetent to testify, whether such party be a party to the issue on trial or not, if he has, or has transmitted to the party calling him, such an interest.⁴ Not a nominal or technical interest, such as that of an executor, administrator, or other trustee entitled to property *in autre droit*,⁵ but a beneficial personal interest, such as an heir, distributee, or legatee has against the estate,⁶ or, *a fortiori*, one asserting a right or claim against it.⁷ In this view a legatee is not permitted to testify against a deceased executor whose account is under examination, as to anything having happened before his death;⁸ nor a surety in a suit by the administrator of a deceased co-surety for reimbursement,⁹ nor a surety on an executor's bond in an action against the executor for an accounting.¹⁰ So a widow is held a competent witness in a proceeding to obtain her distributive share in her husband's estate, because neither the decedent in his lifetime, nor his executor, can be regarded as an adverse party.¹¹ And in an action of ejectment by a plaintiff claiming as the only son and heir of one who died seized of the premises, the widow of the deceased was held com-

York statute to such effect (but see *Lyon v. Snyder*, 61 Barb. 172, 177, holding the assignor incompetent to prove a contract with his deceased partner in an action against the partnership by the assignee).

¹ *Per* Brickell, J., in *Louis v. Easton*, 50 Ala. 470, 471, Peters, J., dissenting, on the ground that the statute of Alabama excepts only parties, p. 472; *Lyon v. Snyder*, 61 Barb. 172, 179; *Reinhardt v. Evans*, 48 Miss. 230, 232, *et seq.*; *Raubitschek v. Blank*, 80 N. Y. 478, 482; *Parcell v. McReynolds*, 71 Iowa, 623; *Stackable v. Stackable*, 65 Mich. 515; *Buck v. Haynes*, 75 Mich. 397.

² *Harris v. Bank*, 22 Fla. 501, 506.

³ *Mutual Life Ins. Co. v. Watson*, 30 Fed. R. 653, 655.

⁴ *Meier v. Thieman*, 90 Mo. 433, 441, overruling s. c. 15 Mo. App. 307, 310.

⁵ *Duryea v. Granger*, 66 Mich. 593; see *Monongahela Bank v. Jacobus*, 109 U. S. 275; *White v. Beaman*, 96 N. C. 122, 126; *Hale v. Meegan*, 39 Mo. 272, 276.

⁶ *Howard v. Patrick*, 38 Mich. 795, 799.

⁷ *Jacks v. Bridewell*, 51 Miss. 881, 887.

⁸ *Barnes v. Dow*, 59 Vt. 530, 544.

⁹ *Harper v. McVeigh*, 82 Va. 751, 755. To similar effect: *Hopkins v. Faber*, 86 Ky. 223; *Griffin v. Griffin*, 125 Ill. 430; *Comer v. Comer*, 119 Ill. 170, 177; *Lacock v. Commonwealth*, 99 Pa. St. 207, 210.

¹⁰ *Miller v. Montgomery*, 78 N. Y. 282.

¹¹ *Hoyt v. Davis*, 30 Mo. App. 309.

petent to prove that she had been married to him before the birth of the plaintiff.¹ In Illinois, under a statute disqualifying as a witness in his own behalf a party to a suit where his adversaries sue or defend as heirs of a deceased person, the rule is formulated that "where, among those conceded to be the heirs, there arises a controversy as to the distribution of the estate among them, they may testify, as such testimony does not tend to reduce or impair the estate among them;" but if the heirship is denied, the witness is incompetent.² But in Utah devisees are incompetent-witnesses on the question whether a testator intentionally pretermitted a child in the will.³

Rule in
Illinois.

Whether and under what circumstances heirs at law or legatees can testify on a contest of the will to show testamentary capacity of the testator or due execution of the will, has been discussed in an earlier chapter.⁴ As a general rule, heirs or distributees are not competent to testify for themselves as to advancements sought to be charged against them.⁵

In Illinois, Pennsylvania, and Wisconsin it is held, that where either the husband or wife is incompetent to testify because a party, the other is incompetent also.⁶ And so it has been decided that the administrator cannot waive the statutory inhibition,⁷ although elsewhere it was held that the administrator waived his right to object to the incompetency of the witness at the trial by having taken his deposition.⁸ One who is neither a party, nor interested in the subject of the litigation, nor incompetent on the score of being an assignor, is not excluded by the policy of the exceptions to the enabling statutes.⁹

Statutory inhibition cannot be waived.

Parties incompetent under the statute to testify in their own behalf are nevertheless competent witnesses for the other side, as is expressly provided in many of the statutes,¹⁰ or they may be called

¹ *Eisenlord v. Clum*, 126 N. Y. 552, reversing s. c. *Eisenlord v. Eisenlord*, 17 N. Y. St. R. 449.

² Hence one prosecuting a suit as widow is not competent to testify until her marriage has been proved or admitted: *Lawrence v. Lawrence*, 164 Ill. 367, 373.

³ *Atwood's Estate*, 14 Utah, 1.

⁴ *Ante*, § 219.

⁵ *Post*, § 558, near end of section.

⁶ *Way v. Harriman*, 126 Ill. 132; *Bitner v. Boone*, 128 Pa. St. 567; *Valentine's Will*, 93 Wis. 47, 52.

⁷ *McHugh v. Dow*, 86 Mich. 412.

⁸ *Ess v. Griffith*, 139 Mo. 322. See other Missouri cases cited below in the following notes, on this point.

⁹ *Canfield v. Bentley*, 60 Vt. 655, al-

lowing a surety on a promissory note paid by him to testify in an action against the estate of a deceased surety on the same note, that he was not a co-surety, but only a surety for the deceased; *Harrington v. Samples*, 36 Minn. 200, 202, relying on and approving *Marvin v. Dutcher*, 26 Minn. 391.

¹⁰ *Keithley v. Stafford*, 126 Ill. 507, 515; *Coffman v. Hedrick*, 32 W. Va. 119; *Jerome v. Bohm*, 21 Col. 322; and where an administrator, in a proceeding to which he was a party, read in evidence a portion of the deposition of the opposite party before it had been offered on behalf of such party, he thereby waived the incompetency of such party: *Soulard's Estate*, 141 Mo. 642. But though one be nomi-

Parties are competent witnesses for their adversaries, and may be compelled to testify;

upon by the court to testify;¹ and where a party competent for some purposes in his own behalf, though incompetent for others, has testified *for him- [* 835] self, he may be compelled, on cross-examination, to testify to other matters, and then becomes the witness of the opposite party.² And a party cannot deprive his adversary of the right to make him a witness by an assignment of his claim, although he cannot by such assignment make himself competent to testify for the assignee.³ But justice seems to require that

but should then be allowed to explain in their own behalf.

in such case the party shall be permitted to give a full explanation of all matters connected with the subject on which he was examined by the other side.⁴ It is to be noticed, however, that, where the statute clearly ex-

cludes a party from testifying, the mere fact that his interest is against the party calling him will not make his testimony competent.⁵ In some States, if a party, or one having a direct interest, testifies to transactions or conversations with another party, the latter may testify to the same transactions or conversation.⁶ So it is held under the statute of New Hampshire, that, where an executor

Party's right to testify if executor of the other side testify.

Ordinarily executor may testify without conferring such right.

or administrator elects to testify in a cause, the court has no power to reject the proffered testimony of his adversary,⁷ although generally executors and administrators, having no beneficial interest, are competent witnesses either for or against the estate, and their testifying does not authorize the party on the other side to testify.⁸ But the character of executor or administrator

nally an adverse party, if his real interest lies with the party calling him as a witness, he is incompetent: *Bardell v. Brady*, 172 Ill. 420, 424.

¹ *Willitts v. Schuyler*, 3 Ind. App. 118.

² *Wm. L. Murfree, Jr.*, in a monograph in 13 *Central Law Journal*, 322, 342, and authorities in note (1). In Missouri, if a party take the deposition of one through whom the plaintiff derives his interest in suit, although it was not used at the trial, he waives the incompetency of the defendant to testify: *Borgess Inv. Co. v. Vette*, 142 Mo. 560, 571; and see cases *supra*. But omitting to object to the examination of an incompetent witness by a co-defendant is not a waiver of his own objection: *Hollmann v. Lange*, 143 Mo. 100, 106.

³ *Roberts v. Briscoe*, 44 Oh. St. 596, 601.

⁴ *Shipp v. Davis*, 78 Ga. 201; *Niccolls v. Esterly*, 16 Kans. 32; *Eaves v. Harbin*, 12 Bush, 445; *Moore v. Dutson*, 79 Ga. 456; *Cousins v. Jackson*, 52 Ala. 262; *Wiley v. Morse*, 30 Mo. App. 266;

Ess v. Griffith, 139 Mo. 322, 329. His testimony in reply or explanation must be confined to the particular matters called out by the adversary party: *Smith v. Smith*, 101 N. C. 461, 471; *Rogers v. Rogers*, 153 N. Y. 343.

⁵ *Donnell v. Braden*, 70 Iowa, 551, relying on *Ivers v. Ivers*, 61 Iowa, 721. See *Wells v. Ayres*, 84 Va. 341.

⁶ *Rankin v. Hannan*, 38 Oh. St. 438, 441; *Waters v. Davis*, 2 S. W. R. (Ky.) 695. See *Murphy v. Ray*, 73 N. C. 588, 593.

⁷ *Ballou v. Tilton*, 52 N. H. 605, *Foster, J.*, remarking that the case is a manifest illustration "of the imperfection and insufficiency of the law": p. 608; *Dow v. Merrill*, 65 N. H. 107, following the decision, but *Blodgett, J.*, stating that "the conclusion arrived at is not free from doubt, inasmuch as it plainly defeats the purpose of the statute, and manifestly works injustice and oppression": p. 110.

⁸ *Rhodes v. Pray*, 36 Minn. 392, 395;

does not authorize one to testify who would not be competent as a witness without such character; hence, an administratrix is not a competent witness to prove her own claim against the estate which she administers;¹ nor where the representative is otherwise personally interested in having the claim established;² and in Ohio, in an action between two executors representing different estates, their interests are held to be adverse and neither can testify.³ Nor is an executor or [* 836] * administrator protected against the right of a claimant to testify in a suit against him in his individual capacity.⁴

But executor has no right to testify for himself.

Where the contracting party acted through an agent who is living and competent to testify, the other party is also competent,⁵ unless expressly disqualified by the statute,⁶ and upon the death of such agent the surviving party contracting with him is excluded,⁷ unless the statutory exceptions to the enabling statute are plainly inapplicable.⁸ Neither an officer of an incorporated company,⁹ nor a shareholder of stock therein,¹⁰ is excepted under a statute disqualifying parties; and it seems a supererogatory statement, but was decided in Missouri, that the death contemplated by the enabling statutes is the death of a natural person, and

Party may testify to contract with living agent, but not when contracting agent is dead.

Agents and stockholders of corporations competent.

Howe v. Merrick, 11 Gray, 129; *McIntyre v. Meldrim*, 40 Ga. 490.

¹ *Preble v. Preble*, 73 Me. 362. To similar effect, *Ela v. Edwards*, 97 Mass. 318; *Perkins v. Perkins*, 58 N. H. 405; *Tuck v. Nelson*, 62 N. H. 469; *Matter of Smith*, 95 N. Y. 516, 525; *Smith v. Burnet*, 35 N. J. Eq. 314, 319; *Hobbs v. Russell*, 79 Ky. 61; *Gordon v. McEachin*, 57 Miss. 834.

² As where an administrator has paid the claim without allowance, and is therefore interested in having the same proved up so as to obtain credit, neither he nor the alleged creditor can testify: *Hullett v. Hood*, 109 Ala. 345, 351; *Matter of Smith*, 153 N. Y. 124.

³ On the ground that he is interested "at least" to the extent of his compensation in the amount recovered: *Farley v. Lisey*, 55 Oh. St. 627.

⁴ *Hall v. Richardson*, 22 Hun, 444, 447.

⁵ *Pratt v. Elkins*, 80 N. Y. 198, 201; *Jacquin v. Davidson*, 49 Ill. 82; *Ward v. Ward*, 37 Mich. 253, 259; *McNab v. Stewart*, 12 Minn. 407; *Miller v. Wilson*, 126 Mo. 48.

⁶ As was held, for instance, in *Whit-*

aker v. Groover, 54 Ga. 174, 176; see also *Cottrell v. Woodson*, 11 Heisk. 681.

⁷ *Williams v. Edwards*, 94 Mo. 447, 451; *Hollmann v. Lange*, 143 Mo. 100, 106; *Langford v. Commissioners*, 75 Ga. 502, citing numerous cases, p. 504; *Parish v. Weed*, 79 Ga. 682. See also *supra*, p. * 830. But if the party for whom the deceased agent acted was present and can testify to the facts, although he took no part in the transaction, the opposing party is not incompetent: *Brim v. Fleming*, 135 Mo. 597.

⁸ *Spencer v. Trafford*, 42 Md. 1, 17; *Hildebrant v. Crawford*, 65 N. Y. 107, 109; *American Life Ins. Co. v. Shultz*, 82 Pa. St. 46, 51; *Hostetter v. Schalk*, 85 Pa. St. 220; *Baldwin v. Ashby*, 54 Ala. 82. The exclusion of the other party extends only to transactions with the deceased agent, as agent, — not to facts independent and outside of such agency: *First National Bank v. Payne*, 111 Mo. 291.

⁹ *Mitchell v. Savings Institution*, 56 Miss. 444, 447; *Kuhn v. Ins. Co.*, 71 Mo. App. 305.

¹⁰ *Banking House v. Rood*, 132 Mo. 256; *Grange Warehouse Association v. Owen*, 7 S. W. R. (Tenn.) 457, 460.

in no wise refers to the dissolution of a corporation.¹ It has been held that the signing of a surety's name to a note, at the latter's request, and in his presence, by one of the makers, does not constitute such maker an agent so as to disqualify him to testify to such fact after the death of the surety; and it is suggested that the inhibition of an agent to testify applies only to the agent of an opposite party.²

It is held that the competency of a witness is to be determined by the facts existing at the time his testimony is given; hence, the validity of depositions taken while both parties are alive is not affected by the subsequent death of one of the parties.³ And it seems just that, when the testimony of a deceased party given at a former trial, or preserved in depositions, is introduced, the other party should be allowed to testify also.⁴ Depositions of a party who died before the trial of the case have been held incompetent in Arkansas.⁵

The principle upon which parties are excluded from testifying * when one of them is dead, is in some States extended [* 837] to parties against heirs and distributees of deceased persons,⁶

Parties against heirs incompetent; so parties against persons under guardianship; donee of parol gift; heir of donor <i>mortis causa</i> .	as well as to parties against persons under guardianship, who cannot testify to any conversation or transaction during the period of disability of such persons. ⁷ The donee of a parol gift, ⁸ or gift <i>causa mortis</i> , ⁹ is incompetent to prove it by his own testimony, and the husband and heir of a donor is not a competent witness for the administrator in an action against him to recover a gift <i>mortis causa</i> . ¹⁰
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¹ Williams v. Edwards, 94 Mo. 447, 450.

² Tremain v. Severin, 16 Ind. App. 447, 453.

³ Comins v. Hetfield, 80 N. Y. 261, 267; Galbraith v. Zimmerman, 100 Pa. St. 374, citing numerous earlier Pennsylvania cases, 376; Armitage v. Snowden, 41 Md. 119, 123; Evans v. Reed, 78 Pa. St. 415, 417; Pratt v. Patterson, 81 Pa. St. 114, 117.

⁴ Strickland v. Hudson, 55 Miss. 235, 241; Monroe v. Napier, 52 Ga. 385; Mumm v. Owens, 2 Dill. 475, 477. In Missouri the surviving party may under such circumstances testify whether the representative of the deceased introduce the testimony in his behalf preserved or not: Stone v. Hunt, 114 Mo. 66. This question is left undecided in Speyerer v. Bennett, 79 Pa. St. 445. But the surviving party

should be *interrogated* on his own side, only upon the points embraced in his former testimony: Leahy v. Rayburn, 33 Mo. App. 55, 59; Stone v. Hunt, *supra*.

⁵ Park v. Lock, 48 Ark. 133.

⁶ Hinckley v. Hinckley, 79 Me. 320; Higgins v. Butler, 78 Me. 520, 523; Way v. Harriman, 126 Ill. 132. See cases cited *supra*, p. * 834. In New Hampshire the statutory protection to executors and administrators is held to extend to all persons holding the estate in a representative capacity: Clark v. Clough, 65 N. H. 43, holding it to be immaterial whether the capacity be that of executor or trustee.

⁷ Stone v. Cook, 79 Ill. 424, 428.

⁸ Patterson v. Durham, 115 Pa. St. 334, 337.

⁹ Scott v. Reilly, 49 Mo. App. 251.

¹⁰ Conner v. Root, 11 Colo. 183, 191.

[* 838]

* CHAPTER XLIII.

OF THE TIME WITHIN WHICH CLAIMS MUST BE ESTABLISHED.

§ 399. **Time of establishing Claims with Reference to their Rejection by the Administrator.**— Before entering upon the consideration of the various statutes of limitation, as affecting the allowance of claims against the estates of deceased persons, mention should be made of the restriction imposed, in some States, in connection with the rejection of such claims by the executor or administrator. Thus, the time within which action must be brought after rejection of the claim is limited to ninety days in Texas; ¹ to three months (if claim due at time of rejection, otherwise two months from time due) in Arizona, ² California, ³ Idaho, ⁴ Montana, ⁵ Nevada, ⁶ Utah, ⁷ and Washington; ⁸ to four months in Connecticut; ⁹ to six months in New York, ¹⁰ North Carolina, ¹¹ and Ohio; ¹² and to nine months in Maryland. ¹³

Time to bring actions in reference to the rejection of the claims.

¹ Sayles' Civ. St. 1897, art. 2082. Although the executor may have been absent from the State: *Cotton v. Jones*, 37 Tex. 34, 36; and if the claim has been rejected, and the creditor fails to bring suit thereon for three months, it will be barred, although the administratrix subsequently retract the rejection: *Burks v. Bennett*, 62 Tex. 277.

² R. St. Arizona, 1887, § 1115.

³ Code Civ. Pr. § 1498. From the actual rejection: *Bank of Ukiah v. Shoemaker*, 67 Cal. 147. Where there is more than one rejection of the same claim, time begins to run from the first: *Gillespie v. Wright*, 93 Cal. 169.

⁴ Rev. St. Idaho, 1887, § 5468.

⁵ Montana Code, 1895, § 2608.

⁶ Rev. St. Nev. 1885, § 2803.

⁷ Code Utah, 1898, § 3856.

⁸ Except that nothing is said as to claims being due or not, limiting all claims to three months: Code Wash. 1896, § 5471.

⁹ Gen. St. 1888, § 583.

¹⁰ Code Civ. Pr. § 1822. Before the amendment of 1882, the restriction applied only if statutory notice to creditors has

been given, and when the claim is rejected by the administrator in person: *Whitmore v. Foose*, 1 Denio, 159, 162; *In re Haxtun*, 102 N. Y. 157, 160. But if the creditor brings suit within the six months, and suffers a non-suit, he is given a year thereafter to bring a new action on the claim: *Titus v. Poole*, 145 N. Y. 414.

¹¹ Code, 1883, § 1427.

¹² Bates' Ann. St. 1897, § 6097.

¹³ *Bradford v. Street*, 84 Md. 273 (pointing out the distinction between claims passed by the Orphan's Court and those rejected without action by the Orphan's Court). But a claim based upon a contract entered into by the deceased, and completed by dealings with the administrator, need not be authenticated by the Orphan's Court, and hence the limitation of the statute does not apply to such claims against the administrator: *Coburn v. Harris*, 58 Md. 87, 104. And the statute only refers to claims which can be exhibited to the executor, and does not begin to run until the claim is rejected; hence it does not apply to a claim by an executor against the estate: *Fallen v. Glover*, 1 App. D. C. 466, 479.

On the other hand, actions are not authorized until after the expiration of a certain period, deemed necessary to give executors and administrators sufficient time to satisfy themselves of the justice of the claim, and of the solvency or insolvency of the estate, so as to enable them to avoid unnecessary litigation and expense. This period is fixed at six months in Alabama, Connecticut, Florida, Kentucky, Mississippi, New Jersey, Oregon, and Tennessee; and at twelve months in Georgia, Massachusetts, * New Hampshire, and Rhode Island.¹ [* 839] In Kansas² and Missouri,³ action may be brought at any time within two years after grant of letters; but if brought within one year in any court other than the court of probate, the claimant must pay all costs, whether he obtain judgment or not.⁴ Similar statutes exist in other States. In Michigan and Minnesota, the administrator cannot be sued until the expiration of the time allowed for the exhibition of claims. In Mississippi, the rule that an administrator cannot be sued within six months is held to apply to a suit to set aside a fraudulent conveyance of the intestate;⁵ but the contrary is held in Alabama.⁶ In this latter State the principle is announced, that the statute applies only to suits against the representative as such, which seek to establish a liability against the decedent's property: hence a claim, adversely to the title of the deceased, to property claimed by the administrator as belonging to the estate, is not within the inhibition of the statute.⁷

§ 400. **Special Limitation of Time to establish Claims against Estates.**—In furtherance of the policy, emphasized in the American States, of securing the earliest possible settlement of the estates of deceased persons compatible with the just rights of creditors, in addition to the preference given to diligent creditors in some of the States,⁸ special laws of limitation are enacted in most of them applicable to demands against the estates of deceased persons, known generally as statutes of non-claim, or of short or special limitation. These limitations exist independent of and collateral to the general law of limitation affecting alike the right of action against living persons and the representatives of those deceased. According to these statutes, all claims against deceased persons must not only be exhibited to their executors or administrators, but also

¹ In Rhode Island the statute allowing suit within sixty days after the report of the commissioners rejecting the claim, in insolvent estates, makes an exception: *Cornell v. Clark*, 17 R. I. 27.

² Gen. St. Kans. 1897, § 86.

³ Rev. St. 1889, § 210.

⁴ Costs in a case not within the jurisdiction of the probate court are not affected by the statute: *Reed v. Crissey*, 63 Mo. App. 184.

⁵ *Rosenthal v. Enevoldsen*, 61 Miss. 532.

⁶ *Ala. State Bank v. Glass*, 82 Ala. 278.

⁷ *Torrey v. Bishop*, 104 Ala. 548.

⁸ *Ante*, § 374, and *post*, § 403.

enforced against them, or reduced to judgments or allowances against the estate within a certain period, varying in duration from four months to several years, in default of which they are forever barred.¹

The period fixed by statute is, four months in estates under a certain value and ten months if over, in California,² Arizona,³ Idaho,⁴ Montana,⁵ Utah,⁶ and

Duration of
statutes of
non-claim.

North Dakota;⁷ nine months in Maryland;⁸ ten months [* 840] in Nevada;⁹ one year in Colorado,¹⁰ * Connecticut,¹¹ Delaware,¹² Georgia,¹³ Indiana,¹⁴ Iowa,¹⁵ Mississippi,¹⁶ South Carolina,¹⁷ Texas,¹⁸ Vermont,¹⁹ Virginia,²⁰ Washington,²¹ West Virginia,²² Wisconsin,²³ Wyoming,²⁴ and now in Alabama;²⁵ eighteen months in Maine,²⁶ Michigan,²⁷ Minnesota,²⁸ and Nebraska;²⁹ two years in Arkansas,³⁰ Florida,³¹ Illinois,³² Massachusetts,³³ Missouri,³⁴ and Tennes-

¹ Bemis v. Bemis, 13 Gray, 559. See post, § 402.

² If the estate be less than \$10,000 in value, four months; if more, then ten months: Code Civ. Pr. § 1491. In the absence of a decree of due publication, the actual value of the estate, and not that estimated by the executor, determines whether the creditor is in time: Patterson v. Schmidt, 111 Cal. 457.

³ The distinction is made between estates over and under \$3000: R. S. Ariz. § 1108.

⁴ \$1500 marks the dividing line: R. S. Idaho, 1887, § 5461.

⁵ Same as in California: Code Mont. 1895, § 2601.

⁶ Same as in California: Code Utah, 1898, § 3849.

⁷ Except that instead of ten months the limit is six months for estates exceeding \$5000: Rev. Code N. Dak. 1895, § 6401.

⁸ 2 Publ. Gen. L. 1888, art. 93, § 107.

⁹ Rev. St. 1885, § 2798.

¹⁰ 2 Mills' Ann. St. 1891, § 4780, pl. 4. See Morse v. Clark, 10 Col. 216, holding that the filing of a claim within the period allowed, and subsequent withdrawal thereof, will not defeat the plea of the statute, if the same is again filed after the expiration of such period.

¹¹ Gen. St. 1887, § 581.

¹² Laws, 1874, p. 551, § 41.

¹³ Code, 1895, § 3421.

¹⁴ Ann. Ind. St. 1894, § 2465. See Roberts v. Spencer, 112 Ind. 85.

¹⁵ Code, 1897, § 3349.

¹⁶ Ann. Code Miss. 1892, § 1933.

¹⁷ Rev. St. S. C. 1893, § 2047.

¹⁸ Sayles' Tex. Civ. St. 1897, art. 2101. Claims not presented within the twelve months are postponed to claims so proved, but may be paid out of remaining or newly discovered assets: Buchanan v. Wagnon, 62 Tex. 375.

¹⁹ St. Vt. 1894, § 2512. But time may be extended to three years.

²⁰ Code, 1887, § 2661.

²¹ Code Wash. 1896, § 5464.

²² Code, 1887, p. 667, § 26.

²³ Saub. & B. Ann. St. 1898, § 3840.

²⁴ St. Wyom. 1887, § 2133.

²⁵ In 1896 the time limited was reduced from eighteen to twelve months.

²⁶ Rev. St. 1883, p. 556, § 4.

²⁷ How. St. § 5892.

²⁸ Gen. St. Minn. 1891, § 5715.

²⁹ Cons. St. Neb. 1893, § 1276. The probate court may extend the time to two years.

³⁰ Dig. of St. 1894, § 110, pl. 5.

³¹ Rev. St. Fla. 1892, §§ 1906, 1910.

³² St. & C. Ann. St. 1896, p. 301, § 70.

³³ Publ. St. 1882, p. 772, § 9.

³⁴ Rev. St. 1889, § 184. It was held in this State that filing a copy of the demand, together with proof of service on the administrator of such copy and notice that the same would be presented for allowance to the court at its next term, with the clerk, during vacation of the court and within the two years, is not sufficient; it must be presented to the court in term time, within the two years: Savings Bank v. Burgin, 73 Mo. App. 108. The soundness of this decision seems less apparent than that of the view of Judge Ellison, dissenting: p. 116.

see;¹ three years in Kansas,² New Hampshire,³ and Rhode Island;⁴ and four years in Ohio.⁵ In Oregon claims may be presented at any time before the final settlement of the estate.⁶ So in New York; but in this State the administrator may publish notice requiring claims to be exhibited on or before a certain day, not less than six months distant, and the administrator is exempted, if acting in good faith, from all liability to subsequently proved claims for assets paid out on claims established within that time, or for legacies or distributive shares paid by him.⁷ In North Carolina⁸ and Pennsylvania⁹ within twelve months after notice given by the administrator to that effect. In New Jersey, it is the duty of the court to order notice to be advertised to creditors to prove their claims within nine months of such order; and on proof of such publication, the court, at the end of the time so limited, enters a decree that all claims are barred, except for satisfaction out of subsequently discovered assets.¹⁰ It is held under this statute, that a claim presented in the interim between the expiration of the rule and the date of the decree cannot be sustained;¹¹ and that, unless such decree be rendered, there is no bar.¹² In some

Time may be extended by the court. of the States, discretion is vested * in the pro- [* 841] bate court to extend the time within which claims may be proved beyond the period limited by the statute; the exercise of this power is held to be mandatory upon the court, so that upon its refusal to hear the application of a creditor to renew a commission and grant further time for commissioners to examine claims, an appellate court may, upon *certiorari*, entertain such application;¹³ but whether or not the application will be granted rests in the sound discretion of the court, to be governed by the

¹ Code, 1884, § 3117. By construction the period of six months is added, on the ground that, since the creditor is prohibited from bringing suit within that period of the grant of letters: *Prewett v. Goodlett*, 98 Tenn. 82, 86.

² Gen. St. Kans. 1897, ch. 107, § 81.

³ Publ. St. N. H. 1891, ch. 191, § 4. See, as to power of extension, *Graves v. Graves*, 58 N. H. 24.

⁴ Publ. St. 1882, p. 496, § 8; in G. L. 1896, ch. 218, § 9, the time was reduced to two years.

⁵ 2 Bates' Ann. St. 1897, § 6113. The four years begin to run from the time of giving bond; but if no bond is required (under the will), they run from the qualification of the executor: *Jones v. Jones*, 41 Oh. St. 417, 419.

⁶ Code, 1887, § 377; *Houck's Estate*, 23 Oreg. 10.

⁷ *Erwin v. Loper*, 43 N. Y. 521; *Matter of Mullon*, 145 N. Y. 98, 104.

⁸ Code, 1883, § 1421; *Mallard v. Paterson*, 108 N. C. 255.

⁹ *Pep. & L. Dig.* 1896, p. 1478, § 107.

¹⁰ See *Emson v. Ivins*, 42 N. J. Eq. 277.

¹¹ *Young v. Young*, 45 N. J. L. 197, citing other cases.

¹² *Terhune v. White*, 34 N. J. Eq. 98, citing and approving *Ryder v. Wilson*, 41 N. J. L. 9. See, for a recital of the various statutes bearing upon the order limiting creditors and declaration of insolvency of the estate: *Von Arx v. Wemple*, 43 N. J. L. 154.

¹³ *Massachusetts Mut. Co. v. Elliott*, 24 Minn. 134.

merits of the case.¹ In California, it is held that, so long as there has been no order to discharge the administrator, no statute of limitation will affect the rights of creditors whose claims have been allowed; ² and similarly in Kentucky.³

It is as much the duty of executors and administrators to insist on this defence as any other; hence it is held that they incur a personal liability to any one who may be injuriously affected thereby, if they fail to plead or invoke this special bar whenever it is applicable; ⁴ the administrator cannot waive the statute.⁵ The failure of the administrator to publish the notice to creditors of his appointment, as required by statute, is generally fatal to the interposition of this plea; ⁶ but in

Duty of administrators to plead Statute of Non-claim.

Alabama, the omission, though said to be a grave breach of [* 842] duty, does not operate to avoid the * limitation.⁷ So in Tennessee, where the statute providing for the notice is held to be merely directory,⁸ and in Rhode Island, where the statute begins to run from the date of notice.⁹ In New York, the Statute of Non-claim is held to be highly penal in its nature, and therefore to be

¹ *Mollison v. Mills*, 25 N. W. R. 631; s. c. nom. *In re Mills*, 34 Minn. 296, affirming *Massachusetts Co. v. Elliott*, *supra*. See also *Gibson v. Brennan*, 46 Minn. 92. Where the court, in refusing to extend the time to present claims, goes beyond the limits of a sound and just discretion, an appellate court on appeal will direct the same to be done: *Smith v. Grady*, 68 Wis. 215, 220.

² *McCrea v. Haraszthy*, 51 Cal. 146, 151; *Dohs v. Dohs*, 60 Cal. 255, 260.

³ *Grey v. Lewis*, 79 Ky. 453, 456, allowing non-resident creditors to prove debts, so long as the administrator has assets, although the Statute of Non-claim has run.

⁴ *Wiggins v. Lovering*, 9 Mo. 262, 264; *Emerson v. Thompson*, 16 Mass. 429, 432; *Langham v. Baker*, 5 Baxt. 701; *Hodgdon v. White*, 11 N. H. 208, 215, and authorities cited; *Woods v. Elliott*, 49 Miss. 168, 180; *Brown v. Porter*, 7 Humph. 373; *Preston v. Cutter*, 64 N. H. 461, 465; *Ames v. Jackson*, 115 Mass. 508; *Dawes v. Shed*, 15 Mass. 6; *Rockport v. Walden*, 54 N. H. 167, 173; *Littlefield v. Eaton*, 74 Me. 516, 519. And see *post*, § 402. In such case the statute may be pleaded by the heir or distributee in a suit against them: *Farris v. Stoutz*, 78 Ala. 130, 134; *Woods v. Woods*, 99 Tenn. 50 (permitting

the legatees to insist on this defence where the representative did not), 58.

⁵ See *post*, § 402.

⁶ See *ante*, § 385; *Stiles v. Smith*, 55 Mo. 363, 366; *Doerge v. Heimenz*, 8 Mo. App. 255 (holding actual notice insufficient in the absence of the publication required by the statute); *Munday v. Leeper*, 120 Mo. 417 (holding three publications, at intervals of one week, to be insufficient where the statute required publication for three weeks; the court remarking that the notice was for only two weeks, but not arguing the proposition the logic of which is not apparent); *Collamore v. Wilder*, 19 Kans. 67, 77 (holding actual notice sufficient); *Steuart v. Carr*, 6 Gill, 430, 440; *Gilliam v. Willey*, 1 Jones Eq. 128; *Gardner v. Callaghan*, 61 Wis. 91; *Bush v. Adams*, 22 Fla. 177, 193; *Knowles v. Whaley*, 15 R. I. 97, 99; *Donnersberg v. Oppenheimer*, 15 Wash. 290; *Hardy v. Ames*, 47 Barb. 413, 415, holding the publication insufficient, because it directed creditors to present their claims to the administrator's attorney, instead of himself; as to other authorities on the effect of a notice to present claims to an administrator's attorney, see *ante*, § 387, p. * 805.

⁷ *Bank of Montgomery v. Plannett*, 37 Ala. 222, 227.

⁸ *Hooper v. Bryant*, 3 Yerg. 1, 7.

⁹ *Bosworth v. Smith*, 9 R. I. 67, 72.

strictly construed.¹ In Minnesota, where commissioners are to be appointed to pass upon claims against estates, the statute is held not to commence running until such commissioners have been appointed.² In North Carolina, the plea of special limitation cannot be set up by the administrator if he has not advertised according to the statute,³ but the statute commences to run from the date of the appointment, without reference to the date of advertisement; ⁴ and this limitation is applicable to the action of an administrator *de bonis non* against his predecessor for the unadministered assets.⁵

The Statute of Non-claim, or Special Limitation, is not to be construed together with, or as attached to, the general Statute of Limitations, but independently. Hence generally, either of the statutes, if it has run its course, although the other has not, may be relied on as a bar.⁶ But it is otherwise in some States, for instance, in Arkansas,⁷ California,⁸ Connecticut,⁹ Florida,¹⁰ Illinois,¹¹ Indiana,¹² Kentucky,¹³ Massachusetts,¹⁴ New Hampshire,¹⁵ New York,¹⁶ and

General or special statute may be pleaded, if either has run,

but otherwise in other States.

¹ Calanan v. McClure, 47 Barb. 206, 211, referring to earlier New York cases; Broderick v. Smith, 3 Lans. 26.

² Wilkinson v. Winne, 15 Minn. 159, 167.

³ Cox v. Cox, 84 N. C. 138.

⁴ Lawrence v. Norfleet, 90 N. C. 533, 535.

⁵ Worthy v. McIntosh, 90 N. C. 536.

⁶ McKinzie v. Hill, 51 Mo. 303, 305; Doerge v. Heimenz, 1 Mo. App. 238, 240; Toby v. Allen, 3 Kans. 399, 413 (holding that failure to give the notice to creditors does not affect the general limitation); Jones v. Keep, 23 Wis. 45, 48; Yorks's Appeal, 110 Pa. St. 69 (citing numerous Pennsylvania cases, and overruling McCintock's Appeal, 29 Pa. St. 360, and McCandless's Appeal, 61 Pa. St. 9, and affirmed in Chapman's Appeal, 122 Pa. St. 331, Keyser's Appeal, 124 Pa. St. 80, and later cases); Maloney v. Wilson, 9 Bax. 403; Loyd v. Loyd, 9 Bax. 406; Knowles v. Whaley, 15 R. I. 97; Morse v. Clark, 10 Col. 216, 219.

⁷ The whole period of non-claim is added: State Bank v. Walker, 14 Ark. 234, 236 (overruling Etter v. Finn, 12 Ark. 632); Walker v. Byers, 14 Ark. 246, 259; Biscoe v. Madden, 17 Ark. 533, 539.

⁸ One year is given after letters, if the general statute would otherwise sooner run its course: McMillan v. Hayward, 94 Cal. 357.

⁹ White v. Judson, 2 Root, 301. So it was held that where the statute requires

claims to be presented within six months and to be sued on in four months after disallowance, a claim presented within the six months and before the general Statute of Limitations had run, and which was sued on within four months thereafter, but when the general statute had run its course, was not barred: Continental Co. v. Barber, 50 Conn. 567, 571.

¹⁰ Governor v. Hooker, 19 Fla. 163, 172, giving the creditor one year after issue of letters, though the claim would otherwise be sooner barred. But the effect of this statute is not to shorten the general statute to one year: Sammis v. Wightman, 31 Fla. 10, 34, citing cases to like effect decided under the similar statutes of California, Nevada, and New York.

¹¹ The creditor is allowed one year from the appointment of the debtor's representative: Roberts v. Tunnell, 165 Illinois, 631.

¹² Eighteen months added: Harris v. Rice, 66 Ind. 267; Knippenberg v. Morris, 80 Ind. 540; Epperson v. Hostetter, 95 Ind. 583.

¹³ St. 1894, § 2528 (allowing one year after appointment of representative).

¹⁴ Two years are allowed: Publ. St. 1882, ch. 197, § 12; Eddy v. Adams, 145 Mass. 489.

¹⁵ Preston v. Cutter, 64 N. H. 461, 464 (at any time within two years after the grant of letters).

¹⁶ Eighteen months after debtor's death is added to the general statute: Sanford

North Carolina,¹ where it is enacted by statute or held, that if the general Statute of Limitations has not run its course at the time of the debtor's death, the creditor may bring his action at any time within a certain period from the grant of letters, or after the debtor's death, or (as in Arkansas) at any time within the period [* 843] covered by the Statute of * Non-claim, although the general statute may meanwhile have completed its course.

The Statute of Non-claim has been held, in some cases to be, in others not to be, applicable to set-offs pleaded by the defendant in an action by the executor or administrator to the extent of the debt claimed by the plaintiff;² nor is it applicable to an action for the recovery of specific personal property;³ nor to an action to compel the application of trust property to the payment of the debt which it is held in trust to secure.⁴

Limitation
applicable to
set-offs;

in some
States not.

§ 401. **Application of the General Statute of Limitations to Executors and Administrators.** — The rule requiring executors and administrators to invoke the bar of the Statute of Non-claim whenever it is applicable,⁵ is not so imperative in respect of the general Statute of Limitations, of which Lord Hardwicke said that no executor was compellable, either at law or in equity, to take advantage against a demand otherwise well founded.⁶ This remark is relied on in several American States as a correct statement of the law,⁷ and the principle is generally recognized in the absence of statutory regulation of the subject.⁸ But in a number of

Plea of gen-
eral statute not
so imperatively
required;

v. Sanford, 62 N. Y. 553; *Christopher v. Carr*, 6 N. Y. 61, 63; *Scovil v. Scovil*, 45 Barb. 517, 519.

¹ Giving the creditor one year after grant of letters, though the claim would otherwise be sooner barred. But this statute does not shorten the general statute, if it does not run out within the year: *Benson v. Bennett*, 112 N. C. 505. See *Redmond v. Pippin*, 113 N. C. 90, 93; *Person v. Montgomery*, 120 N. C. 111, 115.

² See *ante*, § 398, p. * 829.

³ *Andrews v. Huckabee*, 30 Ala. 143, 151.

⁴ See *post*, § 402, and authorities there cited.

⁵ *Ante*, § 400.

⁶ *Norton v. Frecker*, 1 Atk. 524, 526.

⁷ So in *Emerson v. Thompson*, 16 Mass. 429, 431; *Hodgdon v. White*, 11 N. H. 208, 211.

⁸ *Scott v. Hancock*, 13 Mass. 162, 164; *Wiggins v. Lovering*, 9 Mo. 262, 266; *Stiles*

v. Smith, 55 Mo. 363, 366; *Brown v. Porter*, 7 Humph. 373, 384; *Bates v. Elrod*, 13 Lea, 156, 158; *Payne v. Pusey*, 8 Bush. 564; *Trimble v. Marshal*, 66 Iowa, 233; *Preston v. Cutter*, 64 N. H. 461; *Person v. Montgomery*, 120 N. C. 111, in which the court says, however, that if the administrator "out of bad faith fails to plead the statute when he should do so, he may make himself personally liable." So in Pennsylvania the rule is announced that, although the personal representative "is not bound to plead the statute where he believes the debt to be just, yet in the distribution of a fund creditors whose interests are affected can plead it; where, however, a suit is brought against him in his representative capacity on a debt barred by the statute, and he waives his right to plead it, the judgment is *de bonis testatoris*, and cannot be questioned thereafter on distribution": *Claghorn's Estate*, 181 Pa. St. 600, 607; see *Ritter's Appeal*, 23 Pa. St. 149, 152.

unless personal assets insufficient to pay debts; States, generally by statutory provision, the executor or administrator is bound to set up the bar of limitation,¹ and where the personal assets in the administrator's hands are insufficient to pay the debts, so that it becomes necessary to resort to the real estate for this purpose, he is not allowed, in some States, to waive the bar of the general statute,² or the heirs entitled to the real estate may plead it if he does not.³ A distinction is or when the statute has run before decedent's death. also * made, in some States, whether the general [*844] statute has run its course before the appointment of the administrator, in which case he is not allowed credit in his account for the payment of debts so barred,⁴ or whether it has only begun to run during the lifetime, and extends, before completing its course, to a period beyond the debtor's death, in which case, as already pointed out,⁵ the whole period of the Statute of Non-claim is added in one or two of the States there named, or a certain period is added in the other States there referred to, to the time the general statute had already run. And as a general principle, it Statute does not run from creditor's death until appoint- would seem that during the interval between the debtor's death and the appointment of an administrator to his estate the general statute ought not to run;⁶ and

¹ The States in which statutes or judicial decisions so announce are named *infra*, near the close of this section.

² Pollard v. Scars, 28 Ala. 484, 487; Semmes v. Young, 10 Md. 242, 247; Barnawell v. Smith, 5 Jones Eq. 168, 171; Walter v. Radcliffe, 2 Desaus. 577.

³ Lusk v. Anderson, 1 Met. (Ky.) 426; Butler v. Johnson, 41 Hun, 206, 211; Bates v. Elrod, 13 Lea, 156, 158; Kittera's Estate, 17 Pa. St. 416; Champion v. Cayce, 54 Miss. 695; Scott v. Ware, 64 Ala. 174; White v. Joyce, 158 U. S. 128; Ariail v. Ariail, 29 S. C. 84; and the rule applies, though the creditor be the administrator: Trimble v. Fariss, 78 Ala. 260, 266; or the estate be administered as an insolvent estate, unless the heirs have an opportunity to contest the allowance of the claim: Chandler v. Wynne, 85 Ala. 301. So, in Georgia, the administrator may at his peril waive the statute, but distributees may make him liable by showing that the claim was in reality an unjust one: Jordan v. Brown, 72 Ga. 495, 498. In North Carolina the heir is limited to showing that the judgments for which the land is to be sold were obtained against the administrator by collusion or fraud: Smith v. Brown, 101 N. C. 347; Proctor v. Proctor, 105 N. C. 222; Lee v. McKoy, 118 N. C. 518;

but where the debt has not yet been established for which the land is to be sold (which it seems is not required in this State) the heirs can make any defence, or "plead the Statute of Limitations against the debts claimed to be due": Person v. Montgomery, 120 N. C. 111, 113.

⁴ Trotter v. Trotter, 40 Miss. 704; Byrd v. Wells, 40 Miss. 711, 715; Re Kendrick, 107 N. Y. 104, 108; Re Dunn, 5 Dem. 124, 127; Smith v. Pattie, 81 Va. 655 (on p. 665).

⁵ Ante, § 400, p. *842.

⁶ So decided in Little v. Reid, 75 Mo. App. 266; McKinzie v. Hill, 51 Mo. 303, 305, citing earlier cases; Ayers v. Donnell, 57 Mo. 396, 398; Butler v. Lawson, 72 Mo. 227, 249; Quivey v. Hall, 19 Cal. 97 (holding that the statute ceases to run until the administrator has rejected the claim); In re Bullard, 116 Cal. 355; see Crosby v. Dowd, 61 Cal. 557, 597; Dunlap v. Hendley, 92 N. C. 115; Kirby v. Lake S. R. R., 120 U. S. 130, 139. But the contrary is held in Illinois, on the ground that the creditor may compel administration at any time: Baker v. Brown, 18 Ill. 91, 92; and in Mississippi, for the same reason: Byrd v. Byrd, 28 Miss. 144 (if the statute begins to run in the debtor's lifetime); see also Roth v. Holland, 56 Ark. 633, 637. So in

so the time before the expiration of which, in some of the States, the bringing of an action against an executor or administrator is inhibited, ought to be added to the time prescribed by the general Statute of Limitation.¹ The acknowledgment of the validity of a claim by the administrator, and its classification by the judge as an acknowledged debt, interrupt the running of prescription or limitation.²

In a number of States the statute prohibits the allowance of claims barred by the Statute of Limitations; it is so provided, or held by the courts, that the bar of limitation must be interposed, for instance, in Arizona, California,³ Connecticut,⁴ Florida,⁵ Idaho, Michigan,⁶ Minnesota,⁷ Mon-

States forbidding allowance of claims barred by limitation.

South Carolina, prior to the late Code: *Bolt v. Dawkins*, 16 S. C. 198, 210. And in Kansas, while it is said that the debtor's death operates to suspend the statute (*Nelson v. Herkel*, 30 Kans. 456), yet it is held that such suspension cannot be continued indefinitely by postponing the appointment for years, and that it is the duty of the creditor to make application for administration within a reasonable time after the expiration of the fifty days within which the widow or next of kin can alone take out letters: *Bauserman v. Charlott*, 46 Kans. 480. In Alabama the death of the debtor cannot suspend the statute longer than six months, without reference to the time of the appointment of the administrator: *Lewis v. Ford*, 67 Ala. 143, 146, referring to former case. Likewise in Tennessee: *Bright v. Moore*, 87 Tenn. 186; and so in New York, except that eighteen months after death is, by statute, not to be deemed a part of the time limited: *Church v. Olendorf*, 49 Hun. 439; *Sanford v. Sanford*, 62 N. Y. 553; and it is obvious that the appointment of an administrator does not remove the bar of the Statute of Limitation: *Gaines v. Hammond*, 2 McCrary, 432, 435. In other States, where the cause of action accrued after the debtor's death, the statute will begin to run from the appointment of an administrator: *Marsteller v. Marsteller*, 93 Pa. St. 350; *Clark v. Company*, 62 N. H. 612; *Parks v. Norris*, 101 Mich. 71; *Riner v. Riner*, 166 Pa. St. 617 (in which the court regrets that neglect for a long time to take out letters will not alter this rule). So where the statute had not begun to run during the creditor's lifetime: *Sorrels v. Tranthan*, 48 Ark. 386, 390; *McCustian*

v. Ramey, 33 Ark. 141, 147; *Wood v. West*, 38 Ark. 243. Such was formerly the law in Mississippi, but not since 1880: *Hughston v. Nail*, 73 Miss. 284. So if creditors accept the provisions of a will for the payment of debts, by which the time of payment is extended, limitation does not run during such time: *McWilliams's Appeal*, 117 Pa. St. 111, 119.

¹ These States are enumerated, *ante*, § 399; *Henderson v. Hsley*, 11 Sm. & M. 9, 16; *Posey v. Decatur Bank*, 12 Ala. 802; *Lowe v. Jones*, 15 Ala. 545, 548; *Bright v. Moore*, 87 Tenn. 186; *Woods v. Woods*, 99 Tenn. 50; *Tilton v. Yount*, 28 Ill. App. 580; *Moore v. Smith*, 29 S. C. 254; *Allen v. Hillman*, 69 Miss. 225, 231. But not if the cause of action does not accrue until after this period has passed: *Jones v. Whitworth*, 94 Tenn. 602.

² *Johnson v. Waters*, 111 U. S. 640, 670; *Wise v. Williams*, 72 Cal. 544, 548; *Savings Soc. v. Hutchinson*, 68 Cal. 52; *Deans v. Wilcoxon*, 25 Fla. 980, 1036; *Reber's Appeal*, 125 Pa. St. 20. But obviously a mere demand upon the executor or administrator, if the claim is repudiated, will not stop the running of the general Statute of Limitations: *Keyser's Appeal*, 124 Pa. St. 80; nor a mere filing of the claim with the administrator, and demand, though no action be taken by the latter: *Woods v. Woods*, 99 Tenn. 50.

³ Code Civ. Pr. 1885, § 1499: *Boyce v. Fish*, 110 Cal. 107, 117.

⁴ *Peck v. Botsford*, 7 Conn. 172; *Ensign v. Batterson*, 68 Conn. 298, 306.

⁵ *Patterson v. Cobb*, 4 Fla. 481, 486.

⁶ How. St. § 5896; and see *McHugh v. Dowd*, 86 Mich. 412.

⁷ 2 Gen. St. Minn. 1891, § 5719.

tana,¹ Nebraska,² Nevada,³ New York,⁴ North Dakota, Oregon,⁵ Texas,⁶ Utah, Virginia,⁷ Washington, West Virginia,⁸ Wisconsin,⁹ and Wyoming.¹⁰ It was held in Minnesota that where no Statute of Limitations exists in favor of the estate, the equitable doctrine of *laches*, as a reason for denying a remedy, applies to a claim against the estate.¹¹

§ 402. **Application of the Statute of Non-claim or Special Limitation.** — The Statute of Non-claim, or of limitation specially to estates of deceased persons, is in most States applied more rigorously than the general Statute of Limitation; the administrator cannot waive it,¹² and it has been held that the temporary absence of the executor from the State does not interrupt its course;¹³ so where the statute provides that the time of the administrator's temporary absence from the State is to be added to the period of limitation against claimants,¹⁴ the requirement to bring suit within three months after rejection has been held not to be affected thereby;¹⁵ but in New York, if the executor is a non-resident, the creditor may bring suit on a rejected claim, although the six months to bring suit thereon given by statute have expired.¹⁶ And so where an administrator dies, the time intervening before the appointment of his successor has been held not to interrupt the Statute of Non-claim, because it lies within the power of the creditor to cause the appointment of an administrator *de bonis non*, or even to serve as such himself.¹⁷ In Massachusetts it was held that, upon the appointment of an administrator *de bonis non* within the period of the Statute of Non-claim, creditors will not be barred until the expiration of the full period after such appointment.¹⁸ We have seen that in those States where suit is inhibited against the estate for a certain period after the grant of letters, such time is added to the period

¹ Mouillerat's Estate, 14 Mont. 245.

² Comp. St. 1887, ch. 23, § 221.

³ Rev. St. 1885, § 2804.

⁴ Butler v. Johnson, 111 N. Y. 204, 212, 218; Adams v. Fassett, 149 N. Y. 61, 66.

⁵ Code, 1887, § 1134.

⁶ Howard v. Johnson, 69 Tex. 655.

⁷ Smith v. Pattie, 81 Va. 654.

⁸ Cann v. Cann, 40 W. Va. 138, 142, citing Code, ch. 87, § 5.

⁹ Sanb. & B. Ann. St. 1898, § 3841.

¹⁰ See Groesbeck, J., in O'Keefe v. Foster, 5 Wyom. 343, 354.

¹¹ O'Mulcahey v. Gragg, 45 Minn. 112.

¹² Miner v. Aylesworth, 18 Fed. R. 199; Nagle v. Ball, 71 Miss. 333; O'Keefe v. Foster, 5 Wyom. 343, 353.

¹³ Branch Bank v. Donelson, 12 Ala.

741; Lowe v. Jones, 15 Ala. 545, 547; Walker v. Cheever, 39 N. H. 420, 426.

¹⁴ Rev. St. Tex. 1888, § 2017.

¹⁵ Cotton v. Jones, 37 Tex. 34.

¹⁶ Hayden v. Pierce, 144 N. Y. 512.

¹⁷ Lowe v. Jones, 15 Ala. 545, 547. But it has been held also, under a statute allowing four months to exhibit a claim arising after decedent's death that, in case the action did not accrue until after the administrator's final settlement, the four months' limitation did not run, barring *laches*, until an administrator *de bonis non* was appointed: Gay's Appeal, 61 Conn. 445.

¹⁸ Hemenway v. Gates, 5 Pick. 321; Eddy v. Adams, 145 Mass. 489.

of general limitation;¹ but this principle should not be applied to extend the time given by the special or non-claim statute.²

We have seen, that in some of the States the administrator's admission of the correctness of a claim and his verbal promise to pay the same may have the effect of suspending the Statute of Limitation;³ but this is so only if [*846] some *consideration followed the promise, such as forbearance, agreement to abide by the result of other actions pending or to be brought, or the like,⁴ and in other States such promise will not bind the estate.⁵ It is held in some States that the fraud of the administrator in inducing a creditor not to probate his claim until it is barred by the Statute of Non-claim will not exempt such creditor from its operation;⁶ in Iowa, however, the promise of the administrator to pay, and his statement that the filing of the claim for probate was unnecessary, entitles the claimant to equitable relief under the statute, if by reason of such representations he is too late,⁷ and by statute in Tennessee a delay by the creditor to file suit, at the request of the representative, for a stipulated time, suspends the statute during such time.⁸ It has also been held, that where the same person administers the estate of

Promise of administrator sometimes suspends statute.

Executor's fraud or request does not suspend the statute.

Presentation unnecessary if

¹ *Ante*, § 401, and cases cited.

² *Lowe v. Jones*, 15 Ala. 545, 548. In Tennessee, however, the distinction is disregarded, and the six months within which a creditor cannot bring suit is added to the two years' period of the Statute of Non-claim, unless the claim matures after the six months have expired: *Prewett v. Goodett*, 98 Tenn. 82, 86.

³ *Ante*, § 381.

⁴ *Daniel v. Board of Commissioners*, 74 N. C. 494, 500; *Haymore v. Commissioners*, 85 N. C. 268.

⁵ *Brown v. Anderson*, 13 Mass. 201, drawing the distinction between the effect of such a promise upon the general, and upon the special, statute; *Clawson v. McCune*, 20 Kans. 337, 342, citing earlier Kansas cases: *Trott v. West*, 9 Yerg. 433, 435; *McWhirter v. Jackson*, 10 Humph. 209; (so under new statute in North Carolina: *Whitehurst v. Dey*, 90 N. C. 542); *Lewis v. Champion*, 40 N. J. Eq. 59; *Probate Judge v. Ellis*, 63 N. H. 366; *Branch Bank v. Hawkins*, 12 Ala. 755; *Colby v. King*, 67 Iowa, 458; *Smith v. Pattie*, 81 Va. 654, 660. See also *Schutz v. Morette*, 146 N. Y. 137, 143. In Missouri the law holds creditors very strictly to the observance of the rules laid down for the estab-

lishment of their claims (see *ante*, § 388; what is there stated concerning the exhibition of claims is also applicable to their establishment); but it was there held that the administrator may contract for the extension of a debt due by the deceased, and cannot then invoke the special Statute of Limitation against it: *North v. Walker*, 66 Mo. 453, 463, affirming s. c. in 2 Mo. App. 174, 179. So the statute does not bar an action upon the executor's note: *Perry v. Field*, 40 Ark. 175, 180.

⁶ *Nagle v. Ball*, 71 Miss. 330, 335. So in Missouri and Iowa, if the exhibition of the claim is prevented by fraud, the creditor must suffer the consequences: *ante*, § 387, p. *806, discussing also the effect of the executor's fraud in inducing the creditor to wait until the general statute has run.

⁷ *Burroughs v. McLain*, 37 Iowa, 189. But it will not advance the class of the claim, which depends on time of presentation: see *ante*, § 387, p. *806.

⁸ See Tennessee statutes and cases cited in *Prewett v. Goodlett*, 98 Tenn. 82. But there must be a concurrence of the fact of delay after demand by the creditor and a special request: *Woods v. Woods*, 99 Tenn. 50, 55.

claimant's administrator is also debtor's administrator. the debtor as well as of the creditor, no formal presentation or allowance of the claim is necessary, but the claim is extinguished as soon as funds applicable to the payment come into the administrator's hands.¹

The statute runs alike against all persons, under or over age, or whether insane, non-resident, or under other disability of what kind,² unless it contain some saving clause, as it does with respect to non-residents in Arizona,³ California,⁴ Colorado,⁵ Connecticut,⁶ Florida,⁷ Idaho,⁸ Illinois,⁹ Kansas,¹⁰ Montana,¹¹ Nevada,¹² North Dakota,¹³ * Tennessee,¹⁴ [* 847] Utah,¹⁵ Vermont,¹⁶ and probably other States. In most of the States the saving clause extends to infants,¹⁷ persons of unsound mind,¹⁸ persons imprisoned,¹⁹ married women,²⁰ persons in the military or naval service,²¹ and the representatives of a creditor dying after

¹ Thomas v. Chamberlain, 39 Oh. St. 112, 122. That the same principle applies and excuses the presentation or exhibition under such circumstances has been heretofore stated: see *ante*, § 387, p. * 806, and cases there cited.

² Rowell v. Patterson, 76 Me. 196; Erwin v. Turner, 6 Ark. 14, 16; Morgan v. Hamlet, 113 U. S. 449; Padgett v. State, 45 Ark. 495; Nelson v. Haeberle, 26 Mo. App. 1; Richardson v. Harrison, 36 Mo. 96; Morrow v. Barker, 119 Cal. 65.

³ R. S. Ariz. 1887, § 1110.

⁴ 3 Code Civ. Proc. § 1493; Morrow v. Barker, 119 Cal. 65. See Cullerton v. Mead, 22 Cal. 95, 98; not applicable to equitable owner of a claim, if legal owner resides in the State: Marsh v. Dooley, 52 Cal. 232, 234.

⁵ Mills' Ann. St. 1891, § 4780, cl. 4.

⁶ Formerly two years additional in solvent estates to non-inhabitants: Gen. St. 1874, p. 388; Williams v. Belden, 1 Root, 464; but now only one year, and if estate is solvent: Gen. St. 1888, § 581.

⁷ Rev. St. Fla. 1892, § 19 (saving to infants, persons of unsound mind, imprisoned or beyond the limits of the United States "in the military service thereof during the war," two years after the removal of disability).

⁸ R. S. Idaho, 1887, § 5463.

⁹ Same substantially as in Florida: St. & C. Ann. Ill. St. 1896, p. 302, § 69, cl. 7.

¹⁰ Three years after removal of disabilities of infancy, unsound mind, imprisonment

ment, or absence from the United States: Gen. St. Kans. 1897, ch. 107, § 81.

¹¹ Code C. Pr. Mont. 1895, § 2603.

¹² Statute does not run against those who have no notice by reason of absence from the State: Rev. St. 1885, § 2798.

¹³ Code, 1895, N. Dak. § 6403.

¹⁴ Non-residents of the State are allowed three years within which to prove their claims; residents but two: Code, 1884, § 3117.

¹⁵ Code, 1898, Utah, § 3851.

¹⁶ Soldiers out of State three months after service and discharge: Vt. St. 1894, § 2437.

¹⁷ Alabama, Arkansas, Florida, Illinois, Kansas, Missouri, Wyoming, Tennessee. In the last-named State the expiration of seven years affords a complete bar to actions against an estate: Code, § 3119; see Hull v. Jones, 10 Lea, 100, in which an infant was held barred of her claim against her deceased guardian's estate, but not against his sureties. In Alabama, the fact that the infant has a guardian, who may and should act for him, does not exclude the infant from the benefit of the exception to the Statute of Non-claim: Burford v. Steele, 80 Ala. 147, 150.

¹⁸ Alabama, Arkansas, Colorado, Florida, Illinois, Kansas, Missouri, Tennessee, Wyoming.

¹⁹ Arkansas, Colorado, Florida, Kansas, Missouri, Wyoming.

²⁰ Arkansas, Colorado, Florida, Illinois, Missouri, Tennessee.

²¹ Florida, Vermont.

rejection of his claim,¹ all of whom are allowed a certain period after the removal of their disability, or an increase of the time allowed by the statute to establish their claims. But in the absence of a saving clause in favor of the representative of a deceased creditor, there can be no allowance of a claim not presented by him before the expiration of the time limited.² In Iowa the statute excepts cases where "peculiar circumstances entitle plaintiffs to equitable relief;"³ and in Massachusetts and Maine the supreme judicial court may give relief, in certain cases where equity requires it, after the time limited has expired.⁴ In North Dakota an exception is made in favor of creditors not negligent who can show a "sufficient cause" for failure to present within the time limited, if they do so before distribution. So in Pennsylvania it is held that a creditor who is not guilty of *laches* may establish his claim against the estate, at any time before distribution, though he did not exhibit the same within the twelve months given by statute, if such relaxation of the rule to reach the equities of the case will not prejudice the administrator.⁵

It is held in Missouri that the special statute does not apply against the State, at least not in a demand for taxes levied against personalty, while the estate is in course of administration;⁶ while in Indiana it was held that the State was barred, like any other claimant, by the special statute.⁷

So, too, in analogy with the interruptions allowed in respect of the general Statute of Limitations, the Statute of Non-claim has been held, in several of the Southern States, suspended during the war of the rebellion;⁸ but the constitutional provision ^{Suspended during war.} forbidding the computation of the period of the rebellion as a part of the time during which a statute of limitation runs, does not affect the postponement of debts proved subsequently to those proved at a time which entitled them to a preference.⁹ The doctrine applicable to general statutes of limitations, according to which — all intercourse between belligerent States being interdicted, and the courts of the one closed against citizens of the other — the statute is not allowed to run during the period of hostility,¹⁰ applies to the Statute

¹ Connecticut, Kentucky.

² *Morrow v. Barker*, 119 Cal. 65.

³ See, as to what cases will or will not come within the statute, *Roaf v. Knight*, 77 Iowa, 506, and cases referred to; *Sankey v. Cook*, 82 Iowa, 125; *Ury v. Bush*, 85 Iowa, 698.

⁴ St. Mass. ch. 136, § 10; *Knight v. Cunningham*, 160 Mass. 580, and cases referred to; *Ewing v. King*, 169 Mass. 97; *Hurley v. Hewett*, 87 Me. 200. But the statute relieves only against time, not creating a new class of actions: *Hodge v. Hodge*, 90 Me. 505.

⁵ *Cowan's Estate*, 184 Pa. St. 339.

⁶ *State v. Tittman*, 119 Mo. 661.

⁷ *State v. Edwards*, 11 Ind. App. 226, 232 (case upon a judgment on a forfeited recognizance).

⁸ *Williamson v. McCrary*, 33 Ark. 470, 473; *Dwight v. Overton*, 35 Tex. 390, 412; *Woods v. Elliott*, 49 Miss. 168, 177.

⁹ *Standifer v. Hubbard*, 39 Tex. 417, citing earlier Texas cases.

¹⁰ *Hanger v. Abbott*, 6 Wall. 532, 535, *et seq.*; *The Protector*, 9 Wall. 687; *Levy v. Stewart*, 11 Wall. 244, 249, *et seq.*

of Non-claim with equal force.¹ In Missouri, the suspension of the civil law during a portion of the time was not allowed to extend it.²

It is also to be remembered that the equity jurisdiction of federal courts is * independent of that conferred by the [* 848] Claims in States on their own courts and can be affected federal courts. only by the legislation of Congress,³ so that, in a proper case, claims may be enforced there, which would be barred in the State courts.

As between a *cestui que trust* and his trustee the Statute of Limitation does not usually apply; and where a trustee dies, the trust fund, if traceable in specie, constitutes no part of his estate, and is recoverable from the administrator by the successor in the trust, or person entitled to the fund, without any of the formalities prescribed for the establishment of a claim against the deceased;⁴ but when such trust fund is confused with the trustee's own property, so that its identity is lost, the *cestui que trust*, or new trustee, as the case may be, stands in the position of a general creditor,⁵ to whom the Statute of Non-claim applies with equal rigor as against other creditors.⁶ Some cases, however, hold that even where the trust fund is indistinguishable, the Statute of Non-claim does not apply.⁷

The application of the Statute of Non-claim to contingent demands has been fully considered in connection with that subject in the preceding chapter.⁸

§ 403. **Effect of proving Claims after the Time fixed therefor by Statute.** — The chief end of the various statutes enumerated in the

¹ See the reasoning in *United States v. Wiley*, 11 Wall. 508, 512, *et seq.*

² *Richardson v. Harrison*, 36 Mo. 96, 100; *McKinzie v. Hill*, 51 Mo. 303, 306.

³ See on this subject, *ante*, § 156, p. * 357.

⁴ Hence the Statute of Non-claim does not apply to such an action: *Pope v. Boyd*, 22 Ark. 535, 537; *Thompson v. Reno Bank*, 9 Pac. R. (Nev.) 121; *Biron v. Scott*, 80 Wis. 206. See also *Roach v. Caroffa*, 85 Cal. 436; *Smith v. Combs*, 49 N. J. Eq. 420 (applying this rule, though it seems that the fund was mingled with deceased's property, so as to be not traceable in specie), 428; *Hubbard v. Co.*, 53 Kans. 637 (holding the statute for the classification of demands inapplicable, though the fund was mingled with deceased's other property); *Conn. Trust Co. v. Security Co.*, 67 Conn. 438 (holding that the Stat-

ute of Non-claim was inapplicable, even where the trust-fund was so commingled with the intestate's property as to be indistinguishable); *Lathrop v. Security Co.*, 31 Cal. 17; *Gunter v. Janes*, 9 Cal. 643, 658. So where the will expressly charges the testator's estate with the payment of debts, a trust is thereby created, and the statute does not apply: *Abbey v. Hill*, 64 Miss. 340, and see cases cited *post*, § 490, p. * 1096.

⁵ *Ante*, §§ 305, 312. Preferred, in some States: see *ante*, § 368.

⁶ *Nichols v. Shearon*, 49 Ark. 75, 82; *Patterson v. McCann*, 39 Ark. 577; *Fowler v. True*, 76 Me. 43; *Attorney-General v. Brigham*, 142 Mass. 248; *Orcutt v. Gould*, 117 Cal. 315; *McGrath v. Carroll*, 110 Cal. 79.

⁷ See cases in note 4, *supra*.

⁸ *Ante*, § 394.

preceding section — being the speedy settlement of estates in the simplest manner — is perhaps most effectually accomplished by the division of the administration into two or more periods, determining the priority of demands of creditors. This is reached in the States of Arkansas, Iowa, Kansas, Missouri, and Texas by assigning to the claims proved in the later periods an inferior class.¹ In other States the same result is secured by fixing a certain time when the administrator is authorized to pay the debts which

Creditors proving first must be satisfied first ;

[* 849] have been proved, or of which he has * received legal notice, such payments constituting a defence against the claims of creditors appearing subsequently.² In yet other States creditors may prove their demands after the expiration of the period of the Statute of Non-claim, but can have satisfaction only out of such assets as were not inventoried, or known to the administrator before, but were first discovered after such time.³ In such case, the judgment must specially show that the claim is payable out of newly discovered assets,⁴ and the fact of presentation after completion of the statute must be shown by plea, which, for that reason, is not demurrable.⁵ It is held in New Jersey that such an action cannot be brought until after final settlement.⁶

but if assets exist, subsequent creditors will also be satisfied ;

and if assets are discovered subsequently to the expiration of the Statute of Non-claim, creditors proving afterward may be paid out of such.

The principle underlying the division of debts of deceased persons into classes, with priority according to the time of their presentation to the administrator, is one demanded by public policy, and equally applicable whether the omission to prove in time for the earlier classes be due to the negligence of

Saving clauses in favor of certain persons do not affect the

¹ *Ante*, § 374.

² In Delaware, after six months : *Laws*, 1874, p. 547, § 26 ; and distribute to legatees and heirs after one year : *Ibid.* p. 551, § 41. So in Georgia : *Goodwyn v. Hightower*, 30 Ga. 249, 252 ; but is liable to creditors for all unadministered assets, no matter how and in what proportions he may have paid legatees : *Yerby v. Matthews*, 26 Ga. 549. Similar provisions are found in the statutes of Connecticut, Maryland, New York, North Carolina, Ohio, Oregon, South Carolina, Virginia, and West Virginia.

³ So provided, for instance, in Colorado, Illinois, Massachusetts, Mississippi, and New Jersey. See *Wingate v. Pool*, 25 Ill. 118, 122 ; *Peacock v. Haven*, 22 Ill. 23, 26 ; *People v. Brooks*, 22 Ill. App. 594, 599 ; *McClure v. La Plata Co.*, 23 Colo.

130 ; as to what are new assets, see *Gould v. Camp*, 157 Mass. 358, and *Auburn State Bank v. Brown*, 172 Ill. 284. In Mississippi, if the personalty be then exhausted, the belated creditor cannot sell the land : *Nagle v. Ball*, 71 Miss. 330.

⁴ *Russell v. Hubbard*, 59 Ill. 335, 339. But it is error to confine such satisfaction to assets discovered *after the judgment* : *Stone v. Clarke*, 40 Ill. 411, 414.

⁵ *Judy v. Kelley*, 11 Ill. 211, 216.

⁶ Because it cannot be known whether the property is needed to pay claims previously established or not : *O'Neil v. Freeman*, 45 N. J. L. 208. In this State the creditor may sue the heirs after final settlement, though he could have presented his claim to the administrator : see *post*, § 577.

rights of creditors having proved previously. the claimants, or to one of the disabilities recognized by statute as an excuse, or whether the claim itself did not exist in time to be ranked with the preferred claims.

It is obviously necessary that a time be fixed for the payment of debts by executors and administrators. When that time has arrived, the court must by its order determine what creditors, and how much to each one, the administrator is to pay. A compliance by the administrator with such order must be a protection to him against creditors presenting claims subsequently, no matter for what reason they had not appeared before. In most States such orders are required by statute to be * made by the probate court, [* 850] and will be enforced by the law; but the principle upon which the court makes the order is equally true, whether the order

Nor the contingent nature of claims. be made or not. Hence the operation of the saving clauses incorporated in the Statutes of Limitation and of Non-claim, and the postponement of the Statute of Non-

claim in cases of contingent debts are confined to property or assets not liable to creditors whose rights have become fixed by compliance with the legal requirements determining the class and the fund out of which they are to be satisfied.¹ If such claims be proved subsequent to a distribution to heirs or legatees, they may constitute a demand enforceable against them to the extent of the assets received by them;² but if they had an opportunity to prove their claims against the executor or administrator, and neglected to do so, the bar is complete, and protects heirs and legatees as well as executors and administrators.²

¹ Williams v. Penn, 12 Mo. App. 393. And it should be remembered that time of presentation determines the class, not the time of bringing suit on the claim: ante, § 374.

² Pearce v. Calhoun, 59 Mo. 271, 274; Titterington v. Hooker, 58 Mo. 593, 596; post, § 578, and authorities there cited.

[* 851]

* CHAPTER XLIV.

OF CLAIMS AGAINST INSOLVENT ESTATES.

§ 404. **How Estates are declared Insolvent.** — A number of States prescribe a different procedure for the administration of insolvent estates from that provided for ordinary cases. Among them are Alabama,¹ Connecticut,² Florida,³ Indiana,⁴ Louisiana,⁵ Maine,⁶ Massachusetts,⁷ Mississippi,⁸ New Hampshire,⁹ New Jersey,¹⁰ Ohio,¹¹ Rhode Island,¹² Tennessee,¹³ and Vermont.¹⁴ In Pennsylvania an Act of Assembly of April 19, 1794, § 14, seems to have provided for the appointment of auditors of insolvent estates, intended for the protection of executors and administrators, giving jurisdiction to the Orphan's Court.¹⁵ A notable feature of distinction between solvent and insolvent estates was formerly made in Florida, where the priority of debts was abolished in insolvent estates, except as to funeral and last illness expenses, all other debts being payable ratably.¹⁶ It would seem that the division of debts into classes, giving one class priority over another, is peculiarly applicable to insolvent estates; for if there be sufficient assets to pay all debts, [* 852] their gradation serves no important purpose. It * is this gradation of debts, and distinguishing between those created by the decedent and those growing out of the administration, which

Different procedure in insolvent estates.

Gradation of debts produces same result.

¹ Code, 1896, §§ 290 *et seq.*

² Gen. St. 1888, § 585.

³ Rev. St. Fla. 1892, §§ 1939 *et seq.*

⁴ Ann. Ind. St. 1894, §§ 2579 *et seq.*

⁵ In this State the heirs determine whether they will renounce the estate, take it with the benefit of inventory, or assume the debts themselves. See also Rev. St. 1876, § 3680.

⁶ Rev. St. 1883, p. 555.

⁷ Pub. St. 1882, p. 776, ch. 137.

⁸ Miss. Ann. Code, 1892, §§ 1939 *et seq.*

⁹ Publ. St. N. H. 1891, ch. 192.

¹⁰ Gen. St. N. J. 1896, p. 2374, §§ 81 *et seq.*

¹¹ Bates' Ann. Oh. St. 1897, §§ 6224 *et seq.*

¹² G. L. 1896, p. 728, ch. 215, § 3.

¹³ Code, 1884, §§ 3169 *et seq.*

¹⁴ "But now and for many years past all estates are settled as insolvent estates, without any formal representation of insolvency by the administrator": Powers *v.* Powers, 57 Vt. 49, 51.

¹⁵ Metts's Appeal, 1 Whar. 7, 10; Pep. & L. Dig. 1896, p. 1478, § 107.

¹⁶ McClell. Dig. p. 583, § 6. The order of payment in insolvent estates was and still is: 1. Funeral expenses; 2. Debts for board and lodging during last illness; 3. Physician's and surgeon's bill for services during last illness; 4. Judgments of record rendered and docketed during lifetime of deceased, and debts due the State; 5. Other debts without distinction of rank. Dig. p. 84, § 31; Rev. St. Fla. 1892, § 1909. In the revision of 1892, the gradation of debts in solvent estates is extended to insolvent estates: § 1942.

produces substantially the same result in States recognizing no distinction between the administration of solvent and of insolvent estates. The functions of the executor or administrator seem to be fully adequate in either case, since they possess all the powers of assignees, or receivers of insolvent debtors; and the powers of probate courts are peculiarly adapted to secure the rights of creditors with full protection to executors and administrators and the next of kin and legatees.¹

The declaration of insolvency is made by the court having jurisdiction of the estate, upon suggestion, application, or report of the administrator,² or by creditors.³ The estate, as to the method of its settlement, must thereafter be treated as an insolvent estate, even though it may eventually be found in fact to be abundantly solvent,⁴ unless provision to the contrary be found in the statute.

Declaration of insolvency. The declaration of insolvency should be made as soon as it appears that the assets of the estate are insufficient to pay its debts, which he is, as a general rule, bound to know as soon as the time for presenting claims has expired;⁵ but if he has paid claims in full before the expiration of such time, he is not thereby precluded from obtaining a declaration of insolvency.⁶

Consequence of omitting to declare estate insolvent. If he neglect to represent the estate insolvent, knowing it to be so if the claim presented to him be allowed, because he relied upon his defence against the validity of the claim, the judgment on such claim will make him liable for the full amount, without regard to the assets in his hands.⁷ It has been held in Alabama⁸ and Massachusetts,⁹ however, that a subsequent declaration of insolvency may be pleaded in bar of *scire facias* on such judgment; and in Michigan¹⁰ and Mississippi,¹¹ execution on such judgment was enjoined *in chancery. [* 853]

¹ Jackson, J., in *Walker v. Hill*, 17 Mass. 380, 386, calls attention to the circumstance, that the difference in the time in which the Statute of Non-claim might be pleaded, which was eighteen months for insolvent and four years for solvent estates in Massachusetts, then constituted the only virtual distinction between the two systems. And see *Powers v. Powers*, *supra*.

² See Code Ala. 1896, § 291; *Holliday v. McKinne*, 22 Fla. 153, 167.

³ See *Powers v. Powers*, 57 Vt. 49.

⁴ *Walker v. Newton*, 85 Me. 458, 461.

⁵ *Bramblet v. Webb*, 11 Sm. & M. 438, 444; *Parker v. Whiting*, 6 How. (Miss.) 352, 359; *Cash v. Dickens*, 2 Lea, 254. In some cases it is impossible for the administrator to ascertain the actual condition of the estate until the expiration of the time

within which claims must be presented: *Barber v. Collins*, 18 R. I. 760, 763.

⁶ *Quackenbush v. Campbell*, Walk. Ch. 525, 526; *Barber v. Collins*, 18 R. I. 760, 763. In Massachusetts an administrator has been allowed to recover back from the creditor the excess paid him: *Walker v. Hill*, 17 Mass. 380, 386; *Walker v. Bradley*, 3 Pick. 261; but not until decree of distribution has been made: *Flint v. Valpey*, 130 Mass. 385.

⁷ *Newcomb v. Goss*, 1 Met. (Mass.) 333; *Bramblet v. Webb*, 11 Sm. & M. 438, 444; *Howell v. Potts*, 20 N. J. L. 1, 3.

⁸ *Burk v. Jones*, 13 Ala. 167, 169.

⁹ *Coleman v. Hall*, 12 Mass. 570, 573.

¹⁰ *Quackenbush v. Campbell*, Walk. Ch. 525.

¹¹ *Neibert v. Withers*, Sm. & M. Ch. 599, 609.

Allowing judgment to go against him by default, however, was held in Rhode Island to be such an admission of assets as would preclude the executor from subsequently showing that he had no assets of the estate; he should have represented the estate insolvent.¹ If the estate be not declared insolvent, an action for non-payment may be brought on the bond before the lapse of the three years.² The proceeding to declare an estate insolvent may be resisted by creditors,³ and in Alabama the question is triable before a jury.⁴ It is required, in some instances, upon the insufficiency of personal assets for the payment of debts before the real estate can be resorted to.⁵

§ 405. **Special Administration of Insolvent Estates.**—In Alabama, the authority of the administrator is *eo ipso* determined when the estate, after due proceedings for this purpose, has been declared insolvent; the creditors then appoint, under the direction of the probate court, a new administrator, in whom the property of the estate thenceforth vests.⁶ In Tennessee, insolvent estates not exceeding in value one thousand dollars are settled exclusively in probate courts, while over estates exceeding this value the chancery courts have concurrent jurisdiction with courts of probate; if the personalty exceed three thousand dollars, the jurisdiction is exclusively in chancery.⁷ Settlements in chancery courts are conducted upon equitable principles, as on creditors' bills; while in the probate courts (county courts having probate jurisdiction) they are governed by statutory provisions not essentially different from those of other States.⁸ In Mississippi, the administration of all estates is now controlled by courts of chancery;⁹ and when an estate is declared insolvent, the clerk receives proof of debts, and the court orders distribution *pro rata* among all creditors, except for expenses of funeral, last illness, administration, and commissions to the administrator, which are to be paid in full. Before this code took effect, commissioners were appointed, as in most of the States, providing separately for insolvent administrations, and it was held that upon the report of these commissioners the fiduciary relation of the executor or administrator ceased, except as to undiscovered assets.¹⁰ In Florida, if the estate exceeds five hundred dollars in value, probable insol-

Administra-
tion of insol-
vent estates.

¹ Carver v. Wells, 17 R. I. 688.

² Municipal v. McElroy, 18 R. I. 749.

³ Pierce v. Allen, 12 R. I. 510.

⁴ Code, 1896, § 296.

⁵ Frazier v. Pankey, 1 Swan, 75, 79; Woods v. McCann, 3 Ala. 61, 63; Gilchrist v. Cannon, 1 Coldw. 581, 587.

⁶ Code, 1896, §§ 290 *et seq.*

⁷ Fleming v. Talliafer, 4 Heisk. 352.

⁸ The suggestion of insolvency imports

that the administrator has ascertained that the personal assets are not sufficient to pay the debts of an estate, and a bill may then be filed at any time in chancery: Ewing v. Maury, 3 Lea, 381, 388. After the declaration of insolvency, creditors are entitled to payment out of the personalty *pro rata*: Fleming v. Talliafer, 4 Heisk. 352.

⁹ Miss. Ann. Code, 1892, § 482.

¹⁰ Anderson v. Tindall, 26 Miss. 332.

vency may be *suggested in chancery, and claims may be [*854] ordered to be filed there, instead of in the probate court.¹

In Maine, if the estate be not treated as insolvent, each creditor may pursue his remedy through the ordinary courts, to judgment and levy; but if the estate be decreed insolvent, all claims must be presented to commissioners, to be entered on the list of debts entitled to a dividend; but the appointment of commissioners on the representation of insolvency decrees the estate insolvent, and thereafter no levy can be made upon the estate, even though it be in fact abundantly solvent.²

Upon the declaration of insolvency, the statute requires, in most
 Commissioners of the States distinguishing solvent from insolvent
 usually ap- estates, the appointment of commissioners, whose office
 pointed to ex- it is to receive and adjudicate upon all the claims
 amine claims. against the insolvent estate. Commissioners appointed to pass on
 demands against the estates of deceased persons, although they do
 not constitute a "court" in the constitutional sense,³ act judicially,⁴
 and their finding, if not appealed from or rejected by the probate
 Effect of their court, is binding upon all parties concerned.⁵ Their
 allowance. allowance of a claim has, in such case, the force and
 effect of a judgment, so that the administrator is bound to pay the
 amount found by them to be due, although the claim be fraudulent
 and fictitious.⁶ But the administrator, if he deems the
 Appeal from allowance unjust, may appeal from the decision of the
 ance. commissioners, in some States directly,⁷ in others after
 they have made their report to the probate court;⁸ and if the admin-
 istrator refuse to appeal, or the finding be against the claimant, he,⁹
 or any person interested in the estate, may do so.¹⁰ The matter
 appealed from is tried *de novo* in the appellate court, as though no
 prior proceedings had been had;¹¹ but the claim must be the same,

¹ Rev. St. Fla. 1892, § 1943.

² Walker v. Newton, 85 Me. 458.

³ Shurbun v. Hooper, 40 Mich. 503, 504.

⁴ Fish v. Morse, 8 Mich. 34, 37; Clark v. Davis, 32 Mich. 154, 157; Shurbun v. Hooper, *supra*; Stoddard v. Moulthrop, 9 Conn. 502, 505.

⁵ See Sowles v. Quinn, 61 Vt. 354; Shelton v. Hadlock, 62 Conn. 143, 154. But a claim disallowed by commissioners has been allowed to extinguish, *pro tanto*, the demand of the estate against the claimant: Rogers v. Rogers, 67 Me. 456, 458; Wright v. Dunham, 9 Pick. 37. And so of a claim which was not presented to the commissioners for allowance: McDonald v. Webster, 2 Mass. 498.

⁶ Reynolds v. McGregor, 16 Vt. 191;

Mitchell v. Pease, 7 Cush. 350, 353; State v. Ramsey Probate Court, 25 Minn. 22, 25.

⁷ As in Connecticut: Bennett's Appeal, 33 Conn. 214; Rhode Island: Barnes v. Mowry, 11 R. I. 420, 421.

⁸ For instance, in Maine: Robbins v. Brewer, 48 Me. 481, 484; Pattee v. Lowe, 36 Me. 138, 140. Massachusetts: Goff v. Kellogg, 18 Pick. 256; Ellsworth v. Thayer, 4 Pick. 122. Vermont: Hodges v. Thacher, 23 Vt. 455, 462.

⁹ Chapman v. Haley, 43 N. H. 300, 304; Hobart v. Herrick, 28 Vt. 627, 630; Patton v. Bostwick, 39 Mich. 218.

¹⁰ Crouch v. Circuit Judges, 52 Mich. 596.

¹¹ Souhegan Bank v. Wallace, 60 N. H. 354.

and is governed by the same rules of evidence as when the commissioners tried it.¹ They are to report their doings to the probate court, which may hear exceptions to the re-
Report of their finding.

port, made either by the administrator or by the creditors, [*855] and approve or *reject the same. It is the approval by the court which gives the decision of the commissioners its quality as a judgment,² but it has been decided in several States, that the probate court has no power to pass upon the validity of claims in insolvent estates, and that in passing upon the report of the commissioners its discretion extends no further than to determine whether the report presented is the judgment of the commissioners;³ there may therefore be an appeal from the approval or rejection of the entire report,⁴ as well as from the decision of the commissioners on any particular claim,⁵ which causes of appeal must not be confounded with each other, as they present different issues for trial in the appellate court. In Connecticut, however, the cases holding that the probate court has no power to modify the finding of the commissioners, nor to allow or disallow, either directly or indirectly, any claim against an insolvent estate,⁶ have been overruled,⁷ and it is now held that the court of probate has power to go behind the report of the commissioners, and marshal the claims according to principles of equity.⁸

The functions of the commissioners are also to be compared with those of an administrator having authority (as administrators have in many States) to allow and pay claims without previous adjudication; in some of the States, presentation to them of a claim, and its rejection, is a prerequisite to an action thereon in a court of general jurisdiction;⁹ and in some of the States the declaration of insolvency operates to confer exclusive jurisdiction upon the probate court, or the commissioners appointed by that court, for the enforcement of claims against the estate,¹⁰ unless some question of exclusive

Exclusive jurisdiction in probate court of claims against insolvent estates.

¹ Hatheway's Appeal, 52 Mich. 112; Rich v. Eldredge, 42 N. H. 246, 253; Bluehill Academy v. Ellis, 32 Me. 260, 267.

² Hence exceptions to the report must be made at the term to which it is returned: Herring v. Wellons, 5 Sm. & M. 354, 359, citing former Mississippi cases; Chewning v. Peck, 6 How. (Miss.) 524.

³ Hodges v. Thacher, 23 Vt. 455, 463; Parsons v. Mills, 1 Mass. 431.

⁴ Peck v. Sturges, 11 Conn. 420.

⁵ Bennett's Appeal, 33 Conn. 214; Barnes v. Mowry, 11 R. I. 420, 421; Harris v. Angell, 16 R. I. 347, holding an appeal generally from a report to be void, on the ground that each allowance is a sepa-

rate judgment, and must be separately appealed from.

⁶ Hotchkiss v. Beach, 10 Conn. 232, 238, et seq.

⁷ Ashmead's Appeal, 27 Conn. 241, 248.

⁸ Vail's Appeal, 37 Conn. 185, 193.

⁹ Dillingham v. Weston, 21 Me. 263; Severance v. Hammatt, 28 Me. 511, 520; Paine v. Nichols, 15 Mass. 253, 255.

¹⁰ Edwards v. Gibbs, 11 Ala. 292; Watts v. Gayle, 20 Ala. 817, 825; Probate Court v. Van Duzer, 13 Vt. 135, 139; Vreeland v. Vreeland, 16 N. J. Eq. 512, 527; Clark v. Eubank, 65 Ala. 245; Miller v. Harrison, 34 N. J. Eq. 374; Shiver v.

equitable jurisdiction arises which cannot be adjudicated in the probate court.¹

*** § 406. Procedure in establishing Claims against Insolvent [* 856] Estates.**—The jurisdiction of commissioners of insolvent

Power of com-
missioners of
insolvent
estates. estates in passing upon the claims presented against them is very much like that of probate courts in passing upon claims generally, and they are governed by the same rules of evidence. All claims for money owing from the estate arising from a liability of the decedent, whether upon contract or in tort, in law or equity, must be presented to them;² but claims of a purely equitable nature, not calling for a money judgment, are not triable by them.³ Claims not matured, if payable absolutely in the course of time,⁴ must be proved before them, and are generally adjusted by a rebate of the interest;⁵ but contingent claims not running to certain maturity are provable only under express provision

No technical
pleadings
necessary.

of statute.⁶ As in cases before the probate court generally,⁷ no technical pleadings are had in the trial of claims before commissioners;⁸ but they should be in writing, verified, authenticated, and proved under the same rules as claims presented to the probate court against solvent estates.⁹ In Alabama, the court may allow, in its discretion, an affidavit to be attached in verification of a claim filed in due time, at any time before the distribution among the creditors.¹⁰

§ 407. Time within which Claims must be presented against

Time for prov-
ing claim
shortened if
estate is in-
solvent.

Insolvent Estates.—In most of the States providing for special administration of insolvent estates, the time limited for the presentation of claims to the administrator, court, or commissioners of insolvent estates

Rousseau, 68 Ala. 564. The claim must be filed within the statutory time in the probate court, whether before the decree of insolvency it has been reduced to judgment or not: *Hullett v. Hood*, 109 Ala. 345, 351.

¹ *Clark v. Eubank*, *supra*; *Fellows v. Lewis*, 65 Ala. 343.

² *Black v. Bush*, 7 B. Mon. 210, 212; *Todd v. Bradford*, 17 Mass. 567; *Brown v. Slater*, 16 Conn. 192, 195; *Collins v. Pillou*, 26 Conn. 368, 373; *Corr's Appeal*, 62 Conn. 403. Even a claim against the estate of a married woman has been allowed: *Shelton v. Hadlock*, 62 Conn. 143, 154.

³ *Brown v. Sumner*, 31 Vt. 671, 673; *Hunt v. Danforth*, 2 Curt. 592, 604. And see on the subject of equitable jurisdiction of probate courts, *ante*, § 392.

⁴ *Haverhill v. Cronin*, 4 Allen, 141, 144; *Hearn v. Roberts*, 9 Lea, 365, 368,

and see dissenting opinion of Freeman, J., 369 *et seq.*

⁵ *Ante*, § 393.

⁶ *Hall v. Wilson*, 6 Wis. 433 (holding that the probate court might have jurisdiction); *Bacon v. Thorp*, 27 Conn. 251, 261, *et seq.*; *Harding v. Smith*, 11 Pick. 478; *Payson v. Hadduck*, 8 Biss. 293, 297. See, as to contingent claims, *ante*, § 394; *post*, § 578.

⁷ *Ante*, § 149.

⁸ *Mills v. Wildmen*, 18 Conn. 124, 131; *Ransom v. Quarles*, 16 Ala. 437; *Hogan v. Calvert*, 21 Ala. 194, 198; *American Commissioners' Appeal*, 27 Conn. 344, 353; *Bibb v. Mitchell*, 58 Ala. 657.

⁹ *Hansell v. Forbes*, 33 Miss. 42; *Gould v. Tingley*, 16 N. J. Eq. 501; *Dyer v. Stanwood*, 7 N. H. 261.

¹⁰ *Gilbert v. Brashear*, 12 Ala. 191; *Lapsley v. Goldsby*, 14 Ala. 73.

is shorter than the limitation for proving claims against solvent estates. In *Tennessee, this time is fixed at not less than three nor more than six months;¹ the minimum in all the other States is six months; the maximum is six months in Alabama,² Mississippi,³ and Tennessee,⁴ nine months in Florida,⁵ and New Hampshire,⁶ twelve months in Connecticut⁷ and Rhode Island,⁸ and eighteen months in Maine,⁹ Massachusetts,¹⁰ New Jersey,¹¹ and Ohio.¹² Saving clauses are found in some of the States in favor of persons under disability;¹³ and in most of them the court may, for good reason shown, extend the time for a period, the maximum of which is also fixed by statute.¹⁴ The statute has been held as being obligatory upon the court to grant a hearing of the application;¹⁵ but the time cannot be extended beyond the maximum period allowed by statute.¹⁶ Claims not presented within the time limited are barred.¹⁷ It is obvious, however, that this bar does not extend to cases over which the commissioners have no jurisdiction,¹⁸ or when the notice required by the statute has not been given.¹⁹ And if the creditor has been misled by false statements to withdraw a claim filed in due time, he will be allowed to refile it and prove it, if before the estate has been distributed;²⁰ or, if deceived by fraudulent representations of the administrator, he promptly commence action upon the discovery of the fraud, equity will grant relief.²¹ And the bar of the statute does not apply to claims proved subsequently, if the administrator have property in hand which has not before been inventoried or accounted for;²² * *a fortiori*, if the claim was a contingent

Saving clauses and extension of time.

Claims barred;

but not if commissioners have no jurisdiction.

¹ Code, 1884, § 3175. But see for a construction of the Tennessee statutes and when the creditor will have the period of two years and six months to prove claims: *Prewett v. Goodlett*, 98 Tenn. 82.

² Code, 1896, § 306.

³ Miss. Ann. Code, 1892, § 1942.

⁴ Code, § 3175.

⁵ Rev. St. Fla. 1892, § 1940.

⁶ Publ. St. N. H. 1891, ch. 192, § 2.

⁷ Gen. St. 1888, § 586.

⁸ Gen. L. 1896, ch. 215, § 2.

⁹ Rev. St. 1883, p. 556, § 4.

¹⁰ Pub. St. 1882, p. 777, § 9.

¹¹ Gen. St. N. J. 1896, p. 2374.

¹² *Bates' Ann. Oh. St. 1897, §§ 6224 et seq.*

¹³ For instance, in Alabama, where infants and persons of unsound mind are allowed nine months after removal of their disability: *ante*, § 402.

¹⁴ *Griffin v. Parcher*, 48 Me. 406; *Walker v. Lyman*, 6 Pick. 458, 460; *Peabody's*

Petition, 40 N. H. 342; *Parker v. Gregg*, 23 N. H. 416, 422.

¹⁵ *Bufford v. Johnson*, 34 N. H. 489, 491; and see *ante*, § 400.

¹⁶ *Deming's Appeal*, 34 Conn. 201, 204.

¹⁷ *Hollinger v. Holly*, 8 Ala. 454, 460; *Sharp v. Sharp*, 35 Ala. 574; *McCollow v. Hinckley*, 9 Vt. 143, 146; *Watson v. Rose*, 51 Ala. 292, 297; *Vandyke v. Chandler*, 10 N. J. L. 49, 53; *Frisbie v. Preston*, 67 Conn. 448; *Cone v. Dunham*, 59 Conn. 146, 161. See as to claims against solvent estates, *ante*, § 402, p. *846.

¹⁸ *Sparhawk v. Buel*, 9 Vt. 41, 74; *Herrick v. Belknap*, 27 Vt. 673, 698.

¹⁹ *Roberts v. Burton*, 27 Vt. 396; *North v. Probate Judge*, 84 Mich. 69.

²⁰ *Stamps v. Bell*, 2 Baxt. 170, 172.

²¹ *Bank v. Fairbank*, 49 N. H. 131, 138.

²² *Allen v. Keith*, 26 Miss. 232, 239; *Sacket v. Mead*, 1 Conn. 13; *Peirce v. Whittemore*, 8 Mass. 282. But the creditor must first cause the additional inven-

one.¹ In Rhode Island, a claimant whose action is pending when the administratrix represents the estate insolvent is not obliged to discontinue his action and prove his claim before commissioners, but by so doing assumes the risk of a judgment limited to the surplus after payment of all claims allowed by the commissioners.² In Massachusetts the institution of proceedings in insolvency does not suspend the Statute of Non-claim against creditors;³ but the action to recover property fraudulently conveyed by the decedent, which the administrator is authorized to bring in Massachusetts, may be maintained after the claims of creditors are all barred, because the property so recovered will constitute new assets, which creditors may reach, under the Massachusetts statute, after they are so barred.⁴ In Alabama, on the other hand, where the administrator cannot bring an action to set aside a fraudulent conveyance, the creditor must present his claim to the representative within the period limited by the Statute of Non-claim in insolvent estates, although the bill to reach the property conveyed is filed before the bar is completed.⁵ In this State claims may be presented at any time within the time allowed for that purpose under insolvent proceedings, whether the Statute of Non-claim for estates generally has expired or not;⁶ and so, if the estate should turn out to be solvent, claims may be proved at any time within the Statute of Non-claim, although the time limited by the declaration of insolvency have expired.⁷ But if the estate be insolvent, all claims must be proved in the probate court, although they had been reduced to judgment before the decree of insolvency.⁸ In Maine, it is held that preferred claims need not be submitted to the commissioners; hence an action for taxes,⁹ or on a physician's bill for services during the decedent's last illness,¹⁰ may be maintained without having been laid before the commissioners.¹¹ From this it follows that if the assets do not exceed the amount of expense of administration and claims of the preferred classes, there need be no representation of insolvency.¹² In Tennessee, the suggestion of insol-

tory to be made of such newly discovered estate: *Frisbie v. Preston*, 67 Conn. 448. It is so provided by statute in Connecticut, Maine, Massachusetts, Mississippi, New Jersey, Ohio, Rhode Island, and perhaps other States.

¹ *Hawley v. Botsford*, 27 Conn. 80.

² *Gardner v. Gardner*, 17 R. I. 751.

³ *Aiken v. Morse*, 104 Mass. 277, 280.

⁴ *Welsh v. Welsh*, 105 Mass. 229.

⁵ *Herstein v. Walker*, 85 Ala. 37. But this rule has no application where no administrator was ever appointed, since the Statute of Non-claim never began to run; and the creditor may proceed against the fraudulent grantee without joining the ad-

ministrator: *Merchants' Bank v. McGee*, 108 Ala. 304.

⁶ *Lattimore v. Williams*, 8 Ala. 428.

⁷ *Phelan v. Phelan*, 13 Ala. 679.

⁸ *Hullett v. Hood*, 109 Ala. 345 (*per Haralson, J.*, on p. 351).

⁹ *Bulfinch v. Benner*, 64 Me. 404, 407.

¹⁰ *Flitner v. Hanly*, 18 Me. 270.

¹¹ *Flitner v. Hanly*, 19 Me. 261, 264, holding the administrator liable, although the claim had been allowed by the commissioner, but without claimant's directions.

¹² *Ludwig v. Blackington*, 24 Me. 25; *Smith's Pr. L.* 124.

veny and notice operates as an injunction against all suits, and the creditor should file his claim in the insolvency proceedings within the statutory period; where judgment had been obtained or suit instituted prior to such proceedings, the statute is suspended, and the creditor need only file his judgment with the clerk before the funds have been appropriated to pay claims; if the claim does not mature until after suggestion of insolvency, the creditor has two years to file his claim, but takes the risk of the funds meanwhile being appropriated; but a mere demand of the administrator and filing of his claim before insolvency suggestion will not stop the running of the statute.¹

§ 408. **Rights of Creditors holding Collateral Security to Assets of Insolvent Estates.** — Some contrariety of decisions existed in England as to the right of a creditor who possesses collateral security,² to satisfaction out of the general assets of an insolvent debtor, without releasing his security. Judge Redfield, in his edition of Story's Commentaries on Equity Jurisprudence, states the rule in bankruptcy to be that the mortgagee can only prove his debt for the deficiency remaining after deduct-

Rule as to collateral security in bankruptcy,

ing the value of his mortgage security; ³ a rule followed in some [* 859] * cases by courts of chancery,⁴ but questioned by

followed in equity, but also questioned.

Lord Cottingham,⁵ whom Story designates as high authority. Judge Redfield then says: "We believe the general practice, in the settlement of insolvent estates [of deceased persons], is to allow the creditor to prove his whole debt, without regard to any collateral security

Rule as announced by Judge Redfield

he may hold. If the dividend so reduces the debt that the collateral security will more than pay it, the personal representative is bound to redeem for the benefit of the general creditors."⁶ The effect of this rule gives to the creditor the advantage of a dividend on the full amount of his claim, in addition to the value of any collateral security he may hold, and throws the burden of redeeming the same upon the executor or administrator in case both of these funds exceed the amount of the debt. It has been followed in America in a number of States; ⁷ the equitable rule,

followed in American States.

¹ Prewett v. Goodlett, 98 Tenn. 82, 97.

² Security additional to the personal obligation of the debtor: Abb. Law D., "Collateral Security;" Shoemaker v. National Bank, 2 Abb. U. S. R. 416, 423.

³ The same principle is announced in the Federal Bankruptcy Act of 1867: 14 St. at Large, p. 526, § 20.

⁴ Greenwood v. Taylor, 1 Russ. & My. 185; Took v. — (cited as Tooke v. Hartley), 2 Dick. 785.

⁵ In Mason v. Bogg, 2 My. & Cr. 443, 446.

⁶ 1 Story Eq. Jurisp. (10th ed.) § 564 b.

⁷ Says Black, J., in Day v. Graham, 97 Mo. 398, 403: "The creditor is not bound to rely upon his mortgage alone; nor is he required to first exhaust his mortgage security. He may prove up his debt, and is then entitled to be paid out of the assets of the estate." (The rule has since been changed in this State by statute: see *infra*): Miller's Estate (a case of assignment for benefit of creditors), 82 Pa. St. 113, commenting on earlier cases; Furness v. Union N. Bank, 147 Ill. 570,

compelling a creditor having a right of satisfaction out of two funds to resort in the first instance to the one on which the claims of other creditors do not attach, is never applied to the prejudice of the former; ¹ hence, it is said, a creditor cannot be compelled to surrender his collateral security, unless he is tendered the whole amount of his debt.² In these States, in apportioning the assets among cred-

Dividend is based upon amount due at time of apportionment.

Administrator is liable to creditors, if he fail to enforce his remedy.

itors of an insolvent estate, the indebtedness at the time of the apportionment is taken as the basis, and in ascertaining the amounts due to secured creditors, any sum realized by them on their securities obtained after the allowance of their claims should be deducted.³ If an administrator sells lands subject to a mortgage and afterward pays off the mortgage debt out of the general assets of the estate, he will have a clear equity against the purchaser for reimbursement out of the land itself,⁴ and the administrator will be liable on his bond to the creditors if by reason of his failure to enforce his claim the assets become insufficient to pay the debts; ⁵ or he will be held as if he had elected to make the claim for reimbursement his own debt to the estate.⁶

But a different rule prevails in other States, in most of which the creditor is allowed to prove against the general assets only for the difference between the amount of the debt and the value of the security he holds. So in Colorado,⁷ Indiana,⁸ Iowa,⁹ Kentucky,¹⁰ Louisiana,¹¹ Massachusetts,¹² Minnesota,¹³ New Hampshire,¹⁴ New Jersey,¹⁵ New

573; *West v. Bank of Rutland*, 19 Vt. 403, 409; *Moses v. Ranlet*, 2 N. H. 488 (see *infra* as to statutory change of this rule); *Lenore v. Winn*, 4 Desaus. 65.

¹ *Walker v. Covar*, 2 S. C. 16, 19; *Everston v. Booth*, 19 Johns. 486, 493; *Ramsey's Appeal*, 2 Watts, 228.

² *Kittera's Estate*, 17 Pa. St. 416, 424.

³ *McCune's Estate*, 76 Mo. 200; *Jamison v. Co.*, 59 Ark. 548; *Earle v. Lane*, 22 Colo. 273, and cases cited p. 278 (declining to follow *Furness v. Bank*, 147 Ill., *supra*, in which it was held that after proving in the probate court the creditor could realize on his collateral in any sum less than the whole claim, and still be entitled to a dividend out of the estate on the whole claim until paid in full).

⁴ *Greenwell v. Heritage*, 71 Mo. 459; *Day v. Graham*, 97 Mo. 398, 403.

⁵ *Swan v. Thompson*, 36 Mo. App. 155, 160.

⁶ *Swan's Estate*, 54 Mo. App. 17, 22.

⁷ *Earle v. Lane*, 22 Colo. 273, 278.

⁸ *La Plante v. Convery*, 98 Ind. 499, 501, referring to earlier Indiana cases.

⁹ *Wurtz v. Hart*, 13 Iowa, 515, 518.

¹⁰ *Masonic Bank v. Bangs*, 84 Ky. 135, 144; *Spratt v. First N. Bank*, *Id.* 85.

¹¹ *Union Bank v. Marigny*, 11 Rob. (La.) 209.

¹² *Haverhill v. Cronin*, 4 Allen, 141, holding that the creditor may prove for the whole debt, if he will surrender his security; but if he retains it, the value must be ascertained and deducted, and he may prove for the remainder: *Bristol Savings Bank v. Woodward*, 137 Mass. 412.

¹³ *Hill v. Townley*, 45 Minn. 167 (inferentially).

¹⁴ *Drew v. McDaniel*, 60 N. H. 480, 482.

¹⁵ *Bell v. Fleming*, 12 N. J. Eq. 13, 25. The creditor must in this State look primarily to the mortgage for payment, and suit for the deficiency must be brought within six months from the date of sale;

York,¹ North Carolina,² South Carolina,³ Tennessee,⁴ and perhaps in others. This view seems to be gaining ground in the United States, as being consonant with principles of justice, and putting the specialty creditors and the general creditors on an equal [* 860] footing.⁵ *The subject is regulated by statute in a number of States; for instance, in Arizona,⁶ Connecticut,⁷ Idaho,⁸ Kentucky,⁹ Maine,¹⁰ Minnesota,¹¹ Missouri,¹² Montana,¹³ New Hampshire,¹⁴ North Dakota,¹⁵ South Dakota,¹⁶ Utah,¹⁷ Washington,¹⁸ and probably other States. So in Mississippi,¹⁹ and Texas.²⁰

§ 409. **Actions to foreclose Collateral Securities.**—Actions to foreclose mortgages, or to enforce other collateral securities or liens, are distinct from the allowance of the debts so secured; and since, generally, probate courts have no jurisdiction of such actions, the limitations and conditions imposed on the parties enforcing the payment of simple debts against executors or administrators are not applicable. Thus, mortgages or vendor's liens may generally be foreclosed without having

Actions to foreclose not generally triable in probate courts.

but the claim may be presented for allowance before the mortgaged premises are sold: *Smith v. Crater*, 43 N. J. Eq. 636.

¹ *Hanselt v. Patterson*, 124 N. Y. 349, 359.

² *Moore v. Dunn*, 92 N. C. 63 (this case is on an analogous point involving the principle announced in the text).

³ *Wheat v. Dingle*, 32 S. C. 473.

⁴ *Fields v. Wheatley*, 1 Sneed, 351, 354; *Winton v. Eldridge*, 3 Head, 361.

⁵ In the recent case, however, of *Merrill v. National Bank*, 19 Sup. Ct. Rep. 360, the supreme court of the United States throws the weight of its authority into the other scale,—five of the judges holding that a secured bankrupt creditor may prove for the whole of his claim without either crediting his collateral or deducting collections made therefrom after declaration of dividends (so that he receive no more than the full amount of his claim); while the other four adhere to the contrary view. The dissenting judges emphasize that the value of the collateral security operates between the debtor and creditor, as if the debtor had paid so much on the creditor's claim; and that to allow him to prove for more than the difference against the debtor's general estate is neither wise nor just to other creditors.

⁶ Rev. St. Ariz. 1887, §§ 1232, 1233.

⁷ Gen. St. 1888, § 590, requiring the commissioners to ascertain the cash value

of such security, and deduct same from the claim, unless the creditor elect to surrender his security.

⁸ Rev. St. Idaho, 1887, § 5607.

⁹ Ky. St. 1894, § 3869.

¹⁰ Same as in Connecticut: Rev. St. 1883, p. 556, § 7.

¹¹ 2 Gen. St. Minn. § 5735, pl. 5.

¹² The secured creditor may establish his claim in the probate court, as other creditors, but he must exhaust his security before he will be allowed to participate with general creditors in the general assets for any deficiency: Rev. St. 1889, § 190; *Tucker v. Wells*, 111 Mo. 399.

¹³ St. 1895, §§ 2811, 2812. The mortgaged property may be sold by the administrator and the mortgage debt paid out of the proceeds, less the expenses of the sale; the surplus after such payment will be general assets. The costs of administration cannot be deducted from the amount due under the mortgage: *Horsfall v. Royles*, 20 Mont. 495.

¹⁴ Like proceedings in Connecticut: Publ. St. N. H. 1891, ch. 192, § 11.

¹⁵ Rev. Code, N. Dak. 1895, § 6418.

¹⁶ *Kelsey v. Welch*, 8 S. Dak. 255, 261.

¹⁷ Rev. St. 1898, § 3871.

¹⁸ Code, 1896, § 5569.

¹⁹ Miss. Ann. Code, 1892, § 1937.

²⁰ Sayles' Tex. Civ. St. 1897, art. 2096, 2121.

proved the debt in the probate court,¹ or making the affidavit of claimants presenting demands against administrators,² or proceeding within the time required for the presentation of claims against estates of deceased persons;³ nor, on the other hand, does the probate of the claim affect the holder's right of * foreclosure.⁴ [* 861]

Right to fore- For the same reason, the right to foreclose gives
close gives no the holder no remedy against the general assets of the
right to gen- estate,⁵ and does not give such a claim a preference
eral assets. thereto,⁶ and his claim in this respect for any deficiency is barred
like any other claim, unless he presents the same in proper time.⁷ In
Florida, and formerly in California, the statute barring all "claims"
against decedents not presented to the administrator and probate court
within ten months after grant of letters, mortgage liens are held to
be included, and the foreclosure thereof barred if not so presented;⁸

¹ *Toulouse v. Burkett*, 2 Idaho, 170; *Teel v. Winston*, 22 Oreg. 489; *Scammon v. Ward*, 1 Wash. 179; *Waughop v. Bartlett*, 165 Ill. 124; *Allen v. Smith*, 29 Ark. 74, 77; *Haskell v. Sevier*, 25 Ark. 152; *Simms v. Richardson*, 32 Ark. 297; *Watt v. White*, 46 Tex. 338; *McCallam v. Pleasants*, 67 Ind. 542, 545; *Trustees v. Dickson*, 1 Freem. Ch. 474, 483; *Rickards v. Hutchinson*, 18 Nev. 215, 222; *Smith v. Gillam*, 80 Ala. 296 (holding that the rule applies although the lien is held by a surety by subrogation); *Beach v. Bell*, 139 Ind. 167 (contribution for money paid by co-surety); *Cocke v. Montgomery*, 75 Iowa, 259 (case of a chattel mortgage); *In re Galland*, 92 Cal. 293 (pledge of policy of insurance); *Whetstone v. Baker*, 140 Ind. 213 (vendor's lien); *Casey v. Ault*, 4 Wash. 167 (recognizing the general rule, but holding that where the lien arises by operation of law, as a laborer's lien on sawlogs, the claim must first be presented against the estate before foreclosure); *Fish v. De Laray*, 8 S. Dak. 320 (holding that a mechanics' lien claim need not be presented before foreclosure); *Edwards v. Hill*, 19 U. St. App. 493 (allowing foreclosure in a federal court in favor of a non-resident, the court intimating that any State law attempting to abridge this right is impairing the obligation of a contract; the court announcing the same rule for insolvent and deceased debtors).

² *Nicholls v. Gee*, 30 Ark. 135, 138; *Simpson v. Rely*, 31 Tex. 298, 301.

³ *Andrews v. Morse*, 51 Kan. 30; *Hall v. Denckla*, 28 Ark. 506, 510; *Pope v.*

Boyd, 22 Ark. 535, 537; *Mahone v. Had-dock*, 44 Ala. 92, 99; *Miller v. Helm*, 2 Sm. & M. 687, 697; *Miller v. Trustees*, 5 Sm. & M. 651, 657; *Baldwin v. Tuttle*, 23 Iowa, 66, 71; *Ford v. Smith*, 60 Wis. 222; *Beach v. Bell*, 139 Ind. 167; *Kittredge v. Nicholas*, 162 Ill. 410.

⁴ *Turner v. Horner*, 29 Ark. 440; *Simms v. Richardson*, 32 Ark. 297; *Fowler v. Mickley*, 39 Minn. 28; *Verdier v. Bigne*, 16 Oreg. 208; *Willis v. Farley*, 24 Cal. 490; so a landlord having a claim for rent constituting a lien on the assets of the deceased tenant does not waive his lien rights by probating his claim and having it classified by the probate court: *Lillard v. Noble*, 159 Ill. 311.

⁵ *Crow v. Day*, 69 Wis. 637.

⁶ *La Plante v. Convery*, 98 Ind. 499; *Kimmell v. Burns*, 84 Ind. 370; *Piester v. Piester*, 22 S. C. 139; *Reinig v. Hartman*, 69 Wis. 28; *Wheat v. Dingle*, 32 S. C. 473.

⁷ *Hicks v. Jamison*, 10 Mo. App. 35; *Mutual Benefit Co. v. Howell*, 32 N. J. Eq. 146; *Teel v. Winston*, 22 Oreg. 489; *Scammon v. Ward*, 1 Wash. 179; *Andrews v. Morris*, 51 Kan. 30; *Leonard v. Morris*, 9 Paige, 90, 93; *Mulvey v. Johnson*, 90 Ill. 457, 459; *Roberts v. Flatt*, 142 Ill. 485; *Waughop v. Bartlett*, 165 Ill. 124; *Colby v. King*, 67 Iowa, 458; *Willard v. Van Lecuwen*, 56 Mich. 15; *Smith v. Crater*, 43 N. J. Eq. 636.

⁸ *Pitte v. Shipley*, 46 Cal. 154, in which case Niles, J., reviews numerous previous decisions in California; *Bush v. Adams*, 22 Fla. 177, 189.

but the failure to present a claim secured by deed of trust within the time required by the statute does not operate to extinguish the debt, hence a court of equity will refuse to compel the creditor to surrender his securities.¹ And since the amendment of 1876 it is not necessary, in California, when recourse is waived against all property of the estate except that mortgaged or pledged, to present the claim for allowance.² And where a claim secured by mortgage is presented and allowed against the estate, for the purpose of preventing the bar of the Statute of Limitations and the extinguishment of the mortgage, this will not avoid the right of foreclosure.³ In Texas, where the statute provides for the sale of property of a deceased mortgagor by order of the probate court,⁴ it is held that a claim upon a note secured by a deed of trust not presented to the administrator within one year, is not entitled to satisfaction out of the property encumbered, or other property of the decedent, until all claims properly presented within the year have been fully paid.⁵ It was formerly held (under the statute of 1840) that a secured claim, if not thus presented, was barred, not only as to its right to be satisfied out of the estate generally, but as to its right of satisfaction out of the specific property upon which it held a lien.⁶

It is also to be observed, that in most States proceedings to enforce liens or foreclose on collateral securities are suspended by statute for a certain period after the debtor's death, generally six, nine, or twelve months; to an action for the foreclosure before the expiration of

¹ *Whitmore v. San Francisco Union*, 50 Cal. 145, Crockett, J., dissenting on the ground that the decision is inconsistent with previous rulings of the court.

² *In re Galland*, 92 Cal. 293; *Dreyfuss v. Giles*, 79 Cal. 409; *Security Savings Bank v. Connell*, 65 Cal. 574; *Building Assoc'n v. King*, 83 Cal. 440. But the waiver is necessary, though the time for the presentation of claims has expired, and no claim on the mortgage indebtedness presented: *Anglo-Nev. Corp. v. Nadeau*, 90 Cal. 393; and a mortgage of a homestead on community property cannot be enforced without presentation: *Perkins v. Onyett*, 86 Cal. 348; nor a mortgage on a homestead selected by deceased in his lifetime: *Bollinger v. Manning*, 79 Cal. 7. In *Hibernia Soc. v. Wackenrender*, 99 Cal. 503, the distinction between mortgage claims on homestead premises and those on other premises as to the necessity of presentation to the administrator is pointed out. See also, on the question of foreclosing homestead mortgages, *Hibernia S. & L. v. Thornton*, 109 Cal. 427; *McGahey v.*

Forrest, 109 Cal. 63. Where the decedent had bought the land in his lifetime subject to a mortgage already on it, he held title simply subject to the mortgage, and the note not constituting a claim against his estate, neither a presentation nor waiver against the general assets, is necessary before foreclosing: *Ryan v. Holliday*, 110 Cal. 335. Where the mortgagee expressly waives recourse against the estate, except on the mortgaged property, he is not entitled to any part of the rents collected by him after the mortgagor's death and before foreclosure, and an action will lie by the administrator therefor: *Freeman v. Campbell*, 109 Cal. 366.

³ *Moran v. Gardemeyer*, 82 Cal. 96.

⁴ *Sayles' Tex. Civ. St.* 1897, § 2121.

⁵ *Buchanan v. Wagnon*, 62 Tex. 375, reviewing numerous Texas cases.

⁶ *Graham v. Vining*, 1 Tex. 639; s. c. 2 Tex. 433; *Danzey v. Swinney*, 7 Tex. 617, 625; *Gaston v. Boyd*, 52 Tex. 282, 287.

such time, a demurrer is proper and should be sustained.¹ In Colorado the statute is held to impose the duty upon a creditor whose debt is secured by mortgage or deed of trust, as a condition precedent to foreclosure thereunder, to have such debt first proved and allowed in the court having probate jurisdiction; and no foreclosure can be had within a year from the decedent's death, unless permission be obtained from the court to foreclose sooner;² but the creditor does not lose the benefit of the security by not presenting the claim in the probate court within one year, as required of unsecured creditors.³

¹ *Lovering v. King*, 97 Ind. 130, 133. when he got the title: *Lass v. Sternberg*,
The statutes apply only to such encum- 50 Mo. 124.
brances as are executed by the decedent,
and not such as may have been thereon

² *Reid v. Sullivan*, 20 Colo. 498.

³ *Sullivan v. Sheets*, 22 Colo. 153.

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* CHAPTER XLV.

OF THE PAYMENT OF DEBTS WHEN ESTABLISHED.

§ 410. **Nature and Effect of the Allowance or Judgment establishing Claims.** — It should result from the foregoing discussion of the subject under consideration, that all of the provisions requiring notice to be given to creditors — the exhibition of claims to the executor or administrator, allowance or rejection of the claims either by the personal representative or tribunal provided for that purpose, and the judgments rendered thereon either by probate courts or courts of plenary jurisdiction — accomplish the one purpose of determining authoritatively the liability of the deceased debtor to his creditors.¹ The satisfaction to which the creditors are entitled out of the estate in the hands of the executor or administrator is not thereby adjudicated, but is determined by a subsequent proceeding, usually taking the form of an order or decree to pay debts. This feature constitutes the crowning advantage of the American system of administration over that of the common law, operating so as to simplify greatly the duties of executors and administrators in the matter of paying debts and marshalling the assets for that purpose, and reducing the hazard inseparable from the common-law procedure in a corresponding degree. The administrator is relieved from all personal responsibility in this respect, save that he must, in some of the States, admit or reject the claims presented, and in the others make such resistance, and in all of them oppose such defences, to actions brought against him in his representative character as he may be capable of, or as a man of ordinary business capacity would make in an action against himself; and honestly to account to the court.

The determination of the liability of the deceased debtor to his creditor, even where it takes the shape of an allowance or judgment by a court, is not generally enforceable by execution against the decedent's estate or the personal representative, but must be certified to or filed in the

Judgment
allowing a
claim is not
enforceable,

[* 863] * probate court for classification,² resembling, in this re-

¹ The conclusive effect to be given to the allowance of the claim in the probate court has been shown *ante*, § 392, and authorities.

² *Flynn v. Morgan*, 55 Conn. 130; *Wilcox v. State*, 24 Tex. 544, 547; *Porter v.*

Sweeney, 61 Tex. 213; *Bull v. Harris*, 31 Ill. 487; *Fraser v. City Council*, 23 S. C. 373, 382; *Raconillat v. Sansevain*, 32 Cal. 376, 396; *State v. Stafford*, 73 Mo. 658, 661; *Schoeneich v. Reed*, 8 Mo. App. 356; *Dullard v. Hardy*, 47 Mo. 403; *Lyons v*

spect, the judgment *de bonis intestatis*, or *de bonis testatoris*, at common law, but in no manner involving any question of assets,¹ which is determinable in the probate court by an independent proceeding.² Jurisdiction to order the payment of claims established, after ascertaining the amount of assets in the hands of the administrator, and marshalling them according to the dignity of the debts established, is vested in the probate courts in Alabama,³ Arizona,⁴ Arkansas,⁵ California,⁶ Colorado,⁷ Connecticut,⁸ Florida,⁹ Idaho,¹⁰ Illinois,¹¹ Indiana,¹² Iowa,¹³ Kansas,¹⁴ Louisiana,¹⁵ Maine,¹⁶ Massachusetts,¹⁷ Michigan,¹⁸ Minnesota,¹⁹ Missouri,²⁰ Montana,²¹ Nebraska,²² Nevada,²³ New Hampshire,²⁴ New York,²⁵ North Dakota,²⁶ Ohio,²⁷ Oklahoma,²⁸ Oregon,²⁹ Pennsylvania,³⁰ Tennessee,³¹ Texas,³² Utah,³³ Vermont,³⁴ Washington,³⁵ Wisconsin,³⁶ and

Murray, 95 Mo. 23, 29; *Meredith v. Scallion*, 51 Ark. 361, 367; *Peckham v. O'Hara*, 74 Mich. 287; *Green v. Taney*, 16 Colo. 398; *Strouse v. Lawrence*, 160 Pa. 421; *Noe v. Moutray*, 170 Ill. 169 (denying that the allowance of the claim created a technical lien on the realty so as to have priority over an unrecorded deed by the deceased); *Scott v. Whitehill*, 1 Mo. 764 (denying that the judgment against the administrator operated as a lien on the realty).

¹ *Woodward v. Howard*, 13 Wis. 557; *Estate of Hidden*, 23 Cal. 362; *Magraw v. McGlynn*, 26 Cal. 420, 429; *Hart v. Jewett*, 11 Iowa, 276, 279; *Quigg v. Kittedge*, 18 N. H. 137, 140; *Fickle v. Snapp*, 97 Ind. 289, 293; *Goodbub v. Hornung*, 127 Ind. 181; *Barnes v. Scott*, 29 Fla. 285.

² For this reason equity will enjoin a judgment at law by a court in which the plea of insolvency constitutes no defence to the action: *Byrne v. McDow*, 23 Ala. 404, 409; *Williams v. Benedict*, 8 How. (U. S.) 107, 112.

³ Code, 1896, § 316.

⁴ Rev. St. Ariz. 1887, § 1236.

⁵ Dig. of St. Ark. 1894, § 130; see for a construction of the statute, *Jackson v. McNabb*, 39 Ark. 111.

⁶ Code Civ. Pr. 1885, § 1647.

⁷ *Mills' Ann. St.* 1891, § 4793; see *Mattison v. Childs*, 5 Colo. 78.

⁸ Gen. St. Conn. 1887, § 575.

⁹ Rev. St. Fla. 1892, p. 644, ch. xi.; the court must order the administrator to pay to the creditors; an order to pay to the judge or court for distribution is un-

authorized: *Whitaker v. Sparkman*, 30 Fla. 347.

¹⁰ Rev. St. Idaho, 1887, § 5610.

¹¹ St. & C. Ann. Ill. St. 1896, p. 309, § 73; *Foskeit v. Wolf*, 19 Ill. App. 33. See *McCall v. Lee*, 120 Ill. 261, 266.

¹² Ann. Ind. St. 1894, § 2534. See *Jenkins v. Jenkins*, 63 Ind. 120, 127.

¹³ Code of Iowa, 1897, § 3353.

¹⁴ Gen. St. Kans. 1897, § 102. See *Stratton v. McCandless*, 27 Kans. 296, 300.

¹⁵ *Garland's Rev. Code of Practice*, § 987; *Ledoux v. Breaux*, 27 La. An. 190.

¹⁶ Rev. St. 1883, ch. 66, § 25.

¹⁷ Gen. St. 1882, ch. 137, § 18.

¹⁸ How. St. 1882, § 5925.

¹⁹ Gen. St. 1891, § 5740.

²⁰ Rev. St. 1889, § 226.

²¹ St. 1895, § 2814.

²² Cons. Statutes Neb. 1893, § 1310.

²³ Rev. St. 1885, § 2912.

²⁴ Publ. St. 1891, ch. 192, § 21.

²⁵ Code Civ. Pr. § 2743.

²⁶ Rev. Code N. Dak. 1895, § 6423.

²⁷ *Bates' Ann. St.* 1897, § 6235.

²⁸ Okl. St. 1890, § 1509.

²⁹ Gen. L. 1887, § 1191.

³⁰ *Strouse v. Lawrence*, 160 Pa. St. 421.

³¹ Code, 1884, § 3196.

³² *Sayles' Civ. St.* 1897, §§ 2095, 2099, 2100.

³³ Rev. St. 1898, § 3875.

³⁴ Rev. St. 1894, § 2507.

³⁵ Code, 1896, §§ 5571, 5572.

³⁶ Sanb. & B. St. 1889, § 3849.

Wyoming.¹ In Maryland, the Orphan's Court may direct an administrator to bring money into court for investment, but cannot order him to pay a claim, or bring money into court for that purpose.² In Mississippi, the rights and liabilities of creditors and administrators are fixed by the decree of distribution.³ In New Jersey, the [*864] * Orphan's Court has power to decree payment of debts in insolvent estates only.⁴ In New York, where the surrogate had power to decree the payment of a debt in advance of the final accounting and distribution,⁵ it is held that the administrator is protected in paying a debt in full, in obedience to such a decree, although it may finally turn out that the remaining assets are insufficient to pay the other creditors in full.⁶

In some States the statutes provide that execution may issue on judgments recovered, notwithstanding the debtor's death; but the construction given them by the courts tends to limit the effect to be given these statutes, as being opposed to the spirit of the administration law: in Oregon, for instance, the court, while upholding the right to issue execution, suggests that "property coming within the jurisdiction of the probate court, a lien upon it must be enforced in accordance with the laws governing the proceedings of such court," and regrets that the statute had not literally adopted the provisions of the New York Code, which limited the issuance of the execution to property upon which the judgment was a lien.⁷ And in Minnesota the court refused to follow the Oregon case even to this extent, and held that such a statute must be restricted to enforcing judgments against real estate upon which a lien was acquired prior to the debtor's death.⁸ In some States the statute permits an execution on a judgment rendered in the debtor's lifetime, after revivor against the executor, against such land as is bound by the lien of the judgment, without resort to the probate court, but not against other real estate, or the personalty.⁹ In Michigan execution may be levied on realty attached before the debtor's death¹⁰ and in Alabama execution issued prior to defendant's death may be levied thereafter,¹¹ while in Missouri a statute was held to mean that where one of several defendants against whom judgment was had, dies, the judgment, so far as the realty is concerned, may be

Execution
without order
of probate
court.

¹ Rev. St. Wyom. 1887, § 2180.

² *Bowie v. Ghiselin*, 30 Md. 553, 555.

³ *Anderson v. Tindall*, 26 Miss. 332, 334. The *pro rata* share of creditors is determined by the court upon the computation of the clerk: Rev. Code, 1880, § 2060. In the Code of 1892, § 1944, the words "upon the computation of the clerk" are omitted.

⁴ *Miller v. Pettit*, 16 N. J. L. 421.

⁵ 2 R. S. [116], § 18, repealed by Laws of 1880, vol. i. ch. 245, p. 368.

⁶ *Thomson v. Taylor*, 71 N. Y. 217, 220.

⁷ *Bower v. Holaday*, 18 Oreg. 491, citing *Mount v. Mitchell*, 31 N. Y. 356, 360.

⁸ *Byrnes v. Sexton*, 62 Minn. 135.

⁹ *Mendenhall v. Burnette*, 58 Kans. 355; *Grover v. Boon*, 124 Pa. St. 399.

¹⁰ *Lant v. Manly*, 75 Fed. R. (C. C. A.) 627.

¹¹ *Hullett v. Hood*, 109 Ala. 345.

revived against the heirs or devisees, and execution issue against them, without making the personal representative a party.¹

§ 411. **The Order or Decree to pay Debts.**—When the time for proving or exhibiting debts has expired, or when, in those States in

which classification is determined by the time of presentation, the time for proving the preferred class has expired, it is the duty of the executor or administrator

Report necessary by the administrator.

to lay before the court a complete statement of the condition of the estate, showing what assets are in his hands, and what funds immediately available for the payment of debts; also the amount of debts proved against the estate, or admitted; what claims, if any, have been presented and not allowed, or which may be in suit and remain undetermined; and all other matters necessary to enable the court to ascertain the solvency or insolvency of the estate, and determine the

Usually the first periodical accounting or settlement;

or report by commissioners of insolvent estates.

amount of the dividend if insolvent. Where the law does not provide for a special administration of insolvent estates, this statement usually accompanies, or constitutes, the first, temporary, or intermediate accounting;² where a different procedure is pointed out for insolvent estates, and commissioners have been appointed, such statement must be made after the filing of

the report of the commissioners. The court will thereupon decree

Decree to pay debts.

the payment of the debts which have been proved, in the order of the classes to which they were assigned, each class to be paid in full before the next inferior class receives anything; and when the assets are sufficient to pay a part, but not the whole, of the * debts of any one class, the creditors of that class will be payable *pro rata*.³

The order or decree of payment so made corresponds, in some measure, to the judgment *de bonis propriis* at common law; because,

Administrator is personally

having ascertained the amount of assets in the administrator's hands available for the payment of debts, and

¹ *Stewart v. Gibson*, 71 Mo. App. 232, construing § 6024, Rev. St. 1889, and holding further that the personal estate was not affected by such judgment, and that no personal liability was imposed on the heirs.

² In States which do not require annual or other periodical accounting, the probate court may, on application of a creditor or other person in interest, require such account to be rendered: *Wood v. Brown*, 34 N. Y. 337, 343. And so, if the administrator has funds subject to the payment of debts, it is his duty to obtain an order so to apply them: *Walls v. Walker*, 37 Cal.

424, 427; *Quinlan v. Fitzpatrick*, 25 Ark. 471, 473.

³ The order or decree must conform to the statute determining the priority of debts, which can be changed by neither the administrator nor the court: *Jenkins v. Jenkins*, 63 Ind. 120, 127; *Tomkins v. Weeks*, 26 Cal. 50, 66. If the executor or administrator pays a claim or a sum on account of a claim before an order to pay is made, and it develops that the estate cannot pay debts in full, he will be entitled to credit for only so much as he could have rightfully applied on account of said claim: see *post*, § 520, for a discussion on this point.

also the amount to which each creditor is entitled, the court, by its order or decree, renders judgment against the administrator, making him liable personally to the creditor for the specified amount, which is enforceable against him, and by suit on the bond of his sureties,¹ and subjecting him thereafter, in most States, to garnishment by a creditor of the creditor whom he is ordered to pay.² liable for the amount ordered to be paid to the creditors, and to be garnished.

The order to pay should include not only the original amount of the debt as allowed or adjudged, but also any interest that may have accrued subsequently to the allowance, up to the day of the decree to pay,³ if the claim is of a nature entitled to interest.⁴ In Connecticut the claims allowed by the commissioners of an insolvent estate are to be paid *pro rata*, without reference to interest accruing between the time of the allowance and the decree of payment;⁵ and in Massachusetts the same rule prevails, but if the estate subsequently turn out to be solvent, the creditors will be decreed payment in full with interest.⁶ In Kentucky, notwithstanding a statutory provision that no interest accruing after the decedent's death shall be allowed on a claim against his estate unless the claim be verified and payment demanded within one year from the representative's appointment, interest may be allowed where the latter has waived demand, and where he is the only person who will be affected thereby.⁷

§ 412. **Enforcement of the Order or Decree to pay Debts.** — It follows from the nature of the order, as already pointed out,⁸ [* 866] that *the decree to pay debts, involving a judicial determination of the question of liability of the estate to the creditor, and of the further question that the executor or administrator is in possession of assets to discharge the same, must be enforceable against the executor or administrator, either by execution against him, or by action against him and the sureties on his bond. In several of the States a simple and summary remedy is given to creditors by Order to pay debts followed by execution, or by action on his bond.

¹ *Allen v. Smith*, 72 Miss. 689, 697; *Estate of Cook*, 14 Cal. 129; *Bank of Orange v. Kidder*, 20 Vt. 519, 522; *Probate Court v. Chapin*, 31 Vt. 373, 376; *Probate Court v. Kent*, 49 Vt. 380, 388; *Price v. Dietrich*, 12 Wis. 626; *Ryan v. Kinney*, 2 Mont. 454.

² See as to when an administrator may be garnished, *ante*, § 177, p. *390.

³ *McCune's Estate*, 76 Mo. 200, emphasizing this rule whether the estate be solvent or insolvent; *Mowry v. Peck*, 2 R. I. 60; *Bowen v. Evans*, 70 Iowa, 368,

370; *Gleán's Estate*, 74 Cal. 567 (three judges dissenting); *In re Kennedy*, 94 Cal. 22, allowing interest on the judgment for costs.

⁴ *Succession of Durnford*, 1 La. An. 92; *Estate of Selby*, Myr. 125; *Aguierre v. Packard*, 14 Cal. 171.

⁵ *Camp v. Grant*, 21 Conn. 41, 44, 65.

⁶ *Williams v. American Bank*, 4 Met. (Mass.) 317, 319; *Bowers v. Hammond*, 139 Mass. 360.

⁷ *Croninger v. Marthen*, 83 Ky. 662.

⁸ *Ante*, § 411.

Summary remedy in probate courts. proceeding in the probate court. Thus, in Colorado¹ and Illinois,² the creditor may, in addition to his remedy on the bond against the sureties, cause a delinquent executor or administrator to be attached and imprisoned until he comply with the order or be discharged in due course of law. In some States, for instance, in Arkansas,³ Iowa,⁴ and Missouri,⁵ the creditor may have execution against a delinquent executor or administrator *de bonis propriis*, and, if returned *nulla bona*, he may proceed against the sureties by *scire facias* in the probate court. These remedies are cumulative, for the creditor may proceed in other courts if he see fit.⁶ They are intended to be speedy and summary, and although a petition charging specific breaches of the bond might properly be filed against the sureties, yet a formal petition is not essential to make the judgment valid.⁷ In a proceeding on the administrator's bond, the order or decree of the court is usually binding upon the sureties, who are not permitted to make any defence against the same which the administrator might have made;⁸ but this is held otherwise in some of the States.⁹ In some States the administrator may be ordered to bring the money into court, paying it to the judge or clerk,¹⁰ and such officer is liable to account for money so received on his official bond.¹¹ In

No petition necessary in *scire facias*.
Sureties can make no defence which the principal could have made.

* Texas the executor or administrator failing to make pay- [* 867] ment as ordered by the county court, after demand by the person entitled thereto, becomes liable on his official bond for damages, at the rate of five *per centum* per month on the sum ordered to be paid.¹²

It may be remarked here, that the probate court can order payment of no claim which is disputed by the administrator, until the same shall have been definitely passed upon by some court having jurisdiction;¹³ but it must determine the fact whether the debt has

¹ Mills' Ann. St. 1891, § 4796.

² Johnson v. Von Kettler, 66 Ill. 63.

³ Dig. of St. 1894, §§ 157, 159.

⁴ Code, 1897, § 3361.

⁵ Rev. St. Mo. 1889, §§ 228-230; Wolff v. Schaefer, 4 Mo. App. 367; McCartney v. Garneau, 4 Mo. App. 567.

⁶ Wheelhouse v. Bryant, 13 Iowa, 160, 162; State v. Maushy, 53 Mo. 500.

⁷ Hart v. Jewett, 17 Iowa, 234.

⁸ State v. Farmer, 54 Mo. 439, 445; Weber v. North, 51 Iowa, 375, 377; Garber v. Commonwealth, 7 Pa. St. 265; Williamson v. Howell, 4 Ala. 693; Ralston v. Wood, 15 Ill. 159, 168; Hobbs v. Middleton, 1 J. J. Marsh. 176, 179; Irwin v. Backus, 25 Cal. 214, 219. See *ante*, § 255.

⁹ Gookin v. Sanborn, 3 N. H. 491; Dawes v. Shed, 15 Mass. 7, 9; Robinson v. Hodge, 117 Mass. 222, 224.

¹⁰ 2 Davis's (Ind.) St 535; Wright v. Harris, 31 Iowa, 272; Wheeler v. Barker, 51 Neb. 846.

¹¹ Morgan v. Long, 29 Iowa, 434; Dooan v. Elliott, 43 Iowa, 342, 347; Wheeler v. Barker, *supra*.

¹² Rev. St. 1888, art. 2049; Sayles' Civ. St. 1897, § 2103. The liability was formerly ten *per centum* per month; but the courts required very clear proof of contumacy before they would inflict such onerous damages: Van Hook v. Letchford, 35 Tex. 598, 605.

¹³ Miller v. Dorsey, 9 Md. 317, 323; Curtis v. Stilwell, 32 Barb. 354.

been established or not,¹ and in those States in which the probate court has jurisdiction to allow claims, as well as to order their payment, the previous allowance of a claim ordered to be paid will be presumed.² It appears from the previous discussion of the jurisdiction of probate courts, that they have no power, without statutory authorization, to determine disputed questions of assignment from heirs or legatees.³ The same principle has been held to apply to the assignees of creditors,⁴ to claims acquired by subrogation,⁵ and to claims of creditors of beneficiaries of an estate; ° hence no order of payment can be made on such claims.

Probate courts have no power to order payment of debts to assignees, if assignment is disputed.

The action to compel an administrator to pay a claim allowed against the estate, the amount of which the administrator seeks to retain in payment of services rendered to the claimant, is held not a civil action within the meaning of a statute authorizing change of venue in civil actions.⁷

¹ *In re Jones*, 1 Redf. 263, 269.

² *Marlow v. Marlow*, 48 Iowa, 639.

³ *Ante*, § 151, p. *345; *post*, § 461, p. *1015.

⁴ *Hitchcock v. Marshall*, 2 Redf. 174.

⁵ *Leviness v. Cassebeer*, 3 Redf. 491, 493.

⁶ *Barnes v. Ryder*, 3 McLean, 374.

⁷ *Everroad v. Lewis*, 16 Ind. App. 65.

* TITLE SIXTH.

[* 868]

OF LEGACIES AND DEVISES.

§ 413. NEXT after the payment of debts, the most important function of executors and administrators *cum testamento annexo*, consists in giving effect to the disposition made by testators concerning their property. These dispositions are, in technical language, known as devises, and the persons in whose favor they are made as devisees, if the subject of the gifts is real estate; while the gift of personal property by will is called a legacy or bequest, and the donee thereof is known as a legatee, or legatary.¹ But while such is the accepted signification of these terms, they are often interchanged by careless or ignorant persons; and if by force of the context it is clear that a testator has used them in a sense different from their technical import, as, for instance, by referring to the gift of land as a legacy, or bequest, or to the gift of personalty as a devise, courts will give these words the effect which the testator intended, although contrary to their technical meaning;² in accordance with the general rule, that the plainly ascertained intention of the testator controls the meaning of technical words.³

The plan of this treatise forbids an extensive disquisition on the law of wills; yet, as has been before stated, it is deemed indispensable to call attention to some of the most important principles upon which the intention of testators is ascertained in cases of doubt, inconsistency, or ambiguity arising out of the language * employed by testators; as well as to the duties incumbent [* 869] upon executors, or administrators with the will annexed, in respect of legacies and devises, and the rules laid down for the adjustment of the relative rights between legatees and devisees where the intention of the testator cannot, because the assets prove insufficient, or for any other reason, be fully carried into effect.

¹ Rountree v. Talbot, 89 Ill. 246, 250; Smith v. Smith, 17 Gratt. 268, 276; Weeks v. Cornwell, 104 N. Y. 325, 341; Logan v. Logan, 11 Colo. 44 (in this case a legislative enactment), 47.

² Thompson v. Gant, 14 Lea, 310, 313; Holmes v. Mitchell, 2 Murphy, 228, 230; ³ Post, § 414, p. * 872, § 417, p. * 880.

OF ASCERTAINING THE MEANING OF WILLS.

CHAPTER XLVI.

OF THE GENERAL RULES APPLIED IN EXPOUNDING WILLS.

§ 414. **Ascertaining the Testator's Intention.** — A last will or testament is the expression, in such form as may be prescribed by law, of the testator's intention, in respect of his property, to be carried into effect after his death.¹ Hence to ascertain this intention is the first duty of executors and courts whose office it is to carry the will into effect. If its provisions are clearly apparent, no recourse to technical rules is necessary, nor, indeed, permissible, to establish its contents. It has often, therefore, been said by the courts, that precedents are of little value in construing the provisions of any particular will.² For all artificial rules of interpretation or construction can serve but the one purpose, to assist in arriving at the testator's intention; when that is ascertained, there can be no use for rule or guide, for then the end is gained.³ This principle has been announced in almost every case in which interpretation or construction became necessary to ascertain the meaning of a will, and is often inaccurately expressed as a rule of interpretation.⁴

All rules of construction or interpretation are directed to the end of ascertaining the testator's intention,

Great care must be taken, that the expounder scrupulously avoid all extraneous influence in ascertaining the testator's intention.

¹ "It is his intention, manifested in words, which makes it his last will and testament": Shaw, C. J., in *Quincy v. Rogers*, 9 Cush. 291, 295.

² Grant, J., in *Thurber v. Batty*, 105 Mich. 718, 722; *Crozier v. Cundall*, 99 Ky. 202.

³ *Colton v. Colton*, 127 U. S. 300, 309, 310. "It is no part of the rules of interpretation to direct, modify, or prevent the intention, but only to ascertain what it is, to the end it may become operative and

effectual": *Galloway v. Carter*, 100 N. C. 111, 122. "Care is required that tools shall not become fetters, and that the real end shall not be sacrificed to what was intended only as the means of reaching it": *Woelper's Appeal*, 126 Pa. St. 562, 572.

⁴ "The leading rule in the interpretation of wills is to ascertain, if possible, the intent of the testator": *Quincy v. Rogers*, 9 Cush. 294.

to be gathered from his words, This must be gathered from the language employed in the instrument, and from that alone. An

* eminent authority on testamentary law declares that "the [* 871] question in expounding a will is not what the testator meant, but what is the meaning of his words;"¹ and text-writers generally caution against the danger of insensibly substituting the expounder's views for the testator's intention, by speculating upon what the testator may be supposed to have intended to do, instead of giving strict effect to his words.² It is therefore a cardinal principle in expounding wills, announced by so many authorities that it would be tedious, and is unnecessary, to attempt to mention them, that the intention of the testator must be found in his expressed words.³

in their gram- The grammatical and ordinary popular sense, unless repugnant. words should be adhered to, unless it would lead to some absurdity, or repugnance, or inconsistency with the rest of the instrument.⁴ If, in so considering the language of the testator, an intelligible intention may be elicited therefrom, neither technical informality, nor grammatical or orthographical errors, nor confusion in the arrangement of words arising from unskilfulness, can be permitted to defeat it.⁵ Of

Words are taken in the sense in which the testator used them; course, the words which the testator employed should be taken in the sense in which he understood them;⁶ hence, although technical words *are [* 872] not necessary to give effect to a testamentary disposition,

¹ Wms. Ex. [1078]; Hancock's Appeal, 112 Pa. St. 532; Martindale v. Warner, 15 Pa. St. 471, 480, in which Rogers, J., says, "I do not put the case on the actual intention of the testator, but on his *legal* intention, which is the only safe rule"; Couch v. Eastham, 29 W. Va. 784; City v. Hardie, 43 La. An. 251; Doe v. Gwillim, 5 B. & Ad. 122, 129. "Could the testator have foreseen what would occur, he would not have done this, we are sure, but the duty of courts is to execute a will as made, and not to make one for the testator" · Elliott v. Topp, 63 Miss. 138.

² Wms. Ex. [1078]. "Common sense and good faith are the leading stars of all genuine interpretation. Be it repeated, our object is not to bend, twist, or shape the text, until at last we may succeed in forcing it into the mould of preconceived ideas, to extend or cut short in the manner of a Procrustes, but simply and solely to fix upon the true sense, whatever that may be": Lieb. Hermeneutics, Hammond's ed., ch. iv. § iii.

³ Coleridge, J., in Shore v. Wilson, 9 950

Cl. & Fin. 355, 525, says: "The object of all exposition of written instruments must be to ascertain the expressed meaning or intention of the writer, the expressed meaning being equivalent to the intention."

⁴ Bigelow, J., in Barrus v. Kirkland, 8 Gray, 512, 513; Perkins v. Mathes, 49 N. H. 107, 110; Nutter v. Vickery, 64 Me. 490, 499; Chrystie v. Phyfe, 19 N. Y. 344, 348; Kelly v. Reynolds, 39 Mich. 464; Farish v. Cook, 78 Mo. 213, 218; Collins v. Collins, 40 Oh. St. 353, 364; Sheriff v. Brown, 5 Mackey, 172.

⁵ Wms. Ex. [1078], Perkins's note (a⁴); McMurtrie v. McMurtrie, 15 N. J. L. 276, 280; Roberts v. Watson, 4 Jones L. 319; Bradlee v. Andrews, 137 Mass. 50, 53.

⁶ Moore v. Moore, 12 B. Mon. 651, 656. "The testator's understanding of the meaning of the words used in the will, will be adopted without resorting to lexicographers, to determine what the same may mean in the abstract": Reinders v. Koppelman, 94 Mo. 338, 343; Garth v. Garth, 139 Mo. 456.

and will, if used, be controlled by the plain intent of the testator,¹ yet his words and phrases are to be taken, *prima facie*, in their technical sense, and receive that construction which a long series of decisions has attached to them,² unless it is clear that they were used in a different sense.³

technical words controlled by plain intent, but *prima facie* in their technical sense.

The ambiguity of human speech, however, is such as to make it necessary, in many cases, to resort to rules of interpretation,⁴ or of construction,⁵ to discover the meaning of written instruments; and in no class of instruments does this necessity occur so often as in that of wills, the language of which has been exempted from all technical restraint. The wide field thus thrown open to the caprices of language renders it necessary to establish limits and rules sufficiently definite to afford a guide upon otherwise trackless ground.⁶ The intention must be discovered from the words of the will itself,

Rules to establish definite meaning of words conduce to certainty in expounding wills.

and not from extrinsic circumstances; but "the court must [* 873] proceed upon known principles and * established rules, not

¹ Robertson v. Johnston, 24 Ga. 102, 108; Dow v. Dow, 36 Me. 211, 216; Brimmer v. Sohler, 1 Cush. 118, 129; Fetrow's Estate, 58 Pa. St. 424, 427; Stokes v. Tilly, 9 N. J. Eq. 130, 132; Carr v. Green, 2 McCord, 75, 84; Hascall v. Cox, 49 Mich. 435, 440.

² Flinn v. Davis, 18 Ala. 132, 146; Seibert v. Wise, 70 Pa. St. 147; Bonnell v. Bonnell, 47 N. J. Eq. 540, 546.

³ Thus, where a will is artistically drawn, and evinces an accurate use of technical terms, the presumption that the testator used them in their legal sense will not be so easily overcome as if the will bears on its face evidence that it was drawn by an illiterate man: Porter's Appeal, 94 Pa. St. 332, 336; France's Estate, 75 Pa. St. 220, 225; Evans v. Godbold, 6 Rich. Eq. 26, 36; Campbell v. Rawdon, 18 N. Y. 412, 417; Webster v. Welton, 53 Conn. 183, 185. But illiteracy raises no presumption that words are incorrectly used, and unless otherwise controlled by the context, the correct use of the word will prevail, though frequently used in a different sense by the uneducated, and colloquially: Ihrie's Estate, 162 Pa. St. 369, refusing to construe "between" to mean "among."

⁴ "Interpretation is the art of finding out the true sense of any form of words; that is, the sense which their author in-

tended to convey, and of enabling others to derive from them the same idea which the author intended to convey": Lieb. Herm., ch. i. § viii. "The art of interpretation is the art of teaching what is the meaning of another's language; or that skill which enables us to attach to another's language the same meaning that the author has attached to it": *Ib.*, note by Hammond.

⁵ "Construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text from elements known from and given in the text,—conclusions which are in the spirit, though not within the letter, of the text": Lieb. Herm., ch. iii. § ii. "In the most general adaptation of the term construction signifies the representing of an entire whole from given elements by just conclusions": *Ib.*, § iv. The distinction between interpretation and construction, so clearly set forth in Lieber's definitions, is, however, rarely observed in the reasoning of judges passing upon the effect of ambiguous or repugnant testamentary dispositions; it will not be profitable, therefore, to observe the distinction in the further consideration of this subject.

⁶ 1 Jarm. on Wills, *356; 2 *Ib.* *837; Stokes v. Van Wyck, 83 Va. 724, 729.

on loose conjectural interpretations, or by considering what a man may be imagined to do in the testator's circumstances."¹ In this way, as Jarman points out,² the adoption of rules by which particular words and expressions, standing unexplained, have obtained a definite meaning, and the maturity which the system of construction has attained, has led to the satisfactory result of considerable certainty in the expounding of wills, enabling persons conversant with the subject to predict, in most cases, what a court of judicature would decide in any given case.

§ 415. Rule requiring the Several Parts of a Will to be construed together.—Precatory Words.—It is highly important to bear in

The several parts of a will must be considered with reference to each other;

if all cannot stand, the latter of two inconsistent provisions prevails.

mind that the entire will must be construed together, its several parts with reference to each other, so as to form, if possible, one consistent whole,³ giving effect to every part of the instrument,⁴ including the codicil or codicils, if there be any;⁵ if this cannot be done, then the latter of two inconsistent dispositions must prevail.⁶ But this alternative is resorted to only when it is clearly impossible to reconcile the repugnant parts of the will;⁷ * the maxim, *Ut res magis valeat quam* [* 874]

¹ Per Henley, L. K., in *Stephenson v. Heathcote*, 1 Eden, 38, 43.

² 2 Jarman. * 837.

³ *Bailey v. Bailey*, 25 Mich. 185, 188; *Jones v. Jones*, 25 Mich. 401, 403; *Thurber v. Battey*, 105 Mich. 718; *Rotch v. Emerson*, 105 Mass. 431, 433; *Gale v. Drake*, 51 N. H. 78, 83; *Alsop v. Russell*, 38 Conn. 99; *Schott's Estate*, 78 Pa. St. 40, 42; *Welsch v. Belleville Bank*, 94 Ill. 191, 200; *Grimes v. Harmon*, 35 Ind. 198, 205; *Cook v. Weaver*, 12 Ga. 47, 50; *Parker v. Wasley*, 9 Gratt. 477; *Tilton v. Tilton*, 32 N. H. 257, 263; *Wiggin v. Perkins*, 64 N. H. 36; *Lebeau v. Trudeau*, 10 La. An. 164; *Williams v. McKinney*, 34 Kans. 514, 518; *Hinton v. Milburn*, 23 W. Va. 166, 172; *St. John Assoc. v. Buchly*, 5 Mackey, 406; *Reinders v. Koppelman*, 94 Mo. 338.

⁴ *Mersman v. Mersman*, 136 Mo. 244; *Bland v. Bland*, 103 Ill. 11, 15; *Allison v. Chaney*, 63 Mo. 279, 283; *Ballantyne v. Turner*, 6 Jones Eq. 224, 227; *Heidlebaugh v. Wagner*, 72 Iowa, 601, 603.

⁵ *Armstrong v. Armstrong*, 14 B. Mon. 333, 338; *Hard v. Ashley*, 117 N. Y. 606; *Wood v. Hammond*, 16 R. I. 98, 112; *Quincy v. Rogers*, 9 Cush. 291, 295; *Bedloe v. Homer*, 16 Gray, 432; *Boyle v. Parker*, 3 Md. Ch. 42, 44; *Fairfax v.*

Brown, 60 Md. 50, 58; *Thomas v. Levering*, 73 Md. 451, 455; *Ward v. Ward*, 105 N. Y. 68; *Hall v. Smith*, 61 N. H. 144. An expressed intention to make a change in a will in one particular negatives by implication an intention to alter it in any other respect: *Redfield v. Redfield*, 126 N. Y. 466; *In re Ladd*, 94 Cal. 670.

⁶ *Van Nostrand v. Moore*, 52 N. Y. 12, 18; *Iglehart v. Kirwan*, 10 Md. 559, 563; *Snively v. Stover*, 78 Pa. St. 484, 489; *Orr v. Moses*, 52 Me. 287, 291; *Brownfield v. Wilson*, 78 Ill. 467, 470; *Holdefer v. Teifel*, 51 Ind. 343; *Carter v. Lowell*, 76 Me. 342; *Hendershot v. Shields*, 42 N. J. Eq. 317; *Armstrong v. Crapo*, 72 Iowa, 604. A specific bequest following a general bequest of the whole estate has preference, if the assets are exhausted thereby: *Ball v. Ball*, 3 South. R. (La.) 644. The bequest to which preference was given in this case was a general pecuniary legacy, and the general bequest which was postponed to the other was in the nature of a residuary legacy.

⁷ *Van Vechten v. Keator*, 63 N. Y. 52, 55; *Walker v. Walker*, 17 Ala. 396, 399; *Baird v. Baird*, 7 Ired. Eq. 265, 268; *Temple v. Sammis*, 97 N. Y. 526; *Shreiner's Appeal*, 53 Pa. St. 106; *Jones v. Strong*, 142 Pa. St. 496; *Hart v. Stryer*, 164 Pa.

pereat,¹ is of more general application than that of Coke: *Cum duo inter se pugnancia reperiuntur in testamento ultimum ratum est*.² Thus the devise of land to one, after gift of a life estate in the same land to another, is held to constitute a devise of the remainder to the latter;³ a right of disposition superadded to an express bequest for life constitutes a mere power;⁴ a devise to one daughter and her children, and, if she died without heirs of her body, then to another daughter and her children, followed by a gift of the testator's property to the two daughters and their heirs, vests a fee simple in the first daughter, subject to be defeated upon the contingency of her dying without having a child or children.⁵ There is no repugnancy in a gift to one, followed by a condition that if the donee die without issue, it should go to another;⁶ and where a fund is directed to be distributed, at the end of a designated period, to a designated legatee, and there is a subsequent direction that on the death of such legatee without issue, the fund shall go to other parties, it is *prima facie* the testator's intention that the words "death without issue" shall be taken to mean such death without issue before the time of distribution.⁷

Instances of clauses not necessarily inconsistent.

It is also held, though not without authority to the contrary, that a devise of the same land in different clauses of the will, to different persons in fee, will not create an irreconcilable repugnancy, so that only the last clause will be effective, but will convey the lands to all the devisees thereof as tenants in common.⁸

So the specific bequest to a daughter of part of an estate, after a provision for an annuity to the wife in lieu of dower, must be construed to be payable after the wife's death, if without it there is not enough estate to produce the annuity.⁹ So where conditions are connected with a devise, which are impossible of performance, unless the devise

St. 523; *McGehee v. McGehee*, 74 Miss. 386; *Vancil v. Evans*, 4 Coldw. 340, 343; *Price v. Cole*, 83 Va. 343; *West v. Randle*, 79 Ga. 28; *Chace v. Lamphere*, 51 Hun, 524; *Jenks v. Jackson*, 127 Ill. 341.

¹ *Petters v. Petters*, 4 McCord, 151; *Weeks v. Cornwell*, 104 N. Y. 325, 337.

² *Co. Litt.* 112 b; *Jackson v. Robbins*, 16 Johns. 537, 546.

³ *Crissman v. Crissman*, 5 Ired. 498, 501; *Smith v. Bell*, 6 Pet. 68, 75; *Urich's Appeal*, 86 Pa. St. 386; *Rickner v. Kessler*, 138 Ill. 636.

⁴ *Denson v. Mitchell*, 26 Ala. 360, 369; *Ramsdell v. Ramsdell*, 21 Me. 288, 295; *Green v. Sutton*, 50 Mo. 186, 192.

⁵ *Moran v. Dillehay*, 8 Bush, 434, citing numerous Kentucky cases.

⁶ The limitation over is nothing but a qualification of the previous gift, reducing

it to a life estate, and constitutes an executory bequest: *Tyson v. Blake*, 22 N. Y. 558, 560. See also *Summers v. Smith*, 127 Ill. 645.

⁷ *Mintz v. Maryland Bible Society*, 86 Md. 102, 112. See on this point *post*, § 439, p. * 951.

⁸ *Day v. Wallace*, 144 Ill. 256, 260, citing cases *pro* and *con*. See *contra* in a case where there were two clauses making different persons residuary legatees: *Covert v. Sebern*, 73 Iowa, 384.

⁹ Conflicting provisions in a will must be so construed as to carry out the testator's predominant idea, and the provision for the widow will receive the most favorable construction to accomplish the purpose intended: *Stimson v. Vroman*, 99 N. Y. 74, 79; *Thurber v. Chambers*, 66 N. Y. 42, 48.

is construed to carry a fee, it will be so construed.¹ And where the context indicates which of two inconsistent dispositions was intended by the testator, that must prevail, although a later clause be inconsistent therewith,² which, in such case, is held void as being repugnant to the absolute devise.³ So in case of an irreconcilable inconsistency between a general and a specific provision, the latter must prevail.⁴

Precatory words; such as words of entreaty, desire, request, recommendation, or expectation, when addressed by a testator to his legatee or devisee in connection with a testamentary gift, will raise a trust in the donee in favor of an *ul- [* 875]terior beneficiary, if the language employed clearly indicates on the part of the testator a purpose beyond the direct gift. For technical language is not necessary to the creation of a trust, either by deed or by will. "If it appear to be the intention of the parties," says Matthews, J., in rendering the opinion of the Supreme Court of the United States in the case of *Colton v. Colton*,⁵ "from the whole instrument creating it [the trust], that the property conveyed is to be held or dealt with for the benefit of another, a court of equity will affix to it the character of a trust, and impose corresponding duties upon the party receiving the title, if it be capable of lawful enforcement. No general rule can be stated that will carry with it the whole beneficial interest, and when it will be construed to create a trust, but the intention is to be gathered in each case from the general purpose and scope of the instrument." Mr. Bigelow, in his American edition of Jarman, suggests that the words "I wish," or "I desire," *prima facie* import command, but that a real difficulty arises when words of less decided import are employed, such as words expressive of confidence, hope, recommendation, or entreaty.⁶ The principle underlying all rules of construction applies with peculiar force when seeking for the true import of precatory words; the testator's intention must be ascertained from the whole content of the will and surrounding circumstances. Thus, in an early New Hampshire case, great stress was laid upon the relation disclosed by the language of a will as existing between the testatrix and one to whom she "desired" a part of

¹ *White v. White*, 52 Conn. 518, 521.

² *Killmer v. Wuchner*, 74 Iowa, 359; *Dickison v. Dickison*, 138 Ill. 541.

³ As to conditions void for repugnancy, see *post*, § 441.

⁴ No matter in what order they may come: *Waring v. Bosher*, 91 Va. 286. But as between the general intent and the secondary or particular intent, the former must always prevail: see *post*, § 416.

⁵ 127 U. S. 300, 310.

⁶ Bigelow's *Jarm.* *385, note 2. "The

true question, however," he adds, "in all cases, to put the test in more specific form, is whether the confidence or hope expressed is meant to govern the conduct of the party addressed or mentioned, or whether it is a mere indication of that which he thinks would be a reasonable or suitable exercise of the discretion of such party; leaving him, however, to the exercise of his own discretion." See *infra*, p. *876, note 4; *Phillips v. Phillips*, 112 N. Y. 197.

the income of the estate devised to the executor to be paid [* 876] "in his discretion."¹ "If the objects of * the supposed trust are certain and definite," says Bigelow, C. J. ;² "if the property to which it is to attach is clearly pointed out; if the relations and situations of the testator and the supposed *cestuis que trust* are such as to indicate a strong interest and motive on the part of the testator in making them partakers in his bounty; and, above all, if the recommendatory or precatory clause is so expressed as to warrant the inference that it was designed to be peremptory on the donee; the just and reasonable interpretation is that a trust is created which is obligatory and can be enforced in equity as against the trustee by those in whose behalf the beneficial use of the gift was intended."³

But the old Roman and English rules on the subject, according to which words in a will expressive of desire, recommendation, and confidence are of technical significance, importing a trust, are not in force in this country, and such words are not *prima facie* sufficient to convert a devise or bequest into a trust,⁴ although they may, when expressed in reference to the direct disposition of the estate, constitute a sufficient devise or bequest.⁵ Hence a precatory trust is not to be inferred from the declared wishes and confidences of the testator alone, if he has not himself, in the will, manifested the clear intention of creating a trust.⁶ Much less, if from the context it becomes apparent that no trust was intended,⁷ as where a testator,

¹ "To such a person," says Woodbury, J., "it would be very natural for the testatrix to give a legacy; yet not very wise to give it directly; and when she had concluded to give it indirectly, by means of a trust, no person would be selected with more readiness for a trustee than her religious pastor and executor, for whom she entertained 'great esteem.' A peculiar confidence, also, is always presumed to exist between an executor and testator. The slightest wishes of the latter ought, in a case like the present, to be binding on the conscience of the former. The words 'desire,' 'request,' 'recommend,' 'hope,' 'not doubting,' that the executor will conduct in a specific manner, when they come from a testator who has the power to command, are to be construed as commands, clothed merely in the language of civility": *Erickson v. Willard*, 1 N. H. 217, 229.

² In *Warner v. Bates*, 98 Mass. 274, 277.

³ This case and the doctrine as announced by Chief Justice Bigelow are commended and followed in other States:

see *Knox v. Knox*, 59 Wis. 172, 184, and *Noe v. Kern*, 93 Mo. 367, 373, and seems expository of the American view on the subject. See *Bohon v. Barrett*, 79 Ky. 378; *Schmucker v. Reel*, 61 Mo. 592, 596; *Murphy v. Carlin*, 113 Mo. 112; *Blanchard v. Chapman*, 22 Ill. App. 341, 346; *Ander-son v. Crist*, 113 Ind. 65; *Cummings v. Corey*, 58 Mich. 494; *Dexter v. Evans*, 63 Conn. 58.

⁴ *Pennock's Estate*, 20 Pa. St. 268, 274; *Colton v. Colton*, 127 U. S. 300, 311. "The current of decisions of late years sets against the doctrine of converting the devisee or legatee into a trustee; and the courts will not imply a trust, unless it appears from the will that such was the intention of the testator": *Elliot v. Elliot*, 117 Ind. 380, 382; *Mitchell v. Mitchell*, 143 Ind. 113, 121, *et seq.* And see cases to same effect cited in *Eberhardt v. Perolin*, 48 N. J. Eq. 592, 597, *et seq.*; but the ordinary thought himself bound by the early English rule by authority.

⁵ *Burt v. Herron*, 66 Pa. St. 400.

⁶ *Corby v. Corby*, 85 Mo. 371, 393.

⁷ *In re Whitcomb*, 86 Cal. 265.

having settled a fund on his daughters and their children, revokes that bequest on account of the inconvenience of having the money tied up, and then bequeaths the property "to be disposed of by their husbands for the good of their families;"¹ or where an absolute power of disposition or an absolute estate is given, and the precatory or * recommendatory words expressly refer to the [* 877] donee's discretion or judgment;² or where they constitute a mere statement of the motive for the gift,³ or would have the effect of cutting down a prior absolute gift given in clear terms.⁴ And so where precatory words accompany or follow a gift of the power of disposal of property, they affect only so much of the property given as the donee of the power may choose to leave unconverted.⁵ To constitute a precatory trust, there must, of course, be certainty, not only of the subject-matter, but also of the object or purpose of the gift.⁶

§ 416. **General Intent Controlling the Particular Intent.** — It is a familiar and very important rule, also, that the general intention is

to control the particular intention, if there be an irreconcilable inconsistency between them.⁷ Where, for instance, the will directs a purpose to be accomplished, and also points out the means by which the result is to be reached, which means turn out to be inadequate to accomplish the end, so that the provisions cannot both be carried into effect, it is evident that the directions pointing out the means must be sacrificed to the accomplishment of the end, if the end can be accomplished by other means;⁸ for otherwise the testator's intention is

If general and particular intent conflict, the general will control the particular.

¹ 1 Jarm. *388; *Alexander v. Alexander*, 6 De G. M. & G. 593; *Eaton v. Watts*, L. R. 4 Eq. Cas. 151, 155.

² *Van Gorder v. Smith*, 99 Ind. 404, 412, approved in *Fullenwider v. Watson*, 113 Ind. 18; *Rose v. Porter*, 141 Mass. 309; *Sale v. Thornsberry*, 86 Ky. 266; *Colton v. Colton*, 21 Fed. R. 594 (but this case is reversed: 127 U. S. 300); *McIntyre v. McIntyre*, 123 Pa. St. 329; *Giles v. Anslow*, 128 Ill. 187, 197.

³ *Randall v. Randall*, 135 Ill. 398; *Sturgis v. Paine*, 146 Mass. 354, 365; *Ford v. Porter*, 11 Rich. Eq. 238, 255.

⁴ *Clay v. Wood*, 153 N. Y. 134.

⁵ *McMurry v. Stanley*, 69 Tex. 227, 234; *Williams v. Worthington*, 49 Md. 572, 581.

⁶ 1 Jarm. *385, and authorities *supra*; see *Schmucker v. Reel*, 61 Mo. 592; *Phillips v. Phillips*, 112 N. Y. 197, 204.

⁷ *Williams*, in his work on executors, says that this doctrine, "when rightly understood," perhaps means no more than "that technical words, or words of known

legal import, shall have their legal effect, unless from subsequent inconsistent words it is *very clear* that the testator meant otherwise": *Wms. Ex.* [1080], citing English authorities in note (1). But the American annotator points out (same page, note k) that the rule is applicable also when it becomes necessary to choose between inconsistent clauses in the will. Jarman says, "It is clear that the doctrine of *general* and *particular* intention had existed only in name; the cases in which it was professed to be applied being clearly referable to other grounds" (2 Jarm. *488); and refers to *Doe v. Gallini*, 5 B. & Ad. 621 (in which Lord Denman says (p. 640) that in its origin this rule was merely descriptive of the operation of the rule in *Shelley's Case*), as well as other English cases. But the rule is well established in America, as appears from the cases *infra*.

⁸ *Shepley, J.*, in *Pickering v. Langdon*, 22 Me. 413, 430; *Pruden v. Pruden*, 14 Oh. St. 251, 259; *Effinger v. Hall*, 81 Va.

entirely defeated. Thus, where rents and profits of real estate are devised for the support of some person, and * prove insufficient for such support, the devise of the rents and profits will be construed as a direction to sell or mortgage the real estate, in order to obtain the end intended by the testator.¹ Wide and general expressions of a purpose or a power are not to be understood as applicable to special facts and circumstances of a particular parcel of property, the disposition of which is particularly provided for by another clause.² And courts will in some cases enlarge, in others cut down the estate, in order to carry out the leading and prominent objects of the testator, as indicated by a view of the entire will and all its various provisions.³

On the same principle, a devise in fee, clearly manifested, is not to be cut down by subsequent clauses⁴ (or codicils⁵), unless the testator's intention to do so is fairly inferable from the whole will; nor is the devisee's right of disposition to be denied because of subsequent, doubtful, ambiguous, or uncertain expressions.⁶ The subordinate, secondary, particular intention must, if incompatible with the primary, leading, general intention, always give way to the latter.⁷

Devise in fee not cut down by uncertain subsequent expressions.

Primary intent controls.

94, 98 (in which "one-seventh" was bequeathed to each of eight persons). Out of this principle arises the modern rule, that a direction to raise money for a particular purpose out of the "rents and profits" is construed as authorizing the sale or mortgage of the real estate, if necessary to accomplish the purpose: 2 Jarm. * 611; Sto. Eq. §§ 1064, 1064 a.

¹ Haydel v. Hurck, 72 Mo. 253, 257; Green v. Belcher, 1 Atk. 505. See on this point *post*, § 492.

² Mersman v. Mersman, 136 Mo. 244, 257.

³ Napton, J., in *Reinders v. Koppelman*, 68 Mo. 482, 491; *Stimson v. Vroman*, 99 N. Y. 74, 79; *Snively v. Stover*, 78 Pa. St. 484; *Kirkland v. Cox*, 94 Ill. 400, 412; *Robinson v. Greene*, 14 R. L. 181, 190.

⁴ *Post*, § 418, p. * 884; *Parker v. Iasigi*, 138 Mass. 416, 423; *Damrell v. Hartt*, 137 Mass. 218, 220; *Temple v. Sammis*, 97 N. Y. 526; *Byrnes v. Stilwell*, 103 N. Y. 453, 460; *Washbon v. Cope*, 144 N. Y. 287; *Howe v. Hodge*, 144 N. Y. 252; *Jones v. Robinson*, 78 N. C. 396; *Phelps v. Bates*, 54 Conn. 11, 13; *Hochstedler v. Hochstedler*, 108 Ind. 506, 510; *Bruce v. Bissell*, 119 Ind. 525; *Gaskins v.*

Hunter, 92 Va. 528; *Wicker v. Ray*, 118 Ill. 472, 477; *Chew v. Keller*, 100 Mo. 362. The fee will not be cut down by words importing merely an intent to withhold legal incidents of the estate already given: *Good v. Fichthorn*, 144 Pa. St. 287; nor by surplus words setting forth some of the uses to which the devisee might put the property: *Snyder v. Baer*, 144 Pa. St. 278; but if the subsequent clause was evidently intended to be read as a part of the preceding clause, it must be so read, though it alter the effect of the legacy: *Conant v. Palmer*, 63 Vt. 310; *Iimas v. Neidt*, 101 Iowa, 348; *Home v. Noble*, 172 U. S. 383.

⁵ *Bedford v. Bedford*, 99 Ky. 273; *McGehee v. McGehee*, 74 Miss. 386.

⁶ *Rhodes v. Rhodes*, 137 Mass. 343.

⁷ *Howland v. Howland*, 11 Gray, 469, 476; *Malcolm v. Malcolm*, 3 Cush. 472, 477; *Smith v. Bell*, 6 Pet. 68, 78; *Peters v. Carr*, 16 Mo. 54, 65; *Garth v. Garth*, 139 Mo. 456; *Hurt v. Brooks*, 89 Va. 496; *Edgerly v. Barker*, 66 N. H. 434; *Jones' Appeal*, 3 Grant. Cas. 169, 171, citing many authorities; *Workman v. Cannon*, 5 Harr. 91; *Hitchcock v. Hitchcock*, 35 Pa. St. 393, 399; *Chase v. Lockerman*, 11 Gill & J. 185, 206; *Robert v. West*, 15 Ga. 122, 141; *Thrasher v. Ingram*, 32 Ala. 645, 660;

The general rule requiring the same words occurring in different parts of an instrument to be taken everywhere in the same sense,¹ unless clearly contrary to the testator's intention, does not apply when the same words refer to different subject-matters.² Thus, if a word having a technical meaning in the law is accompanied in one clause by context showing that the testator meant it to be understood in a different sense, while in another clause it is used in reference to a different subject without explanatory context, it is * to receive in the latter clause its technical meaning.³ So [* 879]

the same word may, even if used but once, be differently construed in reference to different subjects of gift; where, for instance, real and personal estate are given to one, and if he should die *leaving no issue* of his body, then to another, the words "leaving no issue," when construed as to the personal estate, mean leaving no issue at the time of his death, but as to the freehold they mean an indefinite failure of issue.⁴ And it is to be observed, that where there is no connection by grammatical construction or reference between the parts, and nothing declarative of a common purpose, one devise or clause cannot be relied on to determine the meaning of another perfect in itself, and without ambiguity.⁵ And the rule mentioned by Jarman,⁶ that, where a testator uses an additional word or phrase, he must be presumed to have an additional meaning,⁷ must not be permitted to mislead the expounder by ascribing to it any greater significance than the truism, that different words generally have a different meaning. There are numerous instances in which courts held different words in the same will

Purnell v. Dudley, 4 Jones, Eq. 203; Schott's Estate, 78 Pa. St. 40, 44; Sheriff v. Brown, 5 Mackey, 172.

¹ Hone v. Van Schaick, 3 N. Y. 538, 544; Mathes v. Smart, 51 N. H. 438, 442; Grandy v. Sawyer, Phill. Eq. 8, 10; Gibson v. Gibson, 4 Jones L. 425, 428; Morton, J., in Eliot v. Carter, 12 Pick. 436, 443; see remarks of Bigelow, J., in Hall v. Priest, 6 Gray, 18, 22; Cook v. Holmes, 11 Mass. 528, 531; Turner v. Balfour, 62 Conn. 89. Hence, where it is shown that a testator in two clauses of his will uses the word "heirs" as indicating a class, it will be so construed in a third clause: Preston v. Brant, 96 Mo. 552.

² Hawley v. Northampton, 8 Mass. 3, 38. So the word "children," even when occurring twice in the same sentence, may in one case be a word of purchase, and in the other of limitation: Schaefer v. Schaefer, 141 Ill. 337, 343.

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³ Lloyd v. Rambo, 35 Ala. 709, 712.

⁴ Wms. Ex. [1082], with numerous authorities; Flinn v. Davis, 18 Ala. 132, 147; Mazyck v. Vanderhorst, Bai. Eq. 48, 50; Comegys v. Jones, 65 Md. 317; see on this point *post*, § 423.

⁵ Shepley, C. J., in Pratt v. Leadbetter, 38 Me. 9, 13; Compton v. Compton, 9 East, 268; Parks v. Kimes, 100 Ind. 148.

⁶ As the correlative to the rule above mentioned, that words occurring more than once in the same will should be presumed to be used in the same sense: XVIII. in his summary, 2 Jarm. * 842.

⁷ The author adds in a note, after citing Master v. Fuller, 4 Bro. C. C. 15 and Nanfan v. Legh, 7 Taunt. 85, that he heard Lord Eldon lay down the rule in these words. He then cites other cases to show that the same intention may be expressed in various ways.

to mean the same thing. Thus "maturity" was held to mean what the testator had before expressed by "lawful age;"¹ "proceeds," the same as "income;"² "advanced," the same as "loaned;"³ "applied," the same as "paid over."⁴ But a bequest of one thousand dollars each to two persons in a will, followed by a bequest of one thousand each to the same two persons in a codicil executed two years afterwards, were held to constitute two distinct legacies to each.⁵

§ 417. **Rule allowing Words and Limitations to be transposed, supplied, or rejected.**— If it is impossible to give a rational [* 880] * construction to the words of a will as they stand, words and limitations may be transposed,⁶ supplied,⁷ rejected,⁸ or changed.⁹ So with regard to punctuation.¹⁰ It is evident, however, that resort to this rule can only be had in very clear cases, in which the context leaves no room for reasonable doubt as to the testator's intention. If this cannot be ascertained from the will itself, the bequest or devise must fail, for any alteration of the testator's language would but substitute for his will one made by the expounder.¹¹ Hence where a testator, having specifically devised part of his real estate and bequeathed one-third of his personal estate, added, "and the rest of my estate personal to be divided among my four sons," the court cannot supply the words "real and," to avoid intestacy in respect of the remainder of his real estate.¹²

Instances are very numerous in which clerical, grammatical, or

¹ *Carpenter v. Boulden*, 48 Md. 122, 129. But in this case the construction was to some extent controlled by a statutory provision.

² *Thomson's Appeal*, 89 Pa. St. 36, 46.

³ *Wright's Appeal*, 89 Pa. St. 67, 70.

⁴ *Moore v. Hegeman*, 72 N. Y. 376, 384.

⁵ *Hollister v. Shaw*, 46 Conn. 248, 257.

⁶ *Hunt v. Johnson*, 10 B. Mon. 342, 344; *Linstead v. Green*, 2 Md. 82, 89; *Creveling v. Jones*, 21 N. J. L. 573, 575; *Ex parte Hornby*, 2 Bradf. 420, 422; *O'Neill v. Boozer*, 4 Rich. Eq. 22; *Baker v. Pender*, 5 Jones L. 351, 355; *Ferry's Appeal*, 102 Pa. St. 207; *Merkel's Appeal*, 109 Pa. St. 235.

⁷ *Kellogg v. Mix*, 37 Conn. 243, 245 (supplying the words "net income of my estate"); *Cleland v. Waters*, 16 Ga. 496, 507 (supplying "all," so as to manumit the testator's slaves); *Nichols v. Boswell*, 103 Mo. 151, 160; *In re Stratton*, 112 Cal. 513 (supplying a residuary clause); *Glover v. Condell*, 163 Ill. 566, 584; *Pond*

v. Bergh, 10 Paige, 140, 152; *Dew v. Barnes*, 1 Jones Eq. 149; *Aulick v. Wallace*, 12 Bush, 531, 535; *Zerbe v. Zerbe*, 84 Pa. St. 147, 150; *Hellerman's Appeal*, 115 Pa. St. 120, 128.

⁸ *Hall v. Hall*, 123 Mass. 120, 123; *Estate of Wood*, 36 Cal. 75, 81; *Wright v. Denn*, 10 Wheat. 204, 239; *Schaefer v. Schaefer*, 141 Ill. 337.

⁹ *State v. Joyce*, 48 Ind. 310, 314; *Augustus v. Seabolt*, 3 Met. (Ky.) 155, 160; *Dulany v. Middleton*, 72 Md. 67, 79; *Home v. Noble*, 172 U. S. 383.

¹⁰ *Walker v. Atmore*, 50 Fed. R. 644; *Black v. Herring*, 79 Md. 146; *Allen's Succession*, 48 La. An. 1036, 1049; *Kinkele v. Wilson*, 151 N. Y. 269.

¹¹ *McKeehan v. Wilson*, 53 Pa. St. 74, 76; *McBride v. Smyth*, 54 Pa. St. 245, 248; *Tilden v. Green*, 130 N. Y. 29, 52; *Marshall v. Hadley*, 50 N. J. Eq. 547; *Lynch v. Hill*, 6 Munf. 114.

¹² *Graham v. Graham*, 23 W. Va. 36, 40.

synthetical errors, and obvious mistakes as to the meaning of words are corrected by courts, where there is no reasonable doubt of the testator's meaning. Thus the word "rent" is construed, when necessary to give a rational meaning, as "real;"¹ "majority" as "minority;"² "money" as "property;"³ "effects" as including land;⁴ "personal property" not to include money;⁵ "bequeath" as "devise;"⁶ "legatee" as "devisee," or *vice versa*;⁷ "heirs" as "legatees;"⁸ "oldest" as "youngest;"⁹ "two" as "three" or "all;"¹⁰ "to bequeath to" as "to go to,"¹¹ "return" as "remain;"¹² "bank stock" to pass railroad and State bonds;¹³ "leave" as "have;"¹⁴ * "reviving" as "surviving;"¹⁵ "shall die" as [* 881] "shall have died;"¹⁶ "part" as "share;"¹⁷ "all" as "any;"¹⁸ "without issue" as "leaving issue;"¹⁹ "fourth" as "fifth;"²⁰ "hereinafter" as "hereinbefore;"²¹ "are" as of the future tense;²² "if" as "when;"²³ "paid" as "payable" or "vested;"²⁴ "payable" as "vested;"²⁵ "vested" as "indefeasible;"²⁶ "survivor" as "other;"²⁷ and similarly in other cases. The word "or" is frequently placed for "and," and is so to be construed, in furtherance of the testator's intent;²⁸ and so *vice versa*.²⁹ The reason of the rule allowing the substitution of "or" for "and" is said to rest upon the evident

¹ Baird v. Boucher, 60 Miss. 326, 328.

² State v. Joyce, 48 Ind. 310, 314.

³ Particularly in residuary clauses: see authorities cited § 462, p. * 1018.

⁴ Page v. Foust, 89 N. C. 457, 450; Ruckle v. Grafflin, 86 Md. 627.

⁵ Bills v. Putnam, 64 N. H. 554, 562.

⁶ Dow v. Dow, 36 Me. 211, 216; Lamb v. Lamb, 131 N. Y. 227, 235; Shumate v. Bailey, 110 Mo. 411.

⁷ Ante, § 413, p. * 868.

⁸ Graham v. De Yampert, 106 Ala. 279.

⁹ Tayloe v. Johnson, 63 N. C. 381, 384.

¹⁰ Cleveland v. Carson, 37 N. J. Eq. 377.

¹¹ Den v. Combs, 18 N. J. L. 27, 30.

¹² Den v. McMurtrie, 15 N. J. L. 276, 286.

¹³ Clark v. Atkins, 90 N. C. 629, 640.

¹⁴ Du Bois v. Ray, 35 N. Y. 162, 165.

¹⁵ Pond v. Bergh, 10 Pa. 140, 152.

¹⁶ Abbey v. Aymar, 3 Dem. 400.

¹⁷ Fulford v. Hancock, Busb. Eq. 55, 57.

¹⁸ Jarman v. Vye, L. R. 2 Eq. 784, 786.

¹⁹ Gallini v. Gallini, 5 B. & Ad. 621, 641.

²⁰ Hart v. Tulk, 2 DeG. M. & G. 300, 312.

²¹ Bengough v. Edridge, 1 Sim. 173, 270.

²² Bayliss's Trust, 17 Sim. 178, 182.

²³ Smart v. Clark, 3 Russ. C. C. 365.

²⁴ Martineau v. Rogers, 8 DeG. M. & G. 328.

²⁵ Haydon v. Rose, L. R. 10 Eq. 224.

²⁶ Edmondson's Estate, L. R. 5 Eq. 389, 398.

²⁷ Cross v. Maltby, L. R. 20 Eq. 378, 382.

²⁸ See collection of English cases in Wms. Ex. [1085], [1096], notes (m) and (n), showing where such construction was, and where it was not, allowed.

²⁹ Carpenter v. Heard, 14 Pick. 449, 453; Roome v. Phillips, 24 N. Y. 463, 469; Butterfield v. Haskins, 33 Me. 392, 393; Neal v. Cosden, 34 Md. 421, 426; Tennell v. Ford, 30 Ga. 707; Ely v. Ely, 20 N. J. Eq. 43, 48; Arnold v. Buffum, 2 Mason, 208, 222; Doeblers Appeal, 64 Pa. St. 9, 14 (citing numerous Pennsylvania cases); Brasher v. Marsh, 15 Oh. St. 103, 112; Carpenter v. Boulden, 48 Md. 122, 129; Phelps v. Bates, 54 Conn. 11, 16; East v. Garrett, 84 Va. 523; Crews v. Hatcher, 91 Va. 378.

intention of the testator, in limitations over dependent on the first devisee dying under age or without issue, to give the devisee an estate devolving upon his issue, in the event of his dying under age leaving issue; and that he should take such estate, if he attained the age of majority, absolutely, *i. e.* whether at his subsequent death he left issue or not; and that it is highly improbable that he should intend the estate to the issue to depend upon the contingency of the devisee attaining majority.¹ If, therefore, the testator use additional words indicating a contrary intention, such as "in either case," etc., this rule will not apply.² If the word "or" after the name of a devisee is followed by words of limitation, such as "heirs,"

"heirs of his body," "issue," and the like, it is sometimes [*882] construed as "and,"³ because these words serve the * purpose of pointing out the nature of the title conferred upon the devisee. If the devise be to one "or his heirs *or assigns*," it is manifest that these are words of limitation, because without an indefeasible estate there could be no assignment.⁴ But the current of authorities is more strongly toward a construction of the word "or" as substituting another donee in the event of the first dying in the testator's lifetime, so as to guard against a failure of the gift by lapse. Unless, therefore, a repugnancy would ensue, or a clear intention to the contrary appear, the word "or" will be construed in its natural sense,⁵ and to imply a substitution so as to avoid a lapse.⁶

§ 418. **Testator's Intention Viewed in the Light of Policy of the Law.** — The devolution of title to the property of a person dying, cast by the Statute of Descent and Distribution upon his heir or next of kin, makes it indispensable, if a testator wish to disinherit him, not only to express his intention to that effect, but to vest the title, by plain words of gift, or necessary implication, in some other person.⁷ Unless the descent is diverted from the channel established

¹ 1 Jarm. * 506; *Hunt v. Hunt*, 11 Met. (Mass.) 88, 97; *Den v. English*, 17 N. J. L. 280, 288; *Den v. Mugway*, 15 N. J. L. 330; *Ward v. Barrows*, 2 Oh. St. 241, 248.

² *Parrish v. Vaughan*, 12 Bush, 97, 100; *Brooke v. Craxton*, 2 Gratt. 506, 510; *Robertson v. Johnston*, 24 Ga. 102, 117; *Holcomb v. Lake*, 24 N. J. L. 686, 689, affirmed 25 N. J. L. 605, 608.

³ *Sloan v. Hanse*, 2 Rawle, 28, 32; *Harris v. Davis*, 1 Coll. 416, 423; *Greenway v. Greenway*, 2 DeG. F. & J. 128, 139; *Adshead v. Willetts*, 29 Beav. 358.

⁴ *Walton's Estate*, 8 DeG. M. & G. 173, 175.

⁵ *Robb v. Belt*, 12 B. Mon. 643, 646; *Taylor v. Conner*, 7 Ind. 115, 119; *Sawyer*

v. Baldwin, 20 Pick. 378, 385; *Gittings v. McDermott*, 2 Myl. & K. 69, 75; *Ebey v. Adams*, 135 Ill. 80, 88; *Gilmore's Estate*, 154 Pa. St. 521.

⁶ As to legacies lapsing by the death of the legatee before the will takes effect, see *post*, §§ 434 *et seq.*

⁷ 1 Jarm. on Wills, *532; *Howard v. American Society*, 49 Me. 288, 291. "Though the privilege of making a will is one highly respected by the law, yet, as the law itself makes a just and equitable disposition of the property of an intestate among the natural objects of his bounty, it should prevail over the provisions of any attempted disposition that are so obscure that the general scheme and purpose of the testator cannot be ascertained with

widow does.¹ So, also, a gift to A. "in case B. dies before the expiration of the lease" gives B. an estate for the term of the lease by implication.² A bequest to A. and wife for life, with a power to sell if necessary for their support, "exercising good judgment and saving as much as possible for the children born to them," was held to vest, by implication, the remainder in said children;³ and courts uphold devises by implication whenever the intent of the testator is free from doubt, though no gift of the premises have been made in the will in formal language.⁴ The principle above stated is sometimes expressed by the rule that negative words are not sufficient to exclude the title of the heir or next of kin;⁵ and also, that no words in a will ought to be so construed as to defeat the title of the heirs at law, if they can have any other significance.⁶ It is also a rule of law that, between two equally probable interpretations of a will, that is to be adopted which prefers the testator's kin to strangers,⁷ or avoids intestacy.⁸

but gift to a child after wife's death does.

Presumption against intestacy.

While the rules of construction cannot be strained to bring a devise within the rules of law,⁹ yet, where the will admits of two constructions, that is to be preferred which [* 884] will render it valid;¹⁰ and if the whole * will

A construction is preferred which makes the will valid.

311. See *Lovett v. Gillender*, 35 N. Y. 617.

¹ *Kelly v. Stinson*, 8 Blackf. 387, 390; *Macy v. Sawyer*, 66 How. Pr. 381, 384.

² *Holton v. White*, 23 N. J. L. 330, 334, 425.

³ *Peckham v. Lego*, 57 Conn. 553, 559.

⁴ *Masterson v. Townshend*, 123 N. Y. 458; see *Jacob's Estate*, 140 Pa. St. 268.

⁵ 2 Jarman, Rule VI. of summary; *Hitchcock v. Hitchcock*, 35 Pa. St. 393, 399; *Johnson v. Johnson*, 4 Beav. 318.

⁶ *Ridgely v. Bond*, 18 Md. 432, 448; *Elder v. Lantz*, 49 Md. 186, 201.

⁷ *Quinn v. Hardenbrook*, 54 N. Y. 83, 86; *Downing v. Bain*, 24 Ga. 372, 375; *Smith's Appeal*, 23 Pa. St. 9; *France's Estate*, 75 Pa. St. 220, 225. Where a will is capable of two constructions, one of which will exclude the issue of a deceased child, and the other permit such issue to participate, the latter should be adopted: *Estate of Brown*, 93 N. Y. 295, 299; *Re Patton*, 111 N. Y. 480; *Bowker v. Bowker*, 148 Mass. 198, 203; but language should not be strained to bring about such result: *Matter of Truslow*, 140 N. Y. 559, 605. A construction is favored which casts the property where the law would cast it if there were no will: *Kilgore*

v. Kilgore, 127 Ind. 276; or which leads to equality among children: *Stokes v. Weston*, 142 N. Y. 433.

⁸ *Schult v. Moll*, 132 N. Y. 122; *Borgner v. Brown*, 133 Ind. 391; *Ferry's Appeal*, 102 Pa. St. 207; *Reimer's Estate*, 159 Pa. St. 212; *Mills v. Franklin*, 128 Ind. 444; *Le Breton v. Cook*, 107 Cal. 410; *Toms v. Williams*, 41 Mich. 552, 565; *State v. Smith*, 52 Conn. 558, 563; *Higgins v. Deven*, 100 Ill. 554; *Scofield v. Olcott*, 120 Ill. 362, 374; *Hayward v. Loper*, 49 Ill. App. 53. But this presumption against intestacy cannot supply the actual intent as derived from the language of the will: *Farish v. Cook*, 78 Mo. 213, 220; *Jackson v. Alsop*, 67 Conn. 249; *Schmidt's Estate*, 183 Pa. St. 641; *Minkler v. Simons*, 172 Ill. 323.

⁹ Rule XIV., 2 Jarm. *841. The language cannot be wrested from its natural import in order to save the will from condemnation: *In re Walkerley*, 108 Cal. 627, 660.

¹⁰ *Davis v. Taul*, 6 Dana, 51, 53; *Dennett v. Dennett*, 40 N. H. 498, 500; *Rotch v. Emerson*, 105 Mass. 431, 433; *Fussey v. White*, 113 Ill. 637, 643; *Roe v. Vingut*, 117 N. Y. 204; *Terrell v. Reeves*, 103 Ala. 265. The construction should be such as

Will is to operate as far as it can.

of doubt.²

Devise valid though inconvenient, or resulting unexpectedly.

Positive not cut down by doubtful provision.

Reasons assigned by

cannot be carried into effect, it is not to be rejected for that reason, but it is to work as far as it can.¹ A legacy will be held to be vested, rather than contingent, in case

So the apparent injustice, or the inconvenience or absurdity of a devise, if unambiguous, affords no ground for varying the construction;³ nor the fact that the testator did not foresee the consequences of his disposition;⁴ nor can an express, positive devise be controlled by the reason assigned,⁵ or by subsequent ambiguous words,⁶ or by inference and argument from other parts of the will, or by irrelevant or inaccurate recitals;⁷ yet recourse may be had to such references, reasons, etc., to assist in construction in case of ambiguity or doubt;⁸ even revoked

to avoid partial intestacy if possible: *supra*, p. *883, note 8.

¹ *Wms. Ex.* [1088]; 2 *Jarm.*, Rule XXIII., *843; both citing *Thellusson v. Woodford*, 4 *Ves.* 227, 325, 326; *Baird v. Baird*, 7 *Ired. Eq.* 265; *Kane v. Gott*, 24 *Wend.* 641, 666; *Oxley v. Lane*, 35 *N. Y.* 340, 349; *Underwood v. Curtis*, 127 *N. Y.* 523, 542; *Lepage v. McNamarra*, 5 *Iowa*, 124, 144; *Shillaber, In re*, 74 *Cal.* 144; *Edgerly v. Barker*, 66 *N. H.* 434 (where a remainder vesting beyond the period of the Statute of Perpetuities was decreed to vest within the time allowed by the statute). So an invalid ulterior limitation will not invalidate the primary disposition of the will: *Tiers v. Tiers*, 98 *N. Y.* 568, 573. But where an equal division is the scheme of the will, the failure of the scheme as to one of the beneficiaries should cause the whole scheme to be set aside: *Benedict v. Webb*, 98 *N. Y.* 460, 466. See also *Howard v. Smith*, 78 *Iowa*, 73; and when some of the trusts in a will are legal and some illegal, if they are so connected together as to constitute an entire scheme, so that the presumed intention of the testator would be defeated unless all were retained, or if manifest injustice would result, all the trusts must be construed together and all must fall: *Tilden v. Green*, 130 *N. Y.* 29, 50; *Lawrence v. Smith*, 163 *Ill.* 149.

² *Post*, § 436.

³ "If a will is legally executed, and violates no rule of law, all courts must respect the expressed design of the testatrix, and must accept her action as based

on such reasons as satisfied her. The view which other persons may take of what they may think she ought to have done, can have no bearing on the construction of what she actually thought fit to do": *Toms v. Williams*, 41 *Mich.* 552, 559. "Courts should not seek out technicalities, or arrive at forced or far-fetched conclusions, in order to destroy a will, because of any idea that the testator has done his next of kin injustice, or conveyed his property away from his relatives, and given it to those who have no claim upon his bounty. Nor should the will be examined with a microscope to find some ambiguity or contradiction by which it may be annulled in the interest of the heirs, however deserving or poor the heirs, or any of them, may be": *Stebbins v. Stebbins*, 86 *Mich.* 474, 478.

⁴ *Elliott v. Topp*, 63 *Miss.* 138, 142; *Couch v. Eastham*, 29 *W. Va.* 784, 789.

⁵ *Terry v. Smith*, 42 *N. J. Eq.* 504, and see list of cases appended by the reporter. *post*, § 440, p. *952.

⁶ *Ante*, § 416, p. *878; *Jones v. Robinson*, 78 *N. C.* 396, 398; *Bailey v. Sanger*, 108 *Ind.* 264; *Collins v. Collins*, 40 *Oh. St.* 353, 364; *Finney's Appeal*, 113 *Pa. St.* 11, 18; *Wallace v. Hawes*, 79 *Me.* 177.

⁷ *Conoly v. Gayle*, 61 *Ala.* 116, 122; *Orrick v. Boehm*, 49 *Md.* 72.

⁸ *Jarm.*, Rules XII. and XIII., summary, ch. li.; *Wms. Ex.* [1087]; *Quincy v. Rogers*, 9 *Cush.* 291, 295; *Denson v. Mitchell*, 26 *Ala.* 360, 369; *Beall v. Holmes*, 6 *Harr. & J.* 205, 209, *et seq.*; *Geyer v. Wentzel*, 68 *Pa. St.* 84, 87.

or void clauses are sometimes examined with the view of discovering the testator's intention,¹ although this has been held inadmissible in very emphatic terms.² If there be an erroneous recital that there is a gift contained in the will, the recital may operate as being in itself a gift by implication of that very property; but when the erroneous recital refers to an estate created by another instrument, that recital cannot operate to create an estate by implication.³

testator, irrelevant recitals, void clauses, etc.

Erroneous recital may constitute a gift by implication.

It has been shown elsewhere,⁴ that generally devises of real estate are governed by the law *rei sitæ*, and gifts of personalty [* 885] *made by a testator domiciled in a foreign country by the law of his domicile, and that a devise to testator's heir which is the same in quality and quantity as if there had been no will, is void, the realty passing by descent.⁵

§ 419. From what Period the Will speaks in Respect of the Law governing it. — The will, being ambulatory during the lifetime of the testator, cannot take effect before his death. It is therefore said to speak from the testator's death.⁶ From this it would seem to follow that its provisions must be construed with reference to the law in force at the time of the death of the testator; and such is now almost universally recognized to be the rule. The objection that no statute can or ought to have retrospective effect is clearly inapplicable to the construction of a will drawn and executed before the enactment of a statute bearing upon its provisions, but taking effect by the death of the testator after it is in force. Remembering that no one can acquire any right as heir under the law, or as devisee under a will, until the decease of the testator or intestate,⁷ no beneficiary under a will can be said to be affected by a change in the law with respect thereto as long as the testator lives; nor is any violence done to the intention of the testator by construing his will in accordance with the law as changed, for he must be presumed to know the law, and, by refraining from altering his will, to indicate that he meant it to be construed by its rules.⁸

Will speaks as at testator's death,

and is construed with reference to the law as then in force.

¹ Wetmore v. Parker, 52 N. Y. 450, 464, citing Van Kleeck v. Dutch Church, 20 Wend. 457; Morton v. Woodbury, 153 N. Y. 243.

² "Clauses in a will which are so incomplete as to be inoperative, are not admissible as exponents of a testamentary purpose": Denton v. Clark, 36 N. J. Eq. 534, 536. "Erased clauses are no more a part of the will than if they had been so completely erased that they could not be read, or had never been inserted": Lury v. Rodnitzer, 166 Ill. 609, 616.

³ Hunt v. Evans, 134 Ill. 496, 502; Harris v. Harris, 3 Eq. Irish Rep. 610, 617; Zimmermann v. Hafer, 81 Md. 347.

⁴ § 168; *post*, § 565.

⁵ *Post*, § 423, p. *903.

⁶ Wms. Ex. [1088], pl. 9.

⁷ Morgan v. Perry, 51 N. H. 559, 567; Lorieux v. Keller, 5 Iowa, 196, 200; Adams v. Wilbur, 2 Sumn. 266, 272.

⁸ Meserve v. Meserve, 63 Me. 518, 520; Cushing v. Aylwin, 12 Met. (Mass.) 169, 174; Perkins v. George, 45 N. H. 453, 455; Wakefield v. Phelps, 37 N. H. 296, 965

Under a technical rule of the common law, no real estate could pass by a will of which the testator was not the owner at the time of its execution.¹ This rule has been severely criticised, as calculated to mislead and defeat the intention of testators, and is now abolished by statute in England,² as well as in most, if not all of the States of the Union, providing, substantially, that wills shall be construed, in respect of both real and personal estate, as if executed immediately before the testator's death, or directing real estate acquired by the testator after the date of the will to pass * thereby, if [* 886]

Abolished such appear to have been intended. Such statutes by statute. are found in Alabama,³ Arizona,⁴ California,⁵ Colorado,⁶ Connecticut,⁷ Delaware,⁸ District of Columbia,⁹ Florida,¹⁰ Georgia,¹¹ Idaho,¹² Illinois,¹³ Indiana,¹⁴ Iowa,¹⁵ Kansas,¹⁶ Kentucky,¹⁷ Maine,¹⁸ Maryland,¹⁹ Massachusetts,²⁰ Michigan,²¹ Minnesota,²² Mississippi,²³ Montana,²⁴ Nebraska,²⁵ Nevada,²⁶ New Hampshire,²⁷ New Jersey,²⁸

306; *De Peyster v. Clendinning*, 8 Pa. 295, 303; *Hamilton v. Flinn*, 21 Tex. 713; *Comegys v. Jones*, 65 Md. 317, 320; *Blackburn v. Tucker*, 72 Miss. 735. The Pennsylvania cases maintain a different doctrine: *Quin's Estate*, 144 Pa. St. 444, and cases cited p. 459 of the opinion. Says Clark, J., on p. 460: "As a general rule, the power or capacity of the testator to make the devises in question, the legality of the execution of the devises, and the nature and quantum of the estate are referable to the time and are determinative according to the law as it existed at the execution;" and on p. 461: "The legality of the testator's disposition of his estate must be determined as of the date of the will." And of course the rule that the will speaks as of the time of the testator's death is not an unyielding one (see next section), especially when by a change of statute the words would have had a different meaning if used in a will executed under the new law: *Swenson's Estate*, 55 Minn. 300 (construing "heirs-at-law," when taken in connection with the context, to be ascertainable by the statute in force when the will was made, though the statute was changed before testator's death).

¹ Time of execution rather than date. See 1 Jarm. * 318, note (a); *Randfield v. Randfield*, 8 H. L. Cas. 225, 238.

² 1 Vict. c. 26, § 24.

³ Code, 1896, § 4244.

⁴ Rev. St. Ariz. 1887, § 3233.

⁵ Civ. Code, §§ 1312, 1332.

⁶ Mills' Ann. St. 1891, § 4652.

⁷ Gen. St. 1887, § 537; *Dickerson's Appeal*, 55 Conn. 223.

⁸ Rev. Code, 1874, p. 513, § 25.

⁹ See *Bradford v. Matthews*, 9 App. D. C. 438.

¹⁰ Rev. St. Fla. 1892, § 1794.

¹¹ Code Ga. 1895, § 3329.

¹² Rev. St. Idaho, 1887, § 5749.

¹³ St. & Curt. St. 1896, ch. 148, ¶ 1.

¹⁴ Ann. Ind. St. 1894, § 2737. See *Sturges v. Work*, 122 Ind. 134, 138.

¹⁵ When the intention to pass after acquired property is clear and explicit: *Code of Iowa*, 1897, § 3271; *Briggs v. Briggs*, 69 Iowa, 617.

¹⁶ Gen. St. Kans. 1897, ch. 110, § 53.

¹⁷ Ky. St. 1894, § 4825.

¹⁸ Rev. St. 1883, p. 608, § 5.

¹⁹ Publ. Gen. L. Md. 1888, art. 93, § 321; see *Rizer v. Perry*, 58 Md. 112, 131.

²⁰ Pub. St. 1882, p. 751, § 25.

²¹ How. St. 1882, § 5787.

²² 2 Gen. St. Minn. 1891, § 5632; *Bedell v. Fradenburgh*, 65 Minn. 361.

²³ Miss. Ann. Code, 1892, § 4488.

²⁴ Mont. Civ. Code, 1895, § 1120.

²⁵ Cons. St. Neb. 1893, ch. 12, § 1184.

²⁶ Rev. St. 1885, §§ 3018, 3019.

²⁷ Publ. St. N. H. 1891, ch. 186, § 7.

²⁸ Gen. St. N. J. 1895, p. 3761, § 3.

New York,¹ North Carolina,² North Dakota,³ Ohio,⁴ Oklahoma,⁵ Pennsylvania,⁶ Rhode Island,⁷ South Carolina,⁸ South Dakota,⁹ Tennessee,¹⁰ Texas,¹¹ Utah,¹² Vermont,¹³ Virginia,¹⁴ Washington,¹⁵ West Virginia,¹⁶ Wisconsin,¹⁷ and Wyoming.¹⁸ Adjudications upon these statutes are not uniform in respect of the question whether they apply to all wills taking effect by the death of the testator after their passage, or to such only as were made after their passage. In England it is held that a general devise of real estate, or a devise in such terms as make it applicable to real estate subsequently acquired by the testator, will operate on all property which the testator may own at the time of his decease;¹⁹ the same effect is ascribed to the statutes referred to in many of the States;²⁰ but in others, for various reasons, the contrary is held.²¹ The [* 887] * distinction has also been drawn between devises of par-

Statutes held to apply to property owned by testator at time of his death.

Decisions to the contrary.

¹ 2 Banks & Bro. 1896, p. 1876, § 5.

² Code, 1883, §§ 2140, 2141, 2179.

³ Rev. Code N. D. 1895, § 3289.

⁴ Bates' Ann. St. 1897, § 5969.

⁵ St. Okl. 1893, ch. 76, § 38 (§ 6202).

⁶ Pep. & L. 1896, p. 1444, § 37. The latter section providing that the will is to be construed as if executed immediately before testator's death, etc., affects only the property devised; it does not create a disposing power in the testator just before his death, which he did not possess when he executed the will: Neale's Appeal, 104 Pa. St. 214; see, also, the reasoning of the court and cases referred to in *Quin's Estate*, 144 Pa. St. 448, 460.

⁷ Gen. L. 1896, p. 664, § 6. The intention to devise after-acquired realty must expressly appear in the will: *Webster v. Wiggin*, 19 R. I. 73.

⁸ Rev. St. S. C. 1893, § 1984; *Watson v. Child*, 9 Rich. Eq. 129.

⁹ "Every estate and interest in real or personal property, to which heirs, husband, widow, or next of kin might succeed may be disposed of by will": *Comp. L. Terr. Dak.* 1887, § 3308.

¹⁰ Code, 1884, § 3035.

¹¹ Rev. St. Tex. 1895, § 5334.

¹² Rev. St. Utah, 1898, §§ 2766, 2781.

¹³ Vt. St. 1894, § 2347.

¹⁴ Code, 1887, § 2521.

¹⁵ Code Wash. 1896, § 5324.

¹⁶ Code W. Va. 1891, ch. 77, § 1.

¹⁷ Sanb. & B. Ann. St. 1889, § 2279.

¹⁸ Rev. St. Wyom. 1887, § 2236.

¹⁹ 1 Jarm. * 327; *Hasluck v. Pedley*, L. R. 19 Eq. 271 (construing the Appportionment Act of 1870, 33 & 34 Vict. c. 35).

²⁰ So held in *Winchester v. Forster*, 3 Cush. 366, 371; *Welborn v. Townsend*, 31 S. C. 408; *Loveren v. Lamprey*, 22 N. H. 434, 443; *Condict v. King*, 13 N. J. Eq. 375, 377 (construing an analogous act); *Hamilton v. Flinn*, 21 Tex. 713; *a fortiori* where a codicil was executed after the statute took effect: *Brimmer v. Sohler*, 1 Cush. 118, 131.

²¹ So in *Brewster v. McCall*, 15 Conn. 274, 289; (*Storrs, J.*, arguing that the common-law rule arose from the character of the instrument, considered to be in the nature of a conveyance or appointment of a specific estate); *Gibbon v. Gibbon*, 40 Ga. 562, 576 (because the statute should not operate retrospectively); *Parker v. Bogardus*, 5 N. Y. 309, 311 (because the statute itself provided that it should not affect wills already executed); *Battle v. Speight*, 9 Ired. L. 288, 292 (because the legislature did not mean to affect vested rights); *Gable v. Daub*, 40 Pa. St. 217, citing numerous Pennsylvania authorities: *Roberts v. Elliott*, 3 T. B. Mon. 395; *Means v. Evans*, 4 Desaus. 242, 250, holding that a will executed before the repeal of a statute declaratory of the common law is not affected by such repeal, although the testator died subsequently, on the ground that a will from the time of making it fixes the specific property bequeathed.

ticular estates with a residuary clause, which are held not to be affected by the statute, and an equal or proportional devise of all the estate which may be governed by it;¹ and it is self-evident that the paramount principle requiring the intention of the testator to be accomplished is fully applicable in construing the will as affected by such statutes, as will appear from the discussion of the testator's intention in the light of the period from which the will speaks.²

In Arkansas the course of legislation in that State, though not abolishing the common-law rule in terms, is held to be inconsistent therewith, and a testator may dispose of after-acquired lands, if he manifests his intention to do so.³

In Florida, the statute concerning wills, in force from 1828 to 1892, authorized the devise of lands and all estate therein "in possession, remainder, and reversion at the time of the execution" of the will.⁴ This was construed to confine the testator's right of disposition to such real estate as he had at the time of the execution of the will, being substantially the common-law rule;⁵ by the revision of 1892⁶ it was provided that the will should be construed to apply to the property owned by the testator at his death, unless the will showed a different intention.

In Kentucky and Missouri, the common-law rule prohibiting the devise of real property acquired after the date of the will has never, it seems, been in force. The power to dispose of after-acquired real property was conferred upon testators in Kentucky by act of the legislature in 1785;⁷ this statute was substantially re-enacted in Kentucky in 1797,⁸ and in Missouri (before its admission as a State) in 1807. In 1835 the phraseology of the Missouri statute was changed, omitting any reference to after-acquired real estate, but simply authorizing every person to, "by last will, devise all his estate, real, personal, and mixed," etc.⁹ This language has been construed to authorize the devise of all real estate, as well as the bequest of all personal estate, owned by the testator at the time of his death.¹⁰ This statute was adopted by the Territory of Oregon and re-enacted after its admission into the Union, and has received the same judicial construction as the Missouri courts gave it.¹¹ In Illinois a similar statute was early enacted, enabling the testator to devise any estate in land "in pos-

¹ *Bowen v. Johnson*, 6 Ind. 110.

² *Infra*, § 420.

³ *Patty v. Goolsby*, 51 Ark. 61.

⁴ *McClell. Dig.* 1881, p. 985, § 1; *Watson v. Child*, 9 Rich. Eq. 129, 134.

⁵ *Frazier v. Boggs*, 37 Fla. 307, 318.

⁶ *Rev.* 1892, § 1794.

⁷ *Smith v. Edrington*, 8 Cr. 66, 69.

⁸ *Walton v. Walton*, 7 J. J. Marsh. 58.

⁹ *Rev. St.* 1835, p. 617, § 1. The last revision leaves this phraseology unaltered: *Rev. St.* 1889, § 8868.

¹⁰ *Liggat v. Hart*, 23 Mo. 127, 136; *Applegate v. Smith*, 31 Mo. 166, 169; *Hale v. Andsley*, 122 Mo. 316.

¹¹ *Hardenbergh v. Ray*, 151 U. S. 112, 121, tracing the history of the statute.

session, reversion, or remainder, which he hath, or at the [* 888] time of * his death shall have.”¹ In Louisiana the gift or sale of devised property revokes the devise.² In this State it is now held that a will conveys all the testator’s property owned by him at his death, though acquired after the execution of the will, or wholly changed in the interim.³ Louisiana.

§ 420. **From what Period the Will speaks in Respect of the Testator’s Intention.** — It is plain enough that, when a testator speaks of a condition of things as actually existing, he refers to the period of writing, or executing, the will. Hence, the word “now,” or any expression pointing to present time, must be understood as referring to the date of the will.⁴ Thus, “my present attending physician” means the physician in attendance at the date of the will.⁵ A gift to a township named, including the domicil of the testator, means the township as existing at the time of writing the will, and therefore includes all the territory then forming the township, although a portion thereof was, before his death, incorporated with another.⁶ “Descendants now living” means descendants living at the date of the will, and excludes those coming into existence afterward, but before the testator’s death.⁷ “To the surviving children, not knowing all their names,” means those surviving at the date of the will.⁸ A gift for life to A., and after his death to his widow, was held to apply to the wife of A. living at the date of the will, and not to any wife who might survive him.⁹ A gift to be divided among such nephews “who may read law” includes those who do so between the date of the will and the testator’s death.¹⁰ And where a testator, after making a devise of real estate to his child L. and of all his personal property to the same legatee, then provided that L. should take nothing further, and directed “the balance of his means,” which consisted of certain real estate that he had contracted at the time to convey, and did afterwards so convey, taking a note therefor, to be divided among his other children, it was held that the note should not pass to L. as part of the personalty, but to the others as part of the “balance of his means.”¹¹ A gift to “my wife” will, where such appears to be the testator’s intention, refer to the woman whom he had long lived with

Reference to time by the testator is to be understood as made at the time of execution of the will.

¹ Willis v. Watson, 5 Ill. 64, 67.

² Civ. Code, art. [1688] et seq.

³ Succession of Marks, 35 La. An. 1054, overruling prior cases; Succession of Blackmore, 43 La. An. 846, 850.

⁴ 1 Jarm. * 318; Ellsworth, J., in Gold v. Judson, 21 Conn. 616, 622; Fidelity Trust Co.’s Appeal, 108 Pa. St. 492 (two judges dissenting); Phillipsburgh v. Bruch, 37 N. J. Eq. 482, 485; In re Pearsons, 99 Cal. 30.

⁵ Everett v. Carr, 59 Me. 325, 332.

⁶ Board, &c. v. Ladd, 26 Oh. St. 210. To similar effect, Diocese v. Diocese, 102 N. C. 442.

⁷ 1 Jarm. * 318, and English authorities under note (b); Gold v. Judson, 21 Conn. 616, and authorities, p. 622.

⁸ Morse v. Mason, 11 Allen, 36.

⁹ Anschutz v. Miller, 81 Pa. St. 212, 215.

¹⁰ Benson’s Estate, 169 Pa. St. 602.

¹¹ Frick v. Frick, 82 Md. 218.

and held out to be his wife, instead of his lawful wife whom he long ago deserted in a foreign country.¹ The release of a legatee from charges "I have made against" him, refers to charges made at the time of the execution of the will, and if republished by a codicil, to charges up to the date of the codicil.² So a gift to A.'s oldest or youngest child living refers to the one who is such at the time of writing the will.³ And a gift to the testator's child named, if living at the date of the will, would not, if such child should die, go to another child subsequently born to him, of the same name.⁴ [* 889] But this rule, construing gifts to survivors as applying to objects living at the death of the testator (and *a fortiori* at the date of the will) simply, is confined to cases in which no other period of survivorship can be referred to; hence, where such a gift is preceded by a life estate, or any other prior interest, it takes effect in favor of those who survive the period of distribution, and those only.⁵

The above illustrations sufficiently indicate the circumstances under which the language of a testator must be understood as referring to the condition of things existing at the time of writing the will. It follows from the very nature of the testamentary disposition of property, that, as already indicated,⁶ the will speaks from the testator's death;⁷ hence, unless its language by fair construction indicates otherwise, the testamentary disposition carries all the property owned by the testator at the time of death.⁷ As to personal property, this rule is recognized at common law; but in respect of real estate a different rule prevailed until changed by leg-

¹ Pastine v. Bonini, 166 Mass. 85.

² Van Alstyne v. Van Alstyne, 28 N. Y. 375, 377; Coale v. Smith, 4 Pa. St. 376. To same effect, Rogers v. Rogers, 153 N. Y. 343.

³ Butler v. Butler, 3 Barb. Ch. 304, 308; Eells v. Lynch, 8 Bosw. 465, 481.

⁴ 1 Jarm. * 323, citing Foster v. Cook, 3 Bro. C. C. 346. The author adds: "And the same rule would seem to obtain if the devisee or legatee were described with reference to his filial character only, without any other designation, as in the case of a gift to 'my son' simply, which would apply, it is conceived, to the son (if any) living at the date of the will, to the exclusion of any after-born son, though such after-born son should, by reason of the decease of the then existing son, happen to be the only person answering the description at the death of the testator." But in a note he says that this position is advanced with some diffidence, seeing

the strong anxiety of the courts to extend, as much as possible, gifts to children; and he calls attention to the cases of Perkins v. Micklethwaite, 1 P. Wms. 275; Thompson v. Thompson, 1 Coll. 388, and King v. Bennett, 4 M. & Wel. 36.

⁵ Ridgeway v. Underwood, 67 Ill. 419, 424. See as to the period of survivorship when legacies or devises are given with limitations over in case of the death of the prior legatee, *post*, § 339, p. * 951.

⁶ *Supra*, § 419.

⁷ Canfield v. Bostwick, 21 Conn. 550, 553; Gold v. Judson, 21 Conn. 616, 622; McClasky v. Barr, 54 Fed. R. (C. C. A.) 781, with review of cases; Hardenbergh v. Ray, 151 U. S. 125, 128; Updike v. Tompkins, 100 Ill. 406, 410; Fidelity Trust Co.'s Appeal, 108 Pa. St. 492; Succession of Marks, 35 La. An. 1054; Decker v. Decker, 121 Ill. 341, 358; Nichols v. Allen, 87 Tenn. 131.

isolation. The language of the English, and generally of the American statutes, requires a construction of wills as if executed immediately before the death of the testator, unless a contrary intention appears by the will, without distinguishing between real and personal property. Of course, the end aimed at in expounding a will in which questions as to after-acquired property arise, is the same as in expounding any other will, — to ascertain the intention of the testator;

Statutes require construction of wills as if executed immediately before testator's death.

hence, words which are universal in their scope, [* 890] such as "my whole * estate,"¹ etc., will carry after-acquired property without particular mention of the period of the testator's death; but where the language is not so comprehensive, other words in the will are necessary to indicate such intention,² or the after-acquired property will go as if the testator had died intestate.³ The words "such estate as it has pleased God to bless me with," have been held not sufficiently comprehensive to pass after-acquired property;⁴ so after-acquired realty will not pass under a will which declares that the estate given by it consists only of personalty.⁵ So in the appointment of executors "for the final and full settlement of my estate, whether personal or real,"⁶ "the balance of my means" was held not to include after-acquired real estate, — "means" having been referred to by the testatrix as personal property.⁷ And although the words considered by themselves be comprehensive enough to carry any estate owned by the testator at the time of his death, yet a contrary intention may be inferred from the context, and will be enforced.⁸ So, the rule of construction indicated by the statute may be resorted to in

Instances of words including after-acquired property, or excluding same.

¹ *Lynes v. Townsend*, 33 N. Y. 558, 563; *Flournoy v. Flournoy*, 1 Bush, 515, 523; *Liggat v. Hart*, 23 Mo. 127, 139; *Webb v. Archibald*, 128 Mo. 299 (three judges dissenting on the ground that the wording of the will in question evinced a different intention); *Winchester v. Forster*, 3 Cush. 366, 372; *Walton v. Walton*, 7 J. J. Marsh. 58, 60; *Pruden v. Pruden*, 14 Oh. St. 251; *Succession of Marks*, 35 La. An. 1054; *Commonwealth v. Hackett*, 102 Pa. St. 505, 514; *Edwards v. Warren*, 90 N. C. 604; *Briggs v. Briggs*, 69 Iowa, 617; *Missionary Soc. v. Mead*, 131 Ill. 338.

² *Lynes v. Townsend*, 33 N. Y. 558, 563; *Youngs v. Youngs*, 45 N. Y. 254, 257.

³ *Mason v. Mason*, 3 Bibb, 448; *Bowen v. Johnson*, 6 Ind. 110; *Bedell v. Fradenburgh*, 65 Minn. 361.

⁴ *Dennis v. Warder*, 3 B. Mon. 173.

⁵ *Gardner v. Gardner*, 37 N. J. Eq. 487; and see the valuable collection of cases made by the reporter on the point under what circumstances subsequently acquired property will or will not pass under the will.

⁶ *Lyons v. Townsend*, *supra*.

⁷ *Williams v. Johnson*, 112 Ill. 61.

⁸ *Smith v. Hutchinson*, 61 Mo. 83, 87; *Quinn v. Hardenbrook*, 54 N. Y. 83, 87; *Pond v. Bergh*, 10 Pai. 140, 149; *Raines v. Barker*, 13 Gratt. 128, 131, holding, as the law of Virginia, that, where there is nothing in the will to show that the testator evidently contemplated a disposition of his after-acquired lands, a devise of his lands should be held to refer to the lands owned by him at the date of his will. The same is held in Kentucky: *Ross v. Ross*, 12 B. Mon. 437, 438; and Rhode Island: *Church v. Warren Manufacturing Co.*, 14 R. I. 539.

cases of doubt as to which of several devisees is entitled to property acquired after the making of the will.¹

* § 421. **Extrinsic Evidence in Aid of Construction.**— [* 891] The statutory requirement that wills shall be in writing ob-

viously precludes courts from ascribing to the testator any intention not expressed in the written will;² but courts are obliged to give effect to every intention which the will, properly expounded, expresses; it follows that evidence which in its nature and effect is simply explanatory of *what the testator has written* may be admitted, while none is admissible which, in its nature or effect, is applicable to the purpose of showing merely *what he intended to have written*.³ Sir James Wigram, in his famous *Seven Propositions*, lays down in perspicuous language the rules under which extrinsic evidence is admissible in aid of the interpretation of wills,⁴ a study of

¹ *Garrison v. Garrison*, 29 N. J. L. 153. The devise was of all that part of a farm specified which the testator then owned to one, and of the residuum to another. After making the will, the testator acquired half an acre of land, which had before been part of the farm, and died while in possession of the half acre together with the other portion of the farm. It was held that the specific devisee was entitled in preference to the residuary devisee, because, no intention of the testator to the contrary appearing, the spirit of the statute required the will to be construed as if made immediately before his death. To same effect, *Roney v. Stiltz*, 5 Whart. 381.

² "Otherwise it were great inconvenience that not any may know, by the written words of the will, what construction to make, if it might be controlled by collateral averment out of the will": *Lord Cheney's Case*, 5 Co. 68 b.

³ Wigram on Wills, *Introd.*, pl. 9. "In other words, the question in expounding a will is not what the testator meant, as distinguished from what his words express, but simply what is the meaning of his words. And extrinsic evidence in aid of the exposition of his will must be admissible or inadmissible with reference to its bearing on the issue which this question raises": *Walston v. White*, 5 Md. 297, 305, quoting *Wigram*; *Hawman v. Thomas*, 44 Md. 30, 43; *Hammond v. Hammond*, 55 Md. 575, 581; *Funk v. Davis*, 103 Ind. 281, 285; *McCauley v. Buckner*, 87 Ky. 191;

Bingel v. Voltz, 142 Ill. 214; *Defreese v. Lake*, 109 Mich. 415, 419.

⁴ The gist of these propositions is: I. The words are presumed to be used in their strict and primary acceptation, unless the context shows their use in a different sense, which is then to control. II. If the context does not show them to be used in any but the strict and primary sense, and this is *sensible with reference to extrinsic circumstances*, they must be so construed, although conclusive evidence be tendered of the testator's intention to use them in a different sense, which may be their popular or secondary import. III. If so construed in their primary sense, however, they are *insensible with reference to extrinsic circumstances*, courts may look into the extrinsic circumstances to see whether the meaning of the words be sensible in any popular or secondary sense of which, with reference to these circumstances, they are capable. IV. Experts may be examined to decipher the writing of a will, or to translate the words of a will written in a language not understood by the court. V. To determine the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given, courts may inquire into every material fact relating to the claimant under the will, to the property claimed as the subject of disposition, and to the circumstances of the testator, and of his family and affairs. And so of every other disputed point, respecting which a knowledge of extrinsic facts can

[* 892] which will bring into * bold relief the principles governing this question, upon which, Judge Redfield quotes, "there is no end of citing cases,"¹ which are sometimes said to be irreconcilable.²

Extrinsic evidence, then, is not admissible to supply a clause or word omitted by the testator, or by the scrivener, nor to show that an erroneous word was written in the will by mistake³ not apparent on its face;⁴ nor to control the meaning of language neither ambiguous nor inconsistent with extraneous facts;⁵ nor to vary the terms of a will which can be carried into effect as they stand;⁶ nor, as a general rule, to explain an ambiguity patent on the face of the will.⁷ But if the language of

Extrinsic evidence inadmissible to show mistake, or to control unambiguous language, or to vary terms capable of taking effect,

be shown to be ancillary to the right interpretation of the testator's words. VI. But when the words aided by the evidence of material facts are insufficient to determine the testator's meaning, no evidence is admissible to prove what the testator intended, and the will (except in certain special cases mentioned in Proposition VII.) is void for uncertainty. VII. Courts of law admit extrinsic evidence of *intention* to make certain the *person* or *thing* intended, if the description in the will is insufficient, in cases where the object of a testator's bounty or the subject of disposition (*i. e.* the *person* or *thing* intended) is described in terms which are applicable indifferently to more than one person or thing.

¹ 1 Redf. on Wills, * 502, pl. 12.

² American Bible Society v. Pratt, 9 Allen, 109, 111.

³ Griscom v. Evens, 40 N. J. L. 402, 407, citing earlier New Jersey cases; Reynolds v. Robinson, 82 N. Y. 103, 106; Tucker v. Seaman's Aid Society, 7 Met. (Mass.) 188; Avery v. Chappel, 6 Conn. 270, 274; Andress v. Weller, 3 N. J. Eq. 604, 608; Button v. American Tract Society, 23 Vt. 336, 349; Hanner v. Moulton, 23 Fed. Rep. 5; Taylor v. Maris, 90 N. C. 619; Kurtz v. Hibner, 55 Ill. 514; Bradley v. Rees, 113 Ill. 327, 332; Fairfield v. Lawson, 50 Conn. 501, 508; Funk v. Davis, 103 Ind. 281, 282.

⁴ Judy v. Gilbert, 77 Ind. 96, 98; Fitzpatrick v. Fitzpatrick, 36 Iowa, 674; Wetherhead v. Baskerville, 11 How. (U. S.) 329, 358; McAlister v. Butterfield, 81 Ind. 25; Abercrombie v. Abercrombie,

27 Ala. 489, 495; Caldwell v. Caldwell, 7 Bush, 515; Skipwith v. Cabell, 19 Gratt. 758, 785.

⁵ Appel v. Byers, 98 Pa. St. 479, 481; Crosby v. Mason, 32 Conn. 482, 487; McDaniel v. King, 90 N. C. 597, 602; *In re* Wells, 113 N. Y. 396, 401; Ehrman v. Hoskins, 67 Miss. 192.

⁶ Thweatt v. Redd, 50 Ga. 181, 191; Hill v. Alford, 46 Ga. 247, 252; Brown v. Brown, 43 N. H. 17, 25; Miller v. Springer, 70 Pa. St. 269, 274; Chapin v. Hill, 1 R. I. 446, 453; Mann v. Mann, 14 John. 1, 9; Stannard v. Barnum, 51 Md. 440, 450.

⁷ Davis v. Davis, 8 Mo. 56, 58. "Such an ambiguity is to be removed, if at all, by construction, and not by averment": Lewis v. Douglass, 14 R. I. 604, 607; Taylor v. Maris, 90 N. C. 619. "If the ambiguity occurs in the wording of the will, producing a palpable uncertainty on the face of the instrument, extrinsic evidence cannot remove the difficulty without putting new words in the mouth of the testator, and in effect making a new will for him": Senger v. Senger, 81 Va. 687, 694. "The rule against the introduction of parol testimony," says the court, in Schlottman v. Hoffman, 73 Miss. 188, 202, "in cases of patent ambiguity is very generally stated too broadly, — frequently for the reason that, with reference to the case before the court, the rule, however broadly stated, is correct in its application. But it is not true that an ambiguity appearing on the face of the paper, if that alone be looked to, cannot be explained by parol, nor that all latent ambiguities may be;" and the court allowed parol evidence to be

or to explain patent ambiguities; but words void of meaning with reference to extrinsic circumstances may be explained.

The general

Latent ambiguities may be removed by parol evidence.

This principle is fully applicable to the interpretation of wills, the

Circumstances under which will was written are admissible.

showing that donee was known by different name.

the will, construed in the strict and primary sense of the words, not shown by the context to have been used in any different sense, is void of meaning or insensible with reference to extrinsic circumstances, courts will admit extrinsic evidence to see whether the words be applicable to such circumstances in any popular or secondary sense of which they may be capable.¹

rules * of evidence announce the admissibility [* 893]

of parol evidence to remove latent ambiguities, and to rebut, in the same way, ambiguities raised by proof of facts *aliunde*. But patent ambiguities exist

in the contract itself, to remedy which courts have no authority.²

object being in all cases to discover the intention; the better to do this, courts endeavor to put themselves in the place of the testator, by hearing evidence *aliunde* of the condition and circumstances of the testator's family

and property, the nature and condition of the subjects and objects of the testamentary dispositions, with the view of giving effect to the expressions used by the testator and removing latent ambi-

guities.³ Thus it may be shown that a person or cor-

poration was known to the testator by a name different from his or its ordinary or corporate name, in order to

show identity with one named in the will; ⁴ that a legatee was mis-

admitted to show whether a legacy given in numerals was meant to be five dollars or five hundred dollars, where it was impossible to tell which was intended from the face of the will.

¹ Proposition III. of Wigram, *supra*, p. * 891, note; Allen v. Allen, 18 How. (U. S.) 385, 393; Morgan v. Dodge, 44 N. H. 255, 263; Schoppert v. Gillam, 6 Rich. Eq. 83, 85; Holmes v. Holmes, 36 Vt. 525, 529; Goodhue v. Clark, 37 N. H. 525, 532; Dougherty v. Rogers, 119 Ind. 254.

² Story, J., in Peisch v. Dickson, 1 Mason, 9, 11; 1 Greenl. on Ev. § 297; Pickering v. Pickering, 50 N. H. 349, 350; Domestic, &c. Society v. Reynolds, 9 Md. 341, 347.

³ Proposition V. of Wigram; Brown v. Thorndike, 15 Pick. 388, 400; Hiscocks v. Hiscocks, 5 M. & W. 363, 367; a case quoted in most text-books on this subject as containing the best statement and a lucid exposition of the doctrine applicable; 1 Greenl. Ev. § 289; Brainard v. Cowdry, 16 Conn. 1, 11; Henry v. Henry, 81 Ky. 342; Gilmer v. Stone, 120 U. S. 586, 590;

Senger v. Senger, 81 Va. 687; Decker v. Decker, 121 Ill. 341, 350; Perry v. Bowman, 151 Ill. 25; Small v. Field, 102 Mo. 104, 121. But circumstances occurring after the execution of the will which could not have been within the contemplation of the testator may not be availed of in arriving at his intention: Morris v. Sickly, 133 N. Y. 456.

⁴ Hockensmith v. Slasher, 26 Mo. 237, 240; Gilmore's Estate, 154 Pa. St. 523; Dougherty v. Rogers, 119 Ind. 254; Frick v. Frick, 82 Md. 218; Baldwin v. Baldwin, 7 N. J. Eq. 211; New York Conference v. Clarkson, 8 N. J. Eq. 541, 543; Tudor v. Terrel, 2 Dana, 47, 49; Hart v. Marks, 4 Bradf. 161; McAllister v. McAllister, 46 Vt. 272, 281; Morse v. Stearns, 131 Mass. 389; Beardsley v. American Society, 45 Conn. 327; Bristol v. Ontario Orphan Asylum, 60 Conn. 472; Tilton v. Society, 60 N. H. 377, 382; Taylor v. Tolen, 38 N. J. Eq. 91, 94; Beatty v. Trustees of Society, 39 N. J. Eq. 452, 462; Baptist Convention v. Ladd, 59 Vt. 5; University v. Tucker, 31 W. Va. 621, 631.

named by the testator,¹ or a legacy or devise misdescribed,² and also to show the testamentary character of an instrument.³ In this respect, the maxim *Falsa demonstratio non nocet* is frequently invoked, which primarily imports, that *Falsa demonstratio non nocet* [* 894] where the words of definition * exclusive of the

falsa demonstratio are sufficient, an erroneous addition will not vitiate it;⁴ but when applied to wills is held to mean that where the words of the devise are sufficient, reference being had, if necessary, to the situation of the premises, to the names by which they have been known, or to other circumstances pointing out the meaning of the description in the will,—the misdescription does not avoid the devise or legacy.⁵ If, however, the testator devise property which he does not own, so that the description is false not in part only, but *in toto*, in consequence of a mistake of the testator as to his ownership, there is no room for the application of this maxim, nor of the rule allowing a latent ambiguity to be explained by extrinsic evidence;⁶ when the

¹ Thomas v. Stevens, 4 John. Ch. 607, relying for authority on Beaumont v. Fell, 2 P. Wms. 140, and Bradwin v. Harpur, Amb. 374; Connolly v. Pardon, 1 Pai. 291; Trustees v. Peaslee, 15 N. H. 317, 327; Smith v. Presbyterian Church, 26 N. J. Eq. 132, 139; Thayer v. Boston, 15 Gray, 347; Smith v. Smith, 4 Pai. 271; Lefevre v. Lefevre, 59 N. Y. 434, 440; Cook v. Lanning, 40 N. J. Eq. 369, 373; Wood v. White, 32 Me. 340; Minot v. Boston Asylum, 7 Met. (Mass.) 416; Wagner's Appeal, 43 Pa. St. 102; Preachers' Aid Society v. Rich, 45 Me. 552, 559; Pell v. Mercer, 14 R. I. 412, 448; Cheney v. Selman, 71 Ga. 384; Webster v. Morris, 66 Wis. 366, 379; Ross v. Kiger, 42 W. Va. 402; Missionary Society v. Mead, 131 Ill. 338; Gordon v. Burris, 141 Mo. 602.

² Kinsey v. Rhem, 2 Ired. L. 192, 196; Spencer v. Higgins, 22 Conn. 521, 527; Patch v. White, 117 U. S. 210; Riggs v. Myers, 20 Mo. 239, 242; Coleman v. Eberly, 76 Pa. St. 197, 203; Bowen v. Allen, 113 Ill. 53, 59.

³ Where doubt exists: Smith v. Holden, 58 Kans. 535, and cases cited in the opinion.

⁴ Broom's Leg. Max. * 630.

⁵ Per Patterson, J., in Hubbard v. Hubbard, 15 Q. B. (Ad. & El., n. s.) 227, 241; Patch v. White, 117 U. S. 210; Winkley v. Kaime, 32 N. H. 268, 274; Roy v. Rowzie, 25 Gratt. 599, 604; Moreland v. Brady, 8 Oreg. 303; Pocock v. Redinger, 108 Ind.

573; Decker v. Decker, 121 Ill. 341, 352; Whitcomb v. Rodman, 156 Ill. 116; Huffman v. Young, 170 Ill. 290; Rogers v. Rogers, 78 Ga. 688; Seebrook v. Fedawa, 33 Neb. 413; Gordon v. Burris, 141 Mo. 602, 611.

⁶ Hanner v. Moulton, 23 Fed. Rep. 5. This case, as held by Woods, J., is instructive as showing the distinction between an ambiguity removable by extrinsic evidence and an inoperative testamentary clause. The testator devised "my tract of land, containing near 1,500 acres first-rate land, lying, I believe, in Ellis County, Texas." He owned no land, but at the date of the will and at the time of his death was the owner of a head-right certificate for 1476 acres. Parol evidence held inadmissible to show that he supposed the certificate to have been located in Ellis County, making him the owner of the land; nor that it was his intention, as shown by his declarations and conversations, to devise the certificate if it should turn out that it had not been located, and that he was advised by the attorney who wrote the will that the devise would be effectual to carry out such purpose. So in Illinois the court refused to permit the introduction of parol evidence to show that in a devise of the "southwest quarter," etc., the testator meant "northwest quarter," etc., although the land as described was never owned or claimed by testator. The court recognizes that in Illinois the courts adhere more

false language is eliminated, and nothing remains directing inquiry which may result in discovering the true subject of the devise, it is void.¹

The admissibility of parol evidence to aid in the interpretation of wills does not, in every case, extend to the declarations of the testator. It is said that there is but one class of cases in which they can be properly admitted; namely, cases of equivocation, where an ambiguity arises from the admission of extrinsic evidence, as to which of two or more things, or which of two or more persons, each answering the description in the will, the testator meant to designate.² Thus, where a complete blank is left for the devisee's name, or for the legacy,³ no parol evidence, though strong and clear, can be allowed to fill it up as intended by the * testator; but where the blank is of the Christian name [* 895] only, or where the legatee is imperfectly described, parol evidence will be admitted, including declarations or conversations of the testator, to prove the individual intended.⁴ So the testator's declarations are incompetent to control the language of a will by showing what estate the testator intended the devisee to take,⁵ where the devise to him is inoperative, or affected by a rule in support of public policy.⁶

Under the statutes of most States a child of the testator not named or provided for in the will takes the same share as if the testator had died intestate, unless it appear that the omission was intentional; but whether parol evidence and declarations of the testator are admissible under these statutes to ascertain his intention in this respect is a question on which the States are arrayed on different sides.⁷

It has been held in California that independent of the statute of

strictly to the rule excluding extrinsic evidence than in some other States, but considers itself bound by prior decisions: *Bingel v. Voltz*, 142 Ill. 214. See, for instance, where parol evidence was permitted under somewhat similar circumstances: *Stewart v. Stewart*, 96 Iowa, 620, relying on *Patch v. White*, 117 U. S., cited *supra*.

¹ *Christy v. Badger*, 72 Iowa, 581.

² *Wms. Ex.* [1154]; *Cotton v. Smithwick*, 66 Me. 360, 367.

³ *Everett v. Carr*, 59 Me. 325, 331.

⁴ *Hinckley v. Thatcher*, 139 Mass. 477; See *Gordon v. Burris*, 141 Mo. 602, 611. A prior unattested will, indisputably genuine, was held admissible to explain an ambiguity in the later will, caused by conflicting descriptions of the subject of a

devise, such prior will being in effect a written declaration of the testator: *Thomson v. Thomson*, 115 Mo. 56.

⁵ *Kirkland v. Conway*, 116 Ill. 438, 441; *Peet v. Railway*, 70 Tex. 522, 528; see *Patterson v. Wilson*, 101 N. C. 594. "Verbal declarations of a testator are not competent evidence to prove a mistake in a will." *Pocock v. Redinger*, 108 Ind. 573, 575.

⁶ *Turner v. Hollowell Institution*, 76 Me. 527; *Olliffe v. Wells*, 130 Mass. 221.

⁷ See *ante*, § 55, notes on pp. *110, *111. In Missouri evidence was held admissible to show that one claiming to have been pretermitted was named by an incorrect name in the will: *Gordon v. Burris*, 141 Mo. 602, 611.

wills, where the testator bequeaths property *in trust* to a legatee, without specifying in the will the purpose of the trust and without naming the beneficiaries, and at the same time communicates this purpose to the legatee verbally or by unattested writings, and the legatee, either expressly, or by silent acquiescence, promises to perform the trust, and the trust itself is not unlawful, there a court of equity will raise a constructive trust in favor of the beneficiary intended by the testator, upon the ground that the legatee will not be countenanced in perpetrating a fraud;¹ but this decision seems to conflict with the weight of authority, which, while fully recognizing this doctrine of enforcing a secret trust where the gift to the fraudulent legatee is *absolute* on the face of the will,² yet holds that *an insufficiently declared trust* in the will cannot be set up by extrinsic evidence, the designated trustee in such case holding for the benefit of the heirs at law.³

Insufficiently
worded and
secret trusts.

Text-writers mention, that parol evidence is admissible, not only to explain a latent ambiguity arising *dehors* the will, but also to rebut a resulting trust.⁴ Where a legacy is given to an executor, and the next of kin claim the residue, the testator's declaration and other parol proof were received in England to ascertain the person who was to receive the residue.⁵ This rule is of little or no application in America, because the residue does not, without an express gift by the testator, go to the executor.

§ 422. **Testamentary Donees as Classes.**—A legacy given to a class immediately vests absolutely in the persons composing that class at the death of the testator,⁶ unless the testator intended to

¹ *Curdy v. Berton*, 79 Cal. 420, relying on *Re O'Hara*, 95 N. Y. 403, 413, and numerous cases there cited; it being intimated by the court that a different doctrine is maintained by the case of *Olliffe v. Wells*, *supra*.

² So held in *Re O'Hara*, 95 N. Y. 403, 413; *Fairchild v. Edson*, 154 N. Y. 199; *Amherst College v. Ritch*, 151 N. Y. 282, 323, *et seq.*, with full discussion of the authorities; *Williams v. Vreeland*, 32 N. J. Eq. 734; *Buckingham v. Clark*, 61 Conn. 204; *McAuley's Estate*, 184 Pa. St. 124; and see list of cases cited by the reporter in 32 N. J. Eq. 135-142; *Barrell v. Hamrick*, 42 Ala. 60 (*Coleman, J.*, in *Moore v. Campbell*, 102 Ala. 445, 450, while recognizing the authority of the last-cited case, appeals to the legislature to enact a contrary rule rendering oral evidence inadmissible to establish any trust); *Moore v. Campbell*, 113 Ala. 587 (applying the law to personalty). But such trusts must be lawful, or they cannot be enforced; if in

manifest evasion of a statute, sound public policy forbids that the testator should be permitted to effect indirectly that which he could not effect directly: *Amherst College v. Ritch*, 151 N. Y. 282, p. 333, majority opinion, and 349, dissenting opinion, both agreeing on this point; *Fairchild v. Edson*, *supra* (distinguishing between joint trusts and tenancy-in-common trusts as to the effect of a secret promise by one on the rights of the others).

³ *Heidenheimer v. Bauman*, 84 Tex. 174, 183, and numerous authorities cited; *Sims v. Sims*, 94 Va. 580; *Olliffe v. Wells*, 130 Mass. 221; *Smith v. Smith*, 54 N. J. Eq. 1 (holding that it makes no difference that the attempted trust was a charity).

⁴ 1 Redf. on Wills, *501, pl. 10.

⁵ *Brasbridge v. Woodroffe*, 2 Atk. 69; *Ulrich v. Litchfield*, 2 Atk. 372; *Mann v. Mann*, 1 John. Ch. 231.

⁶ *Mason v. White*, 8 Jones L. 421; *Chasmar v. Bucken*, 37 N. J. Eq. 415, 418; *Scott v. West*, 63 Wis. 529, 564, and au-

Class intended as it exists at testator's death.

"Children" includes those only who are such at testator's death, unless a different intention clearly appear.

Class on expiration of intervening period includes all who compose it at such time.

refer to a class as existing at the date of the will.¹ Hence, as a general rule, a gift to "children" as a class, immediately, intends those, and those only, who answer this description at the death of the testator,² including children *in ventre sa mère*;³ but if from the language of the will it clearly appear that the testator intended those only who answered this description at the date of the will, then the * gift must [* 896] be confined to them.⁴ So a gift to a class which is postponed to the expiration of an intervening period after the testator's death must be shared by all who constitute the class at the expiration of the intervening estate, including children born after the testator's death;⁵ the heirs of such as may have died after the vesting of the gift are entitled to take in their place.⁶ Children born after the period fixed for the distribution have no claim,⁷ although the gift be

authorities cited; *McCartney v. Osburn*, 118 Ill. 403, 416; *Campbell v. Clark*, 64 N. H. 328; *Landwehr's Estate*, 147 Pa. St. 121.

¹ See *ante*, § 420, as to the time from which a will speaks.

² *Walker v. Williamson*, 25 Ga. 549, 556; *Smith v. Ashurst*, 34 Ala. 208; *Eberts v. Eberts*, 42 Mich. 404; *Martin v. Trustees*, 98 Ga. 320; *Matter of Brown*, 154 N. Y. 313. But if there be none such *in esse*, the gift will embrace all the children who may subsequently come into being: *Male v. Williams*, 48 N. J. Eq. 33, 36.

³ *Knorr v. Millard*, 57 Mich. 265. But a child whose mother was unmarried at the time of the testator's death, though born within the period of gestation and legitimated by the mother's previous marriage, was held not included in the class, because not *in esse* (as a legitimately begotten child) before the period of distribution: *In re Corlass*, L. R. 1 Ch. D. 460; *Barker v. Pearce*, 30 Pa. St. 173; *Groce v. Rittenberry*, 14 Ga. 232.

⁴ *Ante*, § 420; *Teets v. Weise*, 47 N. J. L. 154; *Morse v. Mason*, 11 Allen, 36. See *Webb v. Hitchins*, 105 Pa. St. 91.

⁵ *Worcester v. Worcester*, 101 Mass. 128, 132; *Walker v. Johnston*, 70 N. C. 576, 579; *Swinton v. Legare*, 2 McCord, Ch. 440; *Fleetwood v. Fleetwood*, 2 Dev. Eq. 222; *Simpson v. Spence*, 5 Jones Eq. 208; *Jenkins v. Freyer*, 4 Pai. 47, 53; *Hill v. Rockingham Bank*, 45 N. H. 270; *Hubbard v. Lloyd*, 6 Cush. 522; *Satterfield*

v. Mayes, 11 Humph. 58; *Handberry v. Doolittle*, 38 Ill. 202, 206; *Haskins v. Tate*, 25 Pa. St. 249; *Webster v. Welton*, 53 Conn. 183; *Demill v. Reid* (excluding the heirs of such as died before the happening of the contingency, though *in esse* at the testator's death), 71 Md. 175; *Matter of Allen*, 151 N. Y. 243; *Land Co. v. Hill*, 87 Tenn. 589 (excluding children dying before the expiration of the intervening period), 596; *Coggins' Appeal*, 124 Pa. St. 10; *Coveny v. McLaughlin*, 148 Mass. 576; *Ferguson v. Thomason*, 87 Ky. 519 (holding that death before the termination of the intervening estate would defeat the estate). The question whether those born in the intervening period are included or not is one of intention determined by the will and the *res gestæ*: *Matter of Smith*, 131 N. Y. 239, 247 (excluding after-born grandchildren); and the rule of construction is not to be followed, if the will of the testator shows how he intended the class to be made up: *Denlinger's Appeal*, 170 Pa. St. 104.

⁶ *Cheney v. Selman*, 71 Ga. 384; *Hocker v. Gentry*, 3 Met. (Ky.) 463, 471; *Knight v. Wall*, 2 Dev. & B. 125; *Moore v. Weaver*, 16 Gray, 305, 307; *McCartney v. Osburn*, 118 Ill. 403, 417, *et seq.*; *Lombard v. Willis*, 147 Mass. 13; see cases cited *post*, § 439, p. * 951 as to the period to which death refers in gifts with limitation over.

⁷ *Richardson v. Raughley*, 1 Houst. 561; *Fosdick v. Fosdick*, 6 Allen, 41, 43.

to children "born or *to be* born;"¹ but there are cases where the testator expressly states, or by unmistakable inference from the context intends, that *all* the children of some individual shall participate in a gift, although payable at a particular period, not excluding the subsequent birth of other children in the same class;² and in such case the children born subsequently are entitled to their share, although there be difficulty in paying legacies to an uncertain number of persons.³ It seems that property in possession is to be divided between the individuals composing the class at the time when it is distributable, while property in remainder will open to let in all who answer the description at the time of the falling in of the particular estate.⁴

[* 897] * The word "children" properly includes only the immediate descendants of the person named, and does not therefore usually apply to grandchildren or issue generally.⁵ But if the word "children" can have no operation,⁶ or where it is clear that the testator uses the words "children" and "issue" indiscriminately, and that he means *issue* when he says *children*, it will be construed according to his intention, as meaning or including grandchildren.⁷

Children means immediate descendants, unless a different intention is manifest.

¹ Wms. Ex. [1091]; *Brown v. Williams*, 5 R. I. 309.

² *Tucker v. Bishop*, 16 N. Y. 402.

³ Wms. Ex. [1091]; *Annable v. Patch*, 3 Pick. 360, 364. See the argument of Johnston, Ch., in *De Veaux v. De Veaux*, 1 Strobb. Eq. 283, and quotations by him: *Howland v. Howland*, 11 Gray, 469.

⁴ *Britton v. Miller*, 63 N. C. 268, 270; *Scott v. West*, 63 Wis. 529, 570. Justice Mulkey, in *McCartney v. Osburn*, 118 Ill. 417, makes the following classification relating to the vesting of testamentary dispositions applicable alike to classes and individuals: "*First*, where the gift takes effect both in interest and possession at the death of the testator, — and this is always the case when limited *per verba de præsenti*, unless such vesting is expressly or by necessary implication deferred to a future period; *second*, where the gift is so limited as to take effect, both in interest and possession, at a specified time subsequent to the testator's death; *third*, where it is limited to take effect in interest at the testator's death, but the vesting in possession is deferred to a future period; and, *fourth*, where the gift is limited in such a manner as to take effect, both in interest and possession, upon some contingency or event which may or may not happen till after the testator's death. If

the event or contingency happens after his death, the gift will, of course, then vest absolutely; if before, it will then so vest after the testator's death."

⁵ *Cummings v. Plummer*, 94 Ind. 403; *Pugh v. Pugh*, 105 Ind. 552; *Taylor v. Mosher*, 29 Md. 443, 458; *Moon v. Stone*, 19 Gratt. 130, 328; *Willis v. Jenkins*, 30 Ga. 167; *Tucker v. Stites*, 39 Miss. 196, 213; *Churchill v. Churchill*, 2 Met. (Ky.) 466; *Feit v. Vanatta*, 21 N. J. Eq. 84; *Izard v. Izard*, 2 Desaus. 308; *Smith v. Smith*, 24 S. C. 304, 314; *Kirk v. Cashman*, 3 Dem. 242; *Keim's Appeal*, 125 Pa. St. 480; *Hunt's Estate*, 133 Pa. St. 260. In *Webb v. Hitchins*, 105 Pa. St. 91, 95, it is said that when a parent or ancestor, in disposing of property, and in designating the objects of her bounty, speaks of "the children," it is more reasonable to assume that those in being are meant, or those likely to be born of an existing marriage, than those who, at some remote and indefinite time in the future, might possibly be born of a marriage neither existing nor contemplated.

⁶ *In re Schedel*, 73 Cal. 594. Where, for instance, the testator had no children at the time of making the will, but only grandchildren: *Moon v. Stone*, *supra*; and see *infra*, as to the rule in *Wild's Case*.

⁷ *Houghton v. Kendall*, 7 Allen, 72, 76;

It may be mentioned here, that, according to the doctrine usually called "the rule in Wild's Case,"¹ on a devise to a man *and his children*, if he have none at the time of the devise, the word "children" must be taken as a word of limitation, so that he takes an estate tail;² but if he has children living at the time of the devise, "children" must be taken as a word of purchase, and they take jointly with him.³ The rule, which has been followed as the law of England ever since,⁴ can, from the nature of its feudal origin, apply only to real estate;⁵ * in respect of personal property, an absolute interest [*898] will pass where an estate in tail would be created in real property.⁶ So, too, if it be the testator's intention, the father or mother will take a life estate with remainder to the children.⁷ Estates tail having been abolished in most American States, and generally converted into estates in fee simple, the rule in Wild's Case is of but limited application here.⁸

Provision made for a posthumous child, whose birth the testator may happen to survive, is nevertheless a valid provision for such child;⁹ but will not, in such case, apply to another posthumous child, born after the testator's death.¹⁰

Re Paton, 111 N. Y. 480; *Miller v. Carlisle*, 90 Ky. 205; *Douglas v. James*, 66 Vt. 21; *Smith v. Fox*, 82 Va. 763; *Otterback v. Bohrer*, 87 Va. 548. It is held, in case of doubt, that that meaning should be preferred which permits the children of a deceased child to inherit: see cases *ante*, § 418, p. *883, note 7.

¹ Wild's Case, Co. pt. 6, *17. The reasoning by which the rule was deduced is strongly biassed by the feudal views embodied in the common law. "For at the common-law lands were not divisible . . . but by the statutes, . . . which statutes were made to the great disadvantage of heirs at the common law by wills for the most part made in extremity of sickness, and that utterly against the rule and reason also of the common law; for the ancient common law did favor him who the common law made heir, because he was to sit in the seat of his ancestor, and to serve the King and commonwealth in as good estate as his ancestor did. . . . And therefore this difference was resolved for good law," etc., giving the rule.

² *Parkman v. Bowdoin*, 1 Sumn. 359, 363; *Nightingale v. Burrell*, 15 Pick. 104, 114; *Wheatland v. Dodge*, 10 Met. (Mass.) 502.

³ *Johnson v. Johnson*, 1 McM. Eq. 345, 190

347; *Jackson v. Coggin*, 29 Ga. 403; *Annable v. Patch*, 3 Pick. 360; *Silliman v. Whitaker*, 119 N. C. 89 (holding that under the statute the joint estate is converted into a tenancy in common). The context may show that by "children" the testator means heirs: *Schaefer v. Schaefer*, 141 Ill. 337.

⁴ See *Clifford v. Koe*, L. R. 5 App. 447.

⁵ Because there can be no estate tail in personal property: *Shearman v. Angel*, 1 Bai. Eq. 351, 357.

⁶ *Vanzant v. Morris*, 25 Ala. 285, 292; *Cleveland v. Spilman*, 25 Ind. 95; *Shearman v. Angel*, *supra*; *Jenkins v. Hall*, 4 Jones Eq. 334, 338; *Jones v. Jones*, 13 N. J. Eq. 236, 239.

⁷ *Carr v. Estill*, 16 B. Mon. 309, 313; *Woodruff v. Woodruff*, 32 Ga. 358.

⁸ *Turner v. Ivie*, 5 Heisk. 222, 234; *Jones v. Jones*, 13 N. J. Eq. 236; *Haldeman v. Haldeman*, 40 Pa. St. 29, 34; *Miller v. Hurt*, 12 Ga. 357; *Butler v. Ralston*, 69 Ga. 485, holding that the first taker takes the fee; *Silliman v. Whitaker*, 119 N. C. 89, 92.

⁹ *Mordecai v. Boylan*, 6 Jones Eq. 365.

¹⁰ *Burke v. Wilder*, 1 McCord Ch. 551, 556.

The word "children" used in a will is held to refer to legitimate children only, and when not controlled by express designation, or by necessary implication, the word "child," "son," "is-
sue," must be understood to mean *legitimate* child, son, issue.¹ Extrinsic evidence will be heard to prove that illegitimate children had acquired the reputation of being the children of the testator, or of the person named in the will, before its execution, and that the testator knew that fact, and the state of the family,² but for no other purpose.³ There is no rule of law, however, precluding testators from extending their bounty to illegitimate children; nor courts from giving effect to their intention, if they plainly refer to given individuals, although they refer to them as "children."⁴

"Children" includes only legitimate issue,

unless the intention to include illegitimates appears.

Where a testator has children of his own, as well as step-children, a devise to his children does not include the step-children, and extrinsic evidence is not admissible to show a contrary intention.⁵ Where a gift is to the children

So of step-children.

[* 899] * of several persons, whether to the children of A. and B. or to the children of A. and the children of B., they take *per capita*;⁶ and so where the gift is to one person and the children of another, as, for instance, to A. and the children of B.⁷

The term "grandchildren" *prima facie* includes only those who are next in descent to children;⁸ grandchildren by blood, but not by marriage,⁹ nor great-grandchildren.¹⁰ But what has been said above in respect of the construction of the word "children" is fully applicable to the word "grandchildren." A devise or legacy in reversion to "grandchildren equally" should be divided *per capita*.¹¹

"Grandchildren" includes immediate descendants of children.

¹ Wms. Ex. [1099]; Kirkpatrick v. Rogers, 6 Ired. Eq. 130, 135; Thompson v. McDonald, 2 Dev. & B. Eq. 463, 479; Adams v. Adams, 154 Mass. 299.

² Gardner v. Heyer, 2 Pai. 11; Heater v. Van Auken, 14 N. J. Eq. 159, 167.

³ Collins v. Hoxie, 9 Pai. 81, 88; Shearman v. Angel, Bai. Eq. 351, 356; Ferguson v. Mason, 2 Sneed, 618, 625.

⁴ Hughes v. Knowlton, 37 Conn. 429; Pratt v. Flamer, 5 Har. & J. 10, 20; Eagleton v. Horner, L. R. 37 Ch. Div. 695; Smith v. Du Bose, 78 Ga. 413, 441; Elliott v. Elliott, 117 Ind. 380 (holding that the circumstances indicated that by "children" the testator meant illegitimate children, to the exclusion of legitimate children by a former wife); Sullivan v. Parker, 113 N. C. 301.

⁵ Fouke v. Kemp, 5 Har. & J. 135, 138.

Carroll v. Carroll, 20 Tex. 731, 745; Lawrence v. Hebbard, 1 Bradf. 252, 255.

⁶ Benedict v. Ball, 38 N. J. Eq. 48, 51; Senger v. Senger, 81 Va. 687, 695.

⁷ McCartney v. Osburn, 118 Ill. 403, 425, holding, however, that a slight intimation in the context to the contrary will be sufficient to change the rule; and see Frazer v. Dillon, 78 Ga. 474, in which this rule seems not to be followed.

⁸ Wms. Ex. [1103].

⁹ Barnes v. Greenzebach, 1 Edw. Ch. 41, 45.

¹⁰ Hone v. Van Schaick, 3 N. Y. 538, 544; Yeates v. Gill, 9 B. Mon. 203, 204.

¹¹ Morrill v. Phillips, 142 Mass. 240; Maguire v. Moore, 108 Mo. 267. Where the testator seems to have contemplated a division *per stirpes*, the will will be so construed: Woodruff v. Pleasants, 81 Va. 37,

The same is true of the words "nephews and nieces." These words clearly mean the children of a brother or sister;¹ hence great-nephews and great-nieces are not ordinarily included,² nor those by affinity (*i. e.* of the husband or wife),³ unless the testator clearly intend so;⁴ but children of brothers or sisters of the half-blood are included.⁵

Unless the context shows a different intent, legacies to nephews include only such as are legitimate.⁶

"Cousins," without qualification or addition, is construed to mean cousins-german or first-cousins,⁷ and does not include descendants of first-cousins;⁸ and it has been held that a first-cousin once removed is not entitled under a bequest to second-cousins.⁹

§ 423. **Classes designated by Technical Terms.**—It will be useful to remember that the terms "heirs," "descendants," "issue," "family," and the like, are sometimes used, like the word "children," in a sense different from their ordinary signification. They may be enlarged or restricted as may best comport with the intention and purpose of the testator.¹⁰ We have seen that, by the rule in *Wild's Case*,¹¹ the word "children" * may be either a word [* 900] of limitation or of purchase, depending upon the circumstance whether or not there be such children. So, by the doctrine embodied

Rule in in what is known as the rule in *Shelley's Case*,¹² when a freehold is given to one, and by the same instrument a limitation, either expressly or impliedly, to his heirs, or the heirs of his body, the estate vests wholly in the first taker,—if limited to the heirs of his body, a fee tail; if to his heirs, a fee simple.¹³ This rule, which owes its incorporation into the common law to the principles of feudal policy, has been abolished by statute, at least so far as devises in wills are concerned, in most States, among them Alabama,¹⁴ California,¹⁵ Connecticut,¹⁶ Kan-

40; as where there is a devise of a remainder over to "any surviving child or grandchildren in equal parts," the property descends *per stirpes*: *Kilgore v. Kilgore*, 127 Ind. 276.

¹ *Crook v. Whitley*, 7 DeG. M. & G. 490, 494.

² *Cromer v. Pinckney*, 3 Barb. Ch. 466, 475; *In re Woodward*, 53 Hun. 456.

³ *Wells v. Wells*, L. R. 18 Eq. 504; *Smith v. Lidiard*, 3 Kay & J. 252, 256; *Green's Appeal*, 42 Pa. St. 25, 30.

⁴ *Shepard v. Shepard*, 57 Conn. 24, 29, construing the terms as including grand-nephews and grandnieces: *Brower v. Bowers*, 1 Abb. Ct. App. Dec. 214.

⁵ *Shull v. Johnson*, 2 Jones Eq. 202.

⁶ *Lyon v. Lyon*, 88 Me. 395, 400.

⁷ *O'Hara on Int. W.* 323; *Wms. Ex.* [1104].

⁸ *Sanderson v. Bayley*, 4 Myl. & Cr. 56.

⁹ *Bridgnorth v. Collins*, 15 Sim. 538, 541; *Slade v. Fooks*, 9 Sim. 386.

¹⁰ *Matter of Logan*, 131 N. Y. 456, 460, and cases cited.

¹¹ *Ante*, § 422, p. * 897.

¹² *Shelley's Case*, 1 Co. * 93, 104, 106.

¹³ *Butler v. Huestis*, 68 Ill. 594, 599. In other words, if the heirs claim under the same instrument under which the ancestor took an estate equal with that claimed by them, the heirs take by descent and not by purchase.

¹⁴ Code, 1896, § 1025.

¹⁵ Civ. Code, § 779.

¹⁶ *Leake v. Watson*, 60 Conn. 498, 511.

sas,¹ Kentucky,² Maine,³ Massachusetts,⁴ Michigan,⁵ Minnesota,⁶ Missouri,⁷ New Hampshire,⁸ New Jersey,⁹ New York,¹⁰ Ohio,¹¹ Oregon,¹² Tennessee,¹³ Virginia,¹⁴ West Virginia,¹⁵ and Wisconsin.¹⁶ In most of these States it is supplanted by the statutory provision, Rule in lieu thereof that a devise, and in some of them also a bequest, of

property to any person for life, and after his death to his heirs, heirs of his body, or the like, shall vest an estate for life in the former, with remainder in fee simple to the latter. The conversion by statute of estates tail into estates in fee simple, which has been enacted in some, and the simple abolition of estates tail in others, have also affected the rule in Shelley's Case *pro tanto* in those States. It is still recognized in Indiana,¹⁷ Maryland,¹⁸ North Carolina,¹⁹

[* 901] * Pennsylvania,²⁰ and, with such modifications as are conditioned by the difference between the tenure of real estate at common law and under American statutes, in Illinois,²¹ Vermont,²² and perhaps other States.²³ It is here, however, gener-

ally regarded as a rule of construction, not a rule of law, and will therefore always give way to the clearly ascertained intention of the testator,²⁴ although such is not universally the case; in a few of the States it is held to be a rule of law inexorably forbidding the limitation of a remainder to the heir or purchaser, in

The rule in Shelley's Case as a rule of construction.

¹ Gen. St. Kans. 1889, ¶ 7256.

² St. 1894, § 2345.

³ Rev. St. 1883, p. 604, § 6.

⁴ Pub. St. 1882, p. 744, § 4.

⁵ How. St. 1882, § 5544. A devise to one, "and after his decease said real estate is to belong to his heirs," gives a life estate to the first taker: *Defreese v. Lake*, 109 Mich. 415, 417.

⁶ Gen. St. 1891, § 3984.

⁷ Rev. St. 1889, § 8838; *Emmerson v. Hughes*, 110 Mo. 627, 631.

⁸ *Cloutman v. Bailey*, 62 N. H. 44, 45.

⁹ But only where the first taker has lineal descendants; as to collateral heirs the rule is still in force: *Lippincott v. Davis*, 59 N. J. L. 241.

¹⁰ *Banks & Br. Rev. St. 1896*, p. 1792, § 28.

¹¹ *Bates' Ann. St. 1897*, § 5968.

¹² *Laws, 1887*, § 3003.

¹³ *Code, 1891*, p. 634, § 11; *Bigley v. Watson*, 98 Tenn. 353, 373.

¹⁴ *Code, 1887*, § 2423. For a case where the statute was held not to apply, see *Hood v. Haden*, 82 Va. 588, 596; and where it was held to apply, *Stokes v. Van Wyck*, 83 Va. 724.

¹⁵ *Code, 1887*, p. 617, § 11.

¹⁶ *Sanb. & B. Ann. St. 1898*, § 2052; *Jones v. Jones*, 66 Wis. 310, 318.

¹⁷ *Locke v. Barbour*, 62 Ind. 577, 582; *Gonzales v. Barton*, 45 Ind. 295; *Hadlock v. Gray*, 104 Ind. 596; *Hochstedler v. Hochstedler*, 108 Ind. 506.

¹⁸ *Thomas v. Higgins*, 47 Md. 439, 450, citing earlier Maryland cases: *Warner v. Sprigg*, 62 Md. 14, 21.

¹⁹ *Starnes v. Hill*, 112 N. C. 1, 14; *Nichols v. Gladden*, 117 N. C. 497. "Though antiquated and based on reasons upon reasons which have long ceased to exist": *Chamblee v. Broughton*, 120 N. C. 170.

²⁰ *Guthrie's Appeal*, 37 Pa. St. 9, 12; *Cockin's Appeal*, 111 Pa. St. 26.

²¹ *Baker v. Scott*, 62 Ill. 86, 90; *Belslay v. Engel*, 107 Ill. 182, 186; *Wicker v. Ray*, 118 Ill. 472; *Wolfer v. Hemmer*, 144 Ill. 554.

²² *Blake v. Stone*, 27 Vt. 475; *Smith v. Hastings*, 29 Vt. 240.

²³ See *Hardage v. Stroope*, 58 Ark. 303, 310.

²⁴ *De Vaughn v. Hutchinson*, 165 U. S. 566; *Millett v. Ford*, 109 Ind. 159; *Granger v. Granger*, 147 Ind. 95; *Henderson v. Henderson*, 64 Md. 185; *Zavitz v. Preston*, 96 Iowa, 52.

the same instrument, whether deed or will, by which the ancestor takes a preceding freehold.¹ It is also to be remembered, that, as to personal property bequeathed, it vests absolutely in the first taker, and consequently goes to his executor or administrator, whether he has issue or not, by words which would create an estate tail in real property.²

Thus, a legacy to A. and his heirs,³ or to A. and the heirs of his body,⁴ or a legacy in any equivalent expression, is an absolute legacy to A., and this although the gift be through an intervening trustee;⁵ unless it be clear from the context that the testator used these words with the intention of conferring a gift upon the "heirs," etc., treating them, for instance, as synonymous with children, in which case they take as purchasers.⁶ So the word "heirs" may mean children, "Heirs" may where there is a conditional devise to B. if A. should mean children. die "without heirs;"⁷ and where there is a devise to the heirs of one living,⁸ in which case, in some [* 902] States, the class is subject to open and let in afterborn children.⁹ It is held in these cases, that the maxim *Nemo est hæres viventis* does not apply when it is apparent from the will who were intended as the recipients of the testator's bounty.¹⁰ So the context may show that by "heirs" the testator meant children

¹ Kleppner v. Laverty, 70 Pa. St. 70, 73. See also Bassett v. Hawk, 118 Pa. St. 94, 106; Lippincott v. Davis, 59 N. J. L. 241; Leathers v. Gray, 101 N. C. 162. "The only method in which an instrument employing the word 'heirs' can be shown not to be within the rule is by showing that the word was not employed in its strict legal sense": Schofield, J., in Carpenter v. Van Olinder, 127 Ill. 42, 50, quoting from Allen v. Craft, 109 Ind. 476, and overruling Belslay v. Engel, 107 Ill. 182, to the effect that the testator's intention should be carried out. McSherry, J., in Hughes v. Nicklas, 70 Md. 484, says: "No matter how evident the intention to create a life estate may be, when the words used bring the gift within the rule, the intention must give way, and the fixed rule must be followed." To same effect, Nichols v. Gladden, 117 N. C. 497.

² Smith v. Grier, 88 Ala. 414; ante, § 422, p. * 898; Cooke v. Buckline, 18 R. I. 666.

³ Wintermute v. Snyder, 3 N. J. Eq. 489, 498.

⁴ Childers v. Childers, 21 Ga. 377;

Thomas v. Benton, 4 Desaus. 17; Weatherford v. Tate, 2 Strobb. Eq. 27.

⁵ Smith v. Johnson, 21 Ga. 386.

⁶ Jarvis v. Quigley, 10 B. Mon. 104; Bowers v. Porter, 4 Pick. 198, 202; Granger v. Granger, 147 Ind. 95.

⁷ Haley v. Boston, 108 Mass. 576; King v. Beck, 15 Ohio, 559, 563; Haverstick's Appeal, 103 Pa. St. 394; Hinton v. Milburn, 23 W. Va. 166; Beatty v. Trustees, etc., 39 N. J. Eq. 452, 463; Gambrill v. Forest Lodge, 66 Md. 17; Underwood v. Robbins, 117 Ind. 308.

⁸ Nutter v. Vickery, 64 Me. 490, 499; Davis v. Davis, 39 N. J. Eq. 13; Bailey v. Patterson, 3 Rich. Eq. 156; Williamson v. Williamson, 18 B. Mon. 329, 370; Simms v. Garrot, 1 Dev. & B. Eq. 393 (excluding children born after testator's death); Knight v. Knight, 3 Jones Eq. 167 (same).

⁹ Shepherd v. Nabors, 6 Ala. 631, 636; Bullock v. Bullock, 2 Dev. Eq. 307, 316; Roberts v. Ogbourne, 37 Ala. 174, 178.

¹⁰ Morton v. Barrett, 22 Me. 257, 263; Lott v. Thompson, 36 S. C. 38; Montignani v. Blade, 145 N. Y. 111.

living at the date of the will,¹ or that he meant the legatees in the will.²

Where the words "heirs," "legal heirs," etc., are used in a will, not to denote substitution or succession, but as designating legatees, they will be construed in their primary legal sense, unless it appear from the context that the testator used them in a different sense.³ Hence gifts to heirs, whether of the testator or of others, when unexplained and uncontrolled by the context, are gifts to the persons appointed by law⁴ to succeed to the property of a deceased person in case of intestacy,⁵—of the real estate in the strict common-law sense,⁶ but of personal or real estate in America,⁷ where the personal and real property generally proceeds to the same person.⁸ The widow, being neither next of

¹ *Watson v. Watson*, 110 Mo. 164, 168; see also *Albert v. Albert*, 68 Md. 352, 367.

² *Graham v. De Yampert*, 106 Ala. 279.

³ *Gushman v. Horton*, 59 N. Y. 149, 151; *Leake v. Watson*, 60 Conn. 498, 506; *Lord v. Bourne*, 63 Me. 368, 380; *Hochstedler v. Hochstedler*, 108 Ind. 506, 510; *Irvine v. Newlin*, 63 Miss. 192, 196; *Ryan v. Allen*, 120 Ill. 648, 654; *Dodge's Appeal*, 106 Pa. St. 216; *Hascall v. Cox*, 49 Mich. 435; *Fabens v. Fabens*, 141 Mass. 395; *Chew v. Heller*, 100 Mo. 362, 371; *Wallace v. Minor*, 86 Va. 554. But an intention actually expressed, or to be gathered from the language of the will, will prevail over the technical meaning of the word: *Alexander v. Wallace*, 8 Lea, 569, 572; *Webster v. Morris*, 66 Wis. 366, 392; *Peet v. Railway*, 70 Tex. 522; *Lawton v. Corlies*, 127 N. Y. 100; *Swenson's Estate*, 55 Minn. 300.

⁴ Where the gift is to the heirs of another than the testator, the law in force when such person dies will determine who such heirs are, rather than the law in force at the testator's death: *Lincoln v. Perry*, 149 Mass. 368, 374. Similarly where the gift is to the "next of kin": *infra*, p. *905, and cases there cited. But when the gift is after the expiration of a particular interest to the testator's heirs, those take who are his heirs at the time of his death, not at the time of taking, in the absence of words indicating the contrary: *Stewart's Estate*, 147 Pa. St. 383; and see *Kellett v. Shepard*, 139 Ill. 433.

⁵ 2 Jarm. *61. See exhaustive note of

Bigelow on this subject, citing and commenting on numerous American cases. In such case the beneficiaries take *per stirpes*, unless the words used in the will import an intention that the property be given *per capita*: *Richards v. Miller*, 62 Ill. 417, 425; *Best v. Farris*, 21 Ill. App. 49, 51; *Woodward v. James*, 44 Hun, 95, 99; s. c. 115 N. Y. 346, 358; *Eyer v. Beck*, 70 Mich. 179; *Conklin v. Davis*, 63 Conn. 377; *Kelley v. Vigas*, 112 Ill. 242; *De Laurencel v. De Boom*, 67 Cal. 362; *Cummings v. Cummings*, 146 Mass. 501, 507; and they take *per stirpes*, although the will directs that they shall take "by purchase": *Preston v. Brant*, 96 Mo. 552.

⁶ "Heirs at law" construed in the common-law signification in a devise of real estate to a particular person and to his heirs at law, to vest at some future time, upon the occurrence of some designated contingency: *Lombard v. Boyden*, 5 Allen, 249, 254. See the case of *Aspden's Estate*, 2 Wall. (C. Ct.) 368, as to the law of Pennsylvania concerning the import of the phrase "heirs at law." The ordinary construction will yield to the testator's intention; as when it is contemplated that real estate shall be changed into money before going to the heirs at law, then these words are held to mean those entitled to succeed to personal estate in case of intestacy: *Lawrence v. Crane*, 158 Mass. 392.

⁷ *Porter's Appeal*, 45 Pa. St. 201; *Eby's Appeal*, 50 Pa. St. 311; *McKee's Appeal*, 104 Pa. St. 571; *White v. Stanfield*, 146 Mass. 424; *Lawton v. Corlies*, 127 N. Y. 100.

⁸ *Evans v. Godbolt*, 6 Rich. Eq. 26, 35.

kin nor heir, is not generally included in the class designated by these words,¹ unless she be declared an heiress by statute,² in which case she may³ or may *not be included.⁴ The [* 903] same rule prevails as to the husband; he is not included in a devise or bequest to the heir or next of kin,⁵ unless the statute makes him an heir.⁶ Parol evidence is not admissible to show in what sense the testator meant the word "heir."⁷ It may also be mentioned here, that a devise to the testator's heirs is nugatory, because in such case the donees take under the law of descent and distribution.⁸

The word "issue" — popularly expressing progeny, children, offspring⁹ — is equivalent in its technical significance with "descendants," comprehending every degree,¹⁰ unless restrained by the context.¹¹ Thus "issue" is held to mean *prima facie* the same thing as "heirs of the body," and is to be construed as a word of limitation;¹² a devise to the "lawful issue" of A., to mean A.'s children;¹³ or

¹ Lord v. Bourne, 63 Me. 368, 379; Richardson v. Martin, 55 N. H. 45; Dodge's Appeal, 106 Pa. St. 216.

² See *ante*, § 67.

³ Rusing v. Rusing, 25 Ind. 63; Peacock v. Albin, 39 Ind. 25, 29; Evans v. Godbolt, 6 Rich. Eq. 26, 38; Henderson v. Henderson, 1 Jones L. 221; Evans v. Harlee, 9 Rich. L. 501, 511; Gibbon v. Gibbon, 40 Ga. 562, 575; Eby's Appeal, 84 Pa. St. 241, 245; Ashton's Estate, 134 Pa. St. 390; Alexander v. Masonic, &c., 126 Ill. 558, 564; Proctor v. Clarke, 154 Mass. 45 (but refusing to extend the doctrine so as to make her an heir to her life interests); Lyons v. Yarex, 100 Mich. 214.

⁴ Bailey v. Bailey, 25 Mich. 185; Tillman v. Davis, 95 N. Y. 17, 25, 29, reviewing the authorities; Jarboe v. Hey, 122 Mo. 341; Phillips v. Carpenter, 79 Iowa, 600.

⁵ Ivins's Appeal, 106 Pa. St. 176; Peet v. Railway, 70 Tex. 522, 527; Mason v. Bailey, 6 Del. Ct. 129.

⁶ Richards v. Miller, 62 Ill. 417, 422; Lincoln v. Perry, 149 Mass. 368, 374.

⁷ Aspden's Estate, 2 Wall. (C. Ct.) 368, 442; Richards v. Miller, 62 Ill. 417, 426.

⁸ Seabrook v. Seabrook, 10 Rich. Eq. 495, 503. "He who directs his property to be distributed as the law would have distributed it, might as well hold his tongue, for he, in effect, merely wills to die intestate": p. 508. Sedgwick v.

Minot, 6 Allen, 171; Story, J., in Barnitz v. Casey, 7 Cr. 456, 464. See also Root's Will, 81 Wis. 263; Hunt v. Lucas, 68 Mo. App. 518, 525; Landie v. Simms, 1 App. D. C. 507. This doctrine is said to apply only where the devisee is the *sole* heir to the land devised: Hinton, J., in Biedler v. Biedler, 87 Va. 300, 303; and of course is inapplicable if inconsistent with other provisions of the will: Dunlap v. Fant, 74 Miss. 197.

⁹ Webster.

¹⁰ 2 Jarm. * 101.

¹¹ Held to include, as "lawful issue," an illegitimate child, legitimated by act of legislature: Miller's Appeal, 52 Pa. St. 113, 115; but not to include an illegitimate child generally, although such child is by statute a lawful heir of the body: Black v. Cartmell, 10 B. Mon. 188, 193. The word "issue" is to be construed either as a word of limitation or of purchase, as will best effectuate the testator's intention gathered from the whole instrument: Parkhurst v. Harrower, 142 Pa. St. 432, 435; the word in its natural, and often in its legal sense, imports "children": Thomas v. Levering, 73 Md. 451, 453.

¹² Kleppner v. Laverty, 70 Pa. St. 70; to similar effect, Kingsland v. Rapelye, 3 Edw. Ch. 1; Drake v. Drake, 134 N. Y. 220, 225; Wistar v. Scott, 105 Pa. St. 200, 214; Shatters v. Ladd, 141 Pa. St. 349.

¹³ Taylor v. Taylor, 63 Pa. St. 481, 484; Edwards v. Bibb, 43 Ala. 666, 672.

"issue" may, and *prima facie* does, mean all descendants.¹ Distribution to the issue is made *per capita*,² unless otherwise directed by the testator.³

Issue takes *per capita* unless otherwise directed in will.

When there is a devise to several persons belonging to different classes, of different degrees of relationship to testator, and the will leaves in doubt the testator's intention, distribution will be made *per stirpes*;⁴ but where there is but one class, the division should be made *per capita*; hence in a devise to all such as may be a certain person's "heirs" at a given period, the word "heirs" is used as a term designating the devisees at that time, and they will take *per capita*, if no different intent can be gathered from the words in the will;⁵ and a gift to one person and to the children of another person, who stand in the same relation to the testator, is a gift to the legatees *per capita*, and this though the parents of some of the legatees be alive, if the will shows an intention to exclude the parents as if they were dead.⁶

The term "descendants" comprises every individual proceeding from the stock or family referred to,⁷ and does not, without very clear indications of the testator's intent by the context, include collateral heirs, or heirs generally, or next of kin, but only the issue of the body of the person named.⁸ A devise or legacy to descendants, [*904] not otherwise qualified, is distributable between them *per capita*; but the ascertained intention of the testator will govern in this respect also.⁹

"Descendants" excludes collateral heirs unless plainly included by the testator.

They take *per capita*.

A gift to "relations," without a particular specification, is necessarily construed as a gift to those who would take the estate in case of intestacy,¹⁰ because in its widest sense it would include every degree of consanguinity, and thus render the gift void for uncertainty.¹¹ So a power

"Relations" construed as those who would take by descent;

¹ Tier v. Pennell, 1 Edw. Ch. 354; Wistar v. Scott, *supra*; Hills v. Barnard, 152 Mass. 67, 73; Soper v. Brown, 136 N. Y. 244. In Massachusetts it is held that "when personal property is given in trust to pay the income to a person during life, and on the death of such person to pay the principal sum to his issue then living," that the issue presumably include all lineal descendants, and that they take *per stirpes*: Jackson v. Jackson, 153 Mass. 374, criticising English cases.

² Jarm., ch. xxix. pl. iii.; Gest v. Way, 2 Whart. 445, 451.

³ Cushney v. Henry, 4 Pai. 345, 354; Hills v. Barnard, *supra*.

⁴ West v. Rassman, 135 Ind. 278, 292.

⁵ Bisson v. Railroad, 143 N. Y. 125, with a discussion of the cases.

⁶ Scott's Estate, 163 Pa. St. 165.

⁷ Wms. Ex. [1113].

⁸ Bates v. Gillett, 132 Ill. 287, 297; Tichenor v. Brewer, 98 Ky. 349; Baker v. Baker, 8 Gray, 101, 119; Hamlin v. Osgood, 1 Redf. 409, 411; Barstow v. Goodwin, 2 Bradf. 413.

⁹ Barstow v. Goodwin, 2 Bradf. 413, 416; Brown v. Brown, 6 Bush, 648.

¹⁰ 2 Jarm., ch. xxix. pl. vi.; Wms. Ex. [1116], pl. 4; Drew v. Wakefield, 54 Me. 291, 298; Gallagher v. Crooks, 132 N. Y. 338, announcing that persons within the Statute of Distributions would take, in wills relating to personalty, but leaving undecided the effect of the word in case of a devise.

¹¹ Brayton, J., in Huling v. Fenner, 9 R. I. 410; Gallagher v. Crooks, *supra*.

to appoint among the relations, without the power of selection, restrains the donee to a distribution among the next of kin and their representatives, according to the statute.¹ If the gift be to "poor relations,"² or "near relations," it will make no difference,³ either as to personal or real estate.⁴ But under a power to dispose to and amongst "such" of the testator's "relations as" the donee of the power "shall think proper," such donee may appoint exclusively to any of the relations,⁵ and the words "two nearest relatives" are sufficiently descriptive to operate without reference to the Statute of Distribution.⁶ "Nearest relations" will exclude nephews and nieces and applies to when there are surviving brothers⁷ and sisters, and next of kin by blood; applies properly only to those who are of kin by blood; hence, relations by marriage are not included in a bequest to "relations" generally; a wife cannot, therefore, claim under a bequest to her husband's relations, nor a husband as a relation to his wife.⁸ But a gift to be divided between testator's relations and those of his wife goes one-half to the relatives of each.⁹

A devise or bequest to "next of kin" goes to the nearest blood relations in equal degree of the person mentioned, without reference to the Statute of Distribution.¹⁰ Hence, nephews and nieces take under such a gift, to the exclusion of the representatives of deceased nephews and nieces,¹¹ * and a surviving brother in exclusion of the [* 905] children of a deceased brother or sister.¹² Where, however, the testator gives to his next of kin in classes, and leaves the proportions doubtful, the several classes will take according to the Statute of Distribution.¹³ The term does not naturally include husband and husband band or wife;¹⁴ but a bequest to the testator's executor and wife. in trust for the testator's "legal representatives and next of kin" was held to entitle the widow as a legal representative.¹⁵

¹ Varrell v. Wendell, 20 N. H. 431, 435.

² McNeilledge v. Galbraith, 8 S. & R. 43, 45.

³ Handley v. Wrightson, 60 Md. 198, 206.

⁴ McNeilledge v. Barclay, 11 S. & R. 103.

⁵ Portsmouth v. Shackford, 46 N. H. 423, 427; Young's Appeal, 83 Pa. St. 59.

⁶ Ennis v. Pentz, 3 Bradf. 382.

⁷ Locke v. Locke, 45 N. J. Eq. 97, with a collection of cases made by the reporter on the construction given to the term.

⁸ Esty v. Clark, 101 Mass. 36; Storer v. Wheatley, 1 Pa. St. 506; Keniston v. Adams, 80 Me. 290, 294.

⁹ Young's Appeal, 83 Pa. St. 59. And so of a gift to the next of kin of each: Jones v. Oliver, 3 Ired. Eq. 369.

¹⁰ 2 Jarm., ch. xxix. pl. iv.; Wms. Ex. [1120]; Swasey v. Jaques, 144 Mass. 135, and authorities cited. See remarks of Fuller, C. J., in Blagge v. Balch, 162 U. S. 439, 464, and cases referred to.

¹¹ Redmond v. Burroughs, 63 N. C. 242, 245.

¹² Swasey v. Jaques, 144 Mass. 135; Elmsley v. Young, 2 Myl. & K. 780, commenting on and overruling former cases holding otherwise.

¹³ Harris's Estate, 74 Pa. St. 452; Dunlap's Appeal, 116 Pa. St. 500, 504.

¹⁴ See *supra*, in case of "relations" and also "heirs"; Haraden v. Larabee, 113 Mass. 430; Ivins's Appeal, 106 Pa. St. 176; Platte v. Mickle, 137 N. Y. 106.

¹⁵ Johnson v. Johnstone, 12 Rich. Eq. 259.

The natural meaning of "next of kin" points to such at the death of the person whose next of kin is spoken of,¹ unless the context demonstrates that the person to take is to be ascertained at a future period;² or where, for instance, it is the testator's intention to exclude one named as tenant for life from the description of next of kin, to whom he gives the remainder.³ In such case, the expression must be understood as the testator's next of kin living at the death of the life tenant.⁴

The term "family" may be variously construed, depending upon the subject-matter of the gift, and the object of the testator.⁵ It comprises, in its narrowest sense, father, mother, and children,⁶ not including step-children.⁷ It may include sons or daughters after their majority;⁸ an illegitimate child;⁹ all the individuals who live under the authority of another, including the servants of the family;¹⁰ and, in the widest sense, all the relations who descend from a common ancestor, or who spring from a common root.¹¹ Sometimes the meaning of the word is so vague that the gift is void for uncertainty.¹² Without reference

"Family" means in its narrowest sense parents and children. In a wider sense all who live under the authority of another, including servants, or all the relations who descend from a common stock.

[*906] to anything in the * context, the word will be usually held to comprise the same persons as next of kin or relations¹³ in respect of personalty,¹⁴ and heirs in respect of realty.¹⁵ It may¹⁶ or may not¹⁷ refer to the husband or wife, as found to be the testator's intention. A gift to "A. and family jointly," without more, was held to be divisible in equal shares between A., his wife, and daughter, excluding a child born after the testator's decease¹⁸ and a gift to be divided between A.'s family and

¹ *Brent v. Washington*, 18 Gratt. 526, 535; *Fargo v. Miller*, 150 Mass. 225.

² *Fargo v. Miller*, *supra*; *Williams v. Davies*, L. R. 44 Chanc. Div. 484.

³ *Wms. Ex.* [1123] with numerous English and American authorities.

⁴ *Wms. Ex.* [1124]. But see *Kellett v. Shepard*, 139 Ill. 433, 444, and authorities.

⁵ 2 *Jarm. *90*. See *Crosgrove v. Crosgrove*, 69 Conn. 416.

⁶ *Hough, J.*, dissenting, in *Mercier v. West Kansas Land Co.*, 72 Mo. 473, 492; *Whelan v. Reilly*, 3 W. Va. 597, 610.

⁷ *Bates v. Dewson*, 128 Mass. 334.

⁸ *Chicago & N. W. R. R. v. Chisholm*, 79 Ill. 584, 587. But the term strictly construed may not include adult children living separate from the household, and not forming part thereof: *Wood v. Wood*, 63 Conn. 324, and cases cited.

⁹ *Lambe v. Eames*, L. R. 6 Ch. App. 597, 601.

¹⁰ *Wilson v. Cochran*, 31 Tex. 677, 679.

¹¹ *Rap. & L. Law Dict.*; *Bouvier*; see *ante*, § 88.

¹² *Jarm. *90*; *Tolson v. Tolson*, 10 Gill & J. 159, 174; *Harper v. Phelps*, 21 Conn. 257, 267. See on this point *Hill v. Bowman*, 7 Leigh, 650, 659.

¹³ *Supra*, § 423; *Huling v. Fenner*, 9 R. I. 410, 413.

¹⁴ *Wms. Ex.* [1125].

¹⁵ *Heck v. Clippenger*, 5 Pa. St. 385, 389.

¹⁶ *Per Hoar, J.*, in *Bowditch v. Andrew*, 8 Allen, 339, 341; *Chase v. Chase*, 2 Allen, 101, 104; *Bradlee v. Andrews*, 137 Mass. 50, 55.

¹⁷ *Bowditch v. Andrew*, 8 Allen, 339, 342.

¹⁸ *Langmaid v. Hurd*, 64 N. H. 526. See also *Crosgrove v. Crosgrove*, 69 Conn. 416.

B. was held to go one-half to B., and one-half to A.'s children, excluding A.¹

The term "legal representatives," or "personal representatives," applies strictly to executors and administrators; but as it is improbable that gifts to them should be intended for their own benefit, these words have sometimes been construed as meaning the *next of kin*, — a kind of "representative" in the sense of the Statute of Distribution; ² particularly when it is evident that substitution was contemplated.³ But if there is nothing in the context of the will to show that the words "legal representatives" are to have any other than their ordinary meaning, they are to be understood as meaning executors and administrators.⁴

So a gift to one as "executor" is presumed to be given to him in his character as executor,⁵ and hence fails if he do not become such; his qualification as executor is construed as a condition precedent, implied if not expressed,⁶ unless a different intention may be inferred from the nature of the legacy or other circumstances arising in the will,⁷ and the statutory provisions allowing commissions may weaken but do not destroy the presumption;⁸ but if it appear that the testator intended him to take the legacy as an individual, for personal reasons, the legatee will be entitled to take, even though he refuse to qualify.⁹ So where there was a gift to trustees for "the faithful performance of their trust," the gift to the trustees fails, if the trust fails.¹⁰

¹ *Silsby v. Sawyer*, 64 N. H. 580.

² 2 Jarm. *111; *Farnam v. Farnam*, 53 Conn. 261, 290; *In re Hall*, 2 Dem. 112, and authorities cited; *Murray v. Strang*, 28 Ill. App. 608. So in *Albert v. Albert*, 68 Md. 352, 370, the term "executors and administrators" was construed to mean "children."

³ *Phyfe v. Phyfe*, 3 Bradf. 45, 52; *Gibbons v. Fairlamb*, 26 Pa. St. 217; *Drake v. Pell*, 3 Edw. Ch. 251, 270; *Brokaw v. Hudson*, 27 N. J. Eq. 135; *Thompson v. Young*, 25 Md. 450, 461; *Eagleton v. Horner*, L. R. 37 Ch. Div. 695, 711.

⁴ *Cox v. Curwen*, 118 Mass. 198; *Halsey v. Paterson*, 37 N. J. Eq. 445, 448; *Tarrant v. Backers*, 63 Conn. 277. See also *Briggs v. Walker*, 171 U. S. 466, 471.

⁵ And before it can vest in him individually, the intention must be plainly manifested: *Foster v. Winfield*, 142 N. Y.

327. Where a legacy was given to an executor "for his care and trouble in executing that office," it was held that, if he put the estate to expense by refusing to act for a time, such expense could be deducted from his legacy: *Morris v. Kent*, 2 Edw. Ch. 175.

⁶ *Rothmaler v. Myers*, 4 Desaus. 215, 223.

⁷ *Kirkland v. Narramore*, 105 Mass. 31, citing English cases.

⁸ *Billingslea v. Moore*, 14 Ga. 370, 373. As to whether legacies given to executors should be considered as in lieu of their statutory compensation or not, and as to the effect of such provisions, see *post*, § 532.

⁹ *Halsey v. Convention*, 75 Md. 275, 285; *Chassaing v. Durand*, 85 Md. 420.

¹⁰ *Batchelder, Petitioner*, 147 Mass. 465, 470.

[* 907]

* CHAPTER XLVII.

TESTAMENTARY DISPOSITIONS CONTROLLED BY PUBLIC POLICY.

§ 424. **Gifts for Immoral or Superstitious Purposes.**—It is obvious that, if the language of a will, read with the view of ascertaining the testator's intention, is ambiguous or unintelligible, and neither the ordinary rules of construction nor extrinsic evidence where such is applicable are sufficient to enable the expounder to deduce a rational meaning therefrom, the will is to that extent simply void; for if the testator cannot be understood, it is the same as if he had not spoken. The same result necessarily follows where the testator undertakes to do what the law prohibits: a devise or legacy in contravention of law is void. Hence, a gift in furtherance of any illegal purpose is void.¹ So, by force of English statutes,² gifts for superstitious purposes were forfeited to the crown,³ or absolutely avoided;⁴ including the finding or maintenance of a stipendiary priest, or for the maintenance of an anniversary or obit, or of any light or lamp in any church or chapel, and the like;⁵ and under the general policy of the English law the saying of masses for the testator's soul was held a superstitious use, and the bequest for such would go to the one who would take but for the gift.⁶ In the United States, however, the absence of church establishments and of all religious distinctions and prohibitions has almost obliterated

Unintelligible provisions of a will are void.

Gifts for illegal purposes are void.

Gifts for superstitious purposes void by English statutes,

and policy of the common law.

Otherwise in America.

[* 908] the legal cognizance of superstitious uses. "We have * no established religion," says Nichols, J., in deciding a case involving the validity of a gift to the religious society of Shakers;⁷

¹ Schoul. Ex. § 463; *Habershon v. Vardon*, 7 E. L. & Eq. 228, avoiding a gift for the political restoration of the Jews to Jerusalem: *Manners v. Library Co.*, 93 Pa. St. 165, 172; *Thrupp v. Collett*, 26 Beav. 125. Conditions in a will manumitting a slave, which seek to create a condition intermediate between freedom and slavery are void: *Jones v. Jones*, 92 Va. 590.

² 23 Hen. VIII. c. 10; 1 Edw. VI. c. 14.

³ 2 Redf. on Wills, 495; see *Rex v. Portington*, 1 Salk. 162.

⁴ 1 Jarm. * 205.

⁵ Wms. Ex. [1055].

⁶ 1 Jarm. * 205; *West v. Shuttleworth*, 2 Myl. & K. 684, 697; *Attorney-General v. Fishmongers' Co.*, 2 Beav. 151, 171; *Yeap Cheah Neo v. Ong Cheng Neo*, L. R. 6 P. C. 381, 396. See American cases on the question whether legacies for Masses are valid or not at the end of this section.

⁷ *Gass v. Wilhite*, 2 Dana, 170, 176.

“by our Constitution, all religions are viewed as equally orthodox. The recognition which religion generally has obtained from common consent and legislative enactments among us, as a valuable portion of the institutions of our society, must prevent the courts from saying that every religious use is a superstitious use, and, by consequence, must compel them, in fulfilment of the spirit of the Constitution, to declare every religious use a pious use. It is neither for the Religious use is a pious use ; legislature nor the judiciary, in this State, to discriminate and say what is a pious and what a superstitious use. To do so, would necessarily infringe upon the great constitutional guaranty of a perfect freedom and equality in all religions.” Text-writers and courts incline, generally, to the view that in the United States there can be no such thing as a “superstitious use,” in the sense of the English statute.¹ But in Pennsylvania it is held that Christianity is a part of the common law of that State, that maliciously to vilify it is an indictable offence,² that a hall “desecrated in perpetuity for the free discussion of religion, politics, *et cetera*, under the direction of a society of infidels,” would be likely — “sure, indeed” — to cause the religion revealed in the Bible to be openly reviled, ridiculed, or blasphemed.³ Hence, a devise to “The Infidel Society,” for the purpose of building such a hall, is not a charity ;⁴ and a court of equity will not enforce a trust the object of which is the propagation of atheism, infidelity, immorality, or hostility to the existing form of government.⁵

In England, no distinction is now made in favor of any particular creed, nor against any, if the bequest has no tendency to * corrupt the morals, or subvert religion.⁶ In Ireland, a be- [* 909] quest to have Masses said for the soul of the testator is held

¹ Hoeffler v. Cloghan, 171 Ill. 462, 469 ; Holland v. Alcock, 108 N. Y. 312, 329 ; Freeman, J., in Frierson v. General Assembly, 7 Heisk. 683, 707 ; Gibson, C. J., in Methodist Church v. Remington, 1 Watts, 218, 224 ; Bigelow, in his American edition of Jarman, note 1 to vol. i. p. * 207 ; 2 Redf. on Wills, 495 ; Schoul. Ex., § 463 ; Perkins, in his American edition of Wms. Ex. [1055], note (s¹) ; Magill v. Brown, in note to Blemon's Estate, *per* Baldwin, J., Brightly, 338, 373 ; Hagemeyer v. Hanselman, 2 Dem. 87.

² Updegraph v. Commonwealth, 11 Serg. & R. 394 ; Vidal v. Girard, 2 How. (U. S.) 127, 198.

³ Zeisweiss v. James, 63 Pa. St. 465, 471.

⁴ And therefore void, the society not being incorporated: Zeisweiss v. James, *supra*. But for the purpose of invalidating

such a bequest by bringing it within the operation of the statute declaring void any bequest to a religious use made within a month of the testator's death (as to which subject see next section), it is there held that a gift in aid of, or to antagonize, any form of worship or service, is a religious use, and void: Knight's Estate, 159 Pa. St. 500.

⁵ Manners v. Library Co., 93 Pa. St. 165, 172.

⁶ See remarks of Lord Romilly in Thornton v. Howe, 31 Bear. 14, 20, *et seq.*, where a bequest for propagating the religious writings of a woman was held not void on the ground of superstitious use, who therein proclaimed herself with child by the Holy Ghost, etc., — a delusion similar to those held inconsistent with testamentary capacity in Smith v. Tebbitt, L. R. 1 P. & D. 398, 405.

not void as a superstitious use, but valid.¹ So it was held in a New York case, that a bequest to have prayers offered in a Roman Catholic church for the repose of the testator's soul and the souls of all others who may be in purgatory, is valid;² but this case was reversed by the New York Court of Appeals, principally on the ground that in such case there could be no defined beneficiary who could demand the execution of the trust.³ The same doctrine is announced in Wisconsin and for the same reason.⁴ In Alabama, also, a bequest to a church "to be used in solemn Masses" for the repose of the testator's soul, was held incapable of being enforced, and to be void,⁵ as being neither a direct bequest to the church for its general uses, nor creating a charitable use, nor creating a valid private trust. But in a recent case decided by the Supreme Court of Kansas,⁶ the difficulty constraining the New York, Wisconsin, and Alabama courts to avoid bequests for Masses was not deemed insuperable. A bequest to a priest of the Roman Catholic Church for the celebration of Mass for the souls of the testator and another was construed as a gift direct to the donee with an injunction to the performance of the ceremonial; and the court pointed out that neither the English common law, which avoided such bequests as superstitions, nor any of the statutes enacted under Henry VIII. and Edward VI. against superstitious uses were ever in force in America, as being opposed to the spirit of religious toleration which has always prevailed in this country.⁷ So also bequests to churches in trust for the saying of Masses for the repose of the soul of the testator or others have been recently sustained, on the ground that they were valid charitable bequests, in Illinois,⁸ Massachusetts,⁹ and Ireland.¹⁰

Validity of
legacies for
Masses.

¹ Read v. Hodgins, 7 Ir. Eq. 17, 34, reporting also the case of Commissioners of Charity v. Walsh, in a note.

² Holland v. Smyth, 40 Hun, 372.

³ Holland v. Alcock, 108 N. Y. 312.

⁴ McHugh v. McCole, 72 N. W. 631, 635.

⁵ Fistorazzi v. St. Joseph Church, 104 Ala. 327, Brickell, C. J., dissenting.

⁶ Harrison v. Brophy, 51 Pac. R. (Kans.) 883. So also in Iowa a bequest to trustees for the benefit of a certain church, the testator directing that "they or their successors shall invest said money for the benefit of said church, and that service be held in said church for my soul yearly," was a valid bequest, the court holding the gift not to be absolutely conditional on the performance of such yearly services: Seda v. Huble, 75 Iowa, 429.

⁷ It would seem to be an intolerant interference with the religious faith of a Catholic to deprive him of the power of willing his property, in accordance with his conviction, so as to benefit his soul, or the souls of others; and a bequest in favor of a priest or of a church, coupled with a request to celebrate Masses, even if the testator's soul were incapable of being a beneficiary, might be looked on as being in furtherance of the religion professed by the testator, and therefore a pious use or charity. See cases cited *supra*; Dillon on Bequests for Masses (Chicago, 1896); 46 Central Law J., p. 300.

⁸ Hoeffer v. Cloghan, 171 Ill. 462.

⁹ Schouler, Petitioner, 134 Mass. 426.

¹⁰ Attorney-General v. Hall (1897), 2 Ir. R. 426 (on appeal).

§ 425. **Gifts prohibited by the Statute of Mortmain.**—It has at all times been the policy of the law strongly to favor gifts to charitable uses, whether of lands or personal property. This is evidenced by the enactment of a statute authorizing testamentary appointments to corporations for charitable uses,¹ and by the liberal construction given it by the courts, validating devises to such uses by tenants in tail, etc.² The practice of absorbing lands in the hands of ecclesiastics in perpetuity, thereby withdrawing them from public and feudal charges,³ led to a limitation of the rights of corporations, sole and aggregate, taking away their common-law capacity of acquiring and holding lands without the king's license, by a series of statutes known as statutes of mortmain.⁴ These, applying only to real property, were originally levelled at the religious houses, as they were introduced during the establishment and grandeur of the Roman Church; but the later acts included lay corporations as well, and made lands conveyed to any third person for the use of a corporation liable to forfeiture, in like manner as if conveyed

Statutes of mortmain against amassing lands in dead hand

not generally re-enacted in America; but corporations limited in power to hold land.

directly in mortmain.⁵ * It is said that the statutes of mortmain have not been re-enacted in this country, and are not generally in force,⁶ except as corporations may be restricted in the power to acquire or hold lands, either by their charter, or by force of the statutes concerning wills; which subject will be discussed hereafter.⁷

The act popularly known as the Statute of Mortmain,⁸ more accurately the "Charitable Uses Act,"⁹ prohibits the gift, conveyance, or settlement to or upon any person or body corporate of real property, or of personal property to be laid out in the purchase of real property, in trust or for the benefit of any charitable uses whatever, except by deed executed with certain formalities and enrolled a certain time before the donor's death, to take

¹ 43 Eliz. c. 4. See on the subject of gifts to charitable uses, *post*, §§ 429, 431.

² 1 Jarm. *218; Wms. Ex. [1070] *et seq.*

³ "... so as the lands were said to come to dead hands as to the lords, for that by alienation in mortmaine they lost wholly their escheats, and in effect their knights-services for the defence of the realme, wards, marriages, reliefes, and the like; and therefore was called a dead hand, for that a dead hand yeeldeth no service": Co. Inst. (on Litt.) 2 b.

⁴ 2 Kent. Comm. *282. In Rap. & L.'s Law Dict., under "Mortmain," are mentioned Magna Charta, the Stat. De Viris Religiosis (7 Edw. I.). Stat. Westm.

II. (13 Edw. I. c. 32), and 15 Rich. II. c. 5.

⁵ 2 Kent, *supra*; 15 Rich. II. c. 5.

⁶ 2 Kent, *282; Chambers v. City of St. Louis, 29 Mo. 543, 575.

⁷ See *post*, §§ 426, 427. Says Peckham, J., in Matter of McGraw, 111 N. Y. 66, on p. 107: "Although we never adopted or enacted the English Statute of Mortmain, yet in this, as in other States, we have a decided mortmain policy. It is found in our statute in relation to wills, prohibiting a devise to a corporation unless specially permitted by its charter, or by some statute."

⁸ 9 Geo. II. c. 36.

⁹ Rap. & L. Law Dict. "Mortmain."

effect in possession for the charitable use, without power of revocation or reservation in favor of the donor.¹ Under this statute, a devise to a charity in violation of its provisions does not vest the legal title, and the heir may recover at law.² If a devise for the erection of a building is void under its provisions, any bequest for its repair, or for the support of the institution connected therewith, is also void;³ but if one trust in a will is valid, it will be sustained in equity, although joined with one that is void.⁴ It matters not whether the trust in violation of the statute is declared in the will, or rests upon a secret understanding to be carried out by the devisee;⁵ and this may be proved *aliunde*, if the devisee deny it.⁶

In so far as this statute is intended to prevent improvident alienations of land or testamentary disposition by persons *in extremis*, its significant features are incorporated in the statutes of many of the States. Thus the testator, if he leave a wife, or children, or parent, is permitted to will no more than one-fourth part of his estate, after the pay-

American statutes against improvident charitable gifts *in extremis*.

[* 911] ment of his debts, for charities, of any kind, in * Iowa,⁷ and formerly in New York,⁸ one-third part in California,⁹ Georgia,¹⁰ and Montana,¹¹ and one-half now in New York,¹² and Wisconsin.¹³ So in Louisiana, no church, corporation, or minister of the gospel, for himself or the benefit of a church or corporation, can accept a bequest made *in articulo mortis*;¹⁴ in Maryland, no devise or bequest to any minister, public teacher, or religious sect or denomi-

¹ 1 Jarm. * 219.

² *Burdett v. Wright*, 2 B. & AL 710, 721; *Chester v. Chester*, L. R. 12 Eq. 444, 451; *Pilkington v. Boughey*, 12 Sim. 114.

³ *Attorney-General v. Goulding*, 2 Br. C. C. 428; *Smith v. Oliver*, 11 Beav. 481; *Cramp v. Playfoot*, 4 Kay & J. 479.

⁴ *Willet v. Sandford*, 1 Ves. Sen. 186.

⁵ *Boson v. Statham*, 1 Eden, 508, 512; *Paine v. Hall*, 18 Ves. 475; *Muckleston v. Brown*, 6 Ves. 52, 69; *Stickland v. Aldridge*, 9 Ves. 516, compelling a discovery.

⁶ *Edwards v. Pike*, 1 Eden, 267.

⁷ Code of Iowa, 1897, § 3270.

⁸ *Banks & Bro.*, 7th ed., p. 1702, § 6, referring to the law of 1848 for the incorporation of "benevolent, charitable, scientific, and missionary societies." In 1860 the general act "relating to Wills" enlarged the power of the testator to dispose of one-half his estate in charities: *Banks & Bro.*, p. 2288, § 1. It is held that the latter act repealed the former in *Lefevre v. Lefevre*, 59 N. Y. 434, 444.

⁹ Civ. Code (1885), § 1313; *In re*

Hewitt, 94 Cal. 326. After payment of debts: *Estate of Hinckley*, 58 Cal. 457, 514.

¹⁰ Code Ga. 1895, § 3277.

¹¹ Code, 1895, § 1758.

¹² 2 *Banks & Bro.* 1896, p. 1875, § 3, note, referring to former statutes. In the recent case of *Amherst College v. Ritch*, 151 N. Y. 282, the court points out (p. 333 *et seq.*) the difference between the policy of this statute and of the mortmain act, and holds (p. 335) that under this statute "only the persons named in the act and those benefited through them can invoke its protection," and that the rights springing from the statute are personal and may be waived or relinquished; *Andrews, C. J.*, dissented. It is held in *Healy v. Reed*, 153 Mass. 197, that this statute applies only to testators who are inhabitants of New York; hence a gift by a Massachusetts testator to a New York corporation is not invalidated by the statute.

¹³ Laws, 1891, ch. 359.

¹⁴ St. 1876, § 682.

nation, as such respectively, is allowed without sanction of the legislature;¹ in Ohio,² no gift for a benevolent, religious, educational, or charitable purpose is valid unless the will was executed at least one year before the testator's death; in Georgia, it must be executed ninety days,³ in Michigan⁴ and New York two months,⁵ in Wisconsin three months,⁶ and in California and Pennsylvania, respectively thirty days⁷ and one month,⁸ before the testator's death. A codicil executed within the time prohibited by these statutes, which cuts down a charitable bequest in a will executed a sufficient length of time before the testator's death, does not render such bequest void under the statute.⁹ So where, under like conditions such codicil has the effect of simply postponing the time of payment of a similar gift in the body of a will executed more than the necessary statutory period before death, although the clause in the will is expressed to be "revoked" and the gift in the codicil to be "instead thereof."¹⁰ But if the testator's estate is wholly disposed of by a new will, all former wills are revoked, and a charitable bequest which is made void by the statute because the will was executed within a month of testator's death, wholly fails, though by a prior will bequests were given to the same charities; no effect can be given the revoked wills.¹¹ In South Carolina a man cannot dispose of more than one-fourth part of his estate "by deed of gift, legacy, devise, or by any other ways or means whatever," to or in favor of a woman with whom he lives in adultery, or of his illegitimate child or children, if he has a lawful wife or children living.¹²

§ 426. **Corporations as Testamentary Donees.** — It is self-evident that any person, whether natural or corporate, competent to hold property, may be a legatee or devisee under a will, unless expressly prohibited by law. Such an express prohibition to "bodies politic and corporate" is contained in the explanatory statute¹³ to the original act *authorizing the devise of lands in England; [* 912] hence devises to corporations, whether aggregate or sole, either beneficially to them or in trust, were held void, and the de-

Corporations competent to hold property may take by devise unless restrained.

¹ Const. § 38, Decl. Rights.

² Bates' Ann. St. 1897, § 5915.

³ Jones v. Habersham, 107 U. S. 174; Kine v. Becker, 82 Ga. 563.

⁴ Allison v. Smith, 16 Mich. 405.

⁵ Stephenson v. Short, 92 N. Y. 433; Kavanaugh's Will, 125 N. Y. 418; Fairchild v. Edson, 154 N. Y. 199.

⁶ Milwaukee Home v. Becker, 87 Wis. 409.

⁷ Civ. Code, § 1313.

⁸ Rhymer's Appeal, 93 Pa. St. 142; Lutheran Congregation's Appeal, 113 Pa. St. 32; Knight's Estate, 159 Pa. St. 500;

Kane's Estate, 185 Pa. St. 544; the statute cannot be defeated by making a sealed promissory note to such a corporation within one month of testator's death, and directing by a contemporaneous will that such note shall be first paid out of the estate: Luebbe's Estate, 179 Pa. St. 447.

⁹ Carl's Appeal, 106 Pa. St. 635, 641.

¹⁰ Sloane's Appeal, 168 Pa. St. 422.

¹¹ Teacle's Estate, 153 Pa. St. 219; Hoffner's Estate, 161 Pa. St. 331.

¹² Bouknight v. Brown, 16 S. C. 155, 167.

¹³ 34 & 35 Hen. VIII. c. 5, pl. 5.

vised lands descended to the heirs.¹ The late Statute of Wills² omits this prohibition to corporations *to take* land by devise; hence they are now, in England, as capable of taking as natural persons. But their disability *to hold*, arising under different statutes,³ is not thereby removed, and their capability to hold lands now depends upon a license from the crown,⁴ according to a statute enacted to protect against forfeiture under the mortmain acts.⁵

In the United States there is some diversity in respect of the powers of corporations to take by devise or legacy. It is held in New York, where the statute authorized testators to devise their lands "to every person capable by law of holding real estate," but "no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter or by statute to take by devise,"

Corporation may take under New York statute, but not States or governments.

that a devise of lands to the United States for the purpose of assisting the government in the discharge of the debt contracted during the war against the rebellious Confederate States, is void.⁶ But in Massachusetts a different conclusion was reached, holding that there was nothing in the law of the commonwealth to prevent the United States from taking by devise, and that in the absence of proof to the contrary the law of other States is presumed to be the same.⁷ A statute enabling corporations to take lands by devise includes only the domestic corporations created by or organized under the laws of the State enacting such statute; and a devise to a foreign corporation of lands in that State is void, although the corporation was authorized by its charter to take by devise;⁸ but a bequest of personalty to such a corporation will be enforced, if, by the law of its creation, it has authority to acquire property by devise or bequest.⁹ But a foreign corporation may take and hold lands devised to it, although prohibited by some law of the State that granted the charter from so taking,

In other States foreign corporations may take, unless restrained by their charter

¹ 1 Jarm. * 65.

² 1 Vict. c. 26.

³ See *ante*, § 425.

⁴ 1 Jarm. * 65.

⁵ 7 & 8 Wm. III. c. 37.

⁶ Fox's Will, 52 N. Y. 530. Andrews, J., in reasoning on the case, held that the word "person," as used in the statute, includes, in the absence of a restricting context, corporations, but not a State or government: p. 535. This decision was affirmed by the U. S. Supreme Court in *United States v. Fox*, 94 U. S. 315.

⁷ It was accordingly held that a devise of land in Massachusetts and another State to the United States, "towards suppressing the rebellion and restoring the

Union" was an absolute devise, and that the fact that the rebellion had been repressed before the death of the testator was immaterial: *Dickson v. United States*, 125 Mass. 311.

⁸ *White v. Howard*, 46 N. Y. 144, 165.

⁹ *Chamberlain v. Chamberlain*, 43 N. Y. 424, 432; *Sherwood v. American Bible Society*, 4 Abb. App. Dec. 227, 232; *Matter of Huss*, 126 N. Y. 537, 544; *Burbank v. Whitney*, 24 Pick. 146, 154 (expressly disavowing any opinion as to real estate); *Ticknor's Estate*, 13 Mich. 44, 53; *Healy v. Reed*, 153 Mass. 197, 198.

or Statute of Wills. unless restrained by the language of its charter, or some law of the *loci rei sitæ*.¹

* Neither a corporation for specific purposes (not including [* 913] power to hold land) nor even a regular corporation aggregate

Corporations can hold in trust for purposes consistent with the purpose of their incorporation. can be seised of lands in trust for any purpose foreign to its institution,² though it may take as trustee if the object of the trust be consistent with the purposes of the corporation.³ Hence a bequest to a county as a corporation, in trust for certain purposes, is void.⁴ So a municipal corporation, in the absence of an express grant of

power, cannot administer a purely private trust;⁵ but may take as trustee under a will when the trust imposed is germane to the purposes for which the corporation was called into being, and when the administration of the trust and the liabilities it imposes are not foreign to the objects for which it was instituted.⁶ Thus it was held in New York, that the city of St. Louis was not authorized under its charter⁷ to hold real estate outside of its corporate limits in trust for a charitable purpose;⁸ while the courts of Missouri came to an opposite conclusion in construing the same will and the same charter;⁹ and it was decided by the Supreme Court of the United States that the cities of New Orleans and Baltimore are competent to take devises in trust for the education of the poor of those cities.¹⁰ To

¹ Under the theory, that the corporation brings with it into the State of the forum, its charter, but not the other laws of its own State: *White v. Howard*, 38 Conn. 342, 361; *Thompson v. Swoope*, 24 Pa. St. 474, 480; *Voorhees v. Voorhees*, 6 N. J. Eq. 511, 514; *American Bible Society v. Marshall*, 15 Ohio St. 537, 542; *University v. Tucker*, 31 W. Va. 621, 631. See *Female Academy v. Sullivan*, 116 Ill. 375, disapproving so much of the opinion in *Starkweather v. American Bible Society*, 72 Ill. 50, as is inconsistent with the above theory.

² *Jackson v. Hartwell*, 8 John. 422; *Hornbeck v. Westbrook*, 9 John. 73; *Walker v. Walker*, 25 Ga. 420, 428; *Holifield v. Robinson*, 79 Ala. 419, 422. So also in Massachusetts: *First Parish v. Cole*, 3 Pick. 232, 237.

³ *Trustees v. King*, 12 Mass. 546, 553; *Protestant Soc. v. Churchman*, 80 Va. 718. Or to carry out the testator's intention: *American Tract Society v. Atwater*, 30 Oh. St. 77, 88; *Miller v. Teachout*, 24 Oh. St. 525, 533.

⁴ *Holifield v. Robinson*, 79 Ala. 419.

⁵ And it matters not that the trust
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sought to be established is a resulting trust, implied by the law: *Franklin's Estate*, 150 Pa. St. 437.

⁶ *Skinner v. Harrison*, 116 Ind. 139, 142; *Board v. Dinwiddie*, 139 Ind. 128; *Phillips v. Harrow*, 93 Iowa, 92 (hospitals, libraries, &c.); *Beurhaus v. Cole*, 94 Wis. 617 (library, support of the poor, &c.).

⁷ Which has since been amended in this respect.

⁸ *Boyce v. City of St. Louis*, 29 Barb. 650, 654. See also *Fosdick v. Town*, 125 N. Y. 581.

⁹ *Chambers v. City of St. Louis*, 29 Mo. 543, 572. The charity consists in aiding poor emigrants on their way to settle in the West.

¹⁰ *McDonogh v. Murdoch*, 15 How. (U. S.) 367, 400; see *Barnum v. Baltimore*, 62 Md. 275, 291; *Barkley v. Donnelly*, 112 Mo. 561; *Sheldon v. Stockbridge*, 67 Vt. 299; *Phillips v. Harrow*, 93 Iowa, 92; *Peynado v. Peynado*, 82 Ky. 5, holding a foreign city competent to hold property in trust for charitable uses. In Connecticut, on the other hand, it was held that the City of New Haven could not take, as trustee, a legacy, the income

what extent the statute of 43 Elizabeth, c. 4, affects the powers of corporations to take devises to charitable uses will be considered more fully in connection with charities.¹

To what extent unincorporated societies or bodies may or may not hold gifts to charitable uses or otherwise, will be more fully discussed hereafter.² But it may be remarked here, that it is sufficient to validate a legacy if the body be incorporated at the time of the vesting of the legacy, though unincorporated at testator's death.³ While an executory bequest to the use of an institution directed to be incorporated within the period allowed for the vesting of future estates may be upheld, a gift is void where no such limit to the incorporation is fixed, it being left dependent upon the legislative will.⁴

Provision is made by statute, in most States, regulating the capacity of corporations to hold property, especially real estate, and the extent to which they may take property as testamentary beneficiaries, particularly for charitable, eleemosynary, or religious purposes. In addition to what has been said

Limitations upon power of corporations to take.

in this direction in connection with the subject of mortmain,⁵ [*914] it may be stated that the value * or amount of real estate which a religious corporation may own is restricted, among, perhaps, other States, in Alabama, Arizona, Florida, Idaho, Illinois, Indiana, Kentucky,⁶ Louisiana, Maryland, Massachusetts, Michigan, Mississippi,⁷ New York, Oregon, Pennsylvania, South Carolina, Tennessee, and Virginia. It is held in New York, on a careful examination of the question, that a devise or bequest to a corporation of property which exceeds the amount or value which the corporation is permitted to take, will be void for the excess; and the heirs or next of kin can raise the question.⁸ The same doctrine is maintained in some other States;⁹ but the contrary view is an-

of which was to be applied for the aid of deserving indigent persons not paupers: *Dailey v. City*, 60 Conn. 314.

¹ *Post*, §§ 429, 431.

² *Post*, § 429.

³ *Shipman v. Rollins*, 98 N. Y. 311; *Longheld v. Church*, 129 N. Y. 211.

⁴ *People v. Simonson*, 126 N. Y. 299.

⁵ *Ante*, § 425.

⁶ A devise in trust, to be applied to a charitable purpose, is valid. The restriction was intended to prevent a church from holding *for its own use* more than fifty acres: *Kinney v. Kinney*, 86 Ky. 610.

⁷ All such devises or bequests are void under the constitution of 1890: *Const. Miss. 1890*, §§ 269, 270, except that a bequest of personalty (not of realty or

money raised by a sale thereof) in trust to be applied to charity by such corporation or body politic is valid: *Blackbourn v. Tucker*, 72 Miss. 735, holding the statute applicable where the will was made before, but the testator died after, its passage. As to the policy of the State prior to the law of 1890, see *White v. Kellar*, 68 Fed. R. (C. C. A.) 796.

⁸ *In re McGraw*, 111 N. Y. 66, 108. But if the devise is not held to be void, and the corporation has received and is holding property in excess of the limitation of its charter, no one but the State can raise the question or enforce a forfeiture; *Heiskell v. Chickasaw*, 87 Tenn. 668, 686, distinguishing the two cases.

⁹ *Wood v. Hammond*, 16 R. I. 98, 116;

nounced in other jurisdictions, holding that only the State in a direct proceeding can raise the question of the validity of the gift.¹ In Delaware,² Michigan, and Vermont no gift of personal or real property to any person and his successor in any ecclesiastical office is valid; gifts for religious purposes must be made to corporations authorized by law.

§ 427. **Rule against Perpetuities.**—Like the statutes of mortmain, the rule against perpetuities is directed against the accumulation of property in the possession of those in whose hands it would be locked up from the community. The necessity of the rule is strongly set forth by Jarman,³ to * confine the power of creating springing uses [* 915] and executory devises which no act of the owner of the preceding estate could defeat within limits adequate to the exigencies of families, without transgressing the bounds prescribed by a sound public policy. The common-law rule, as finally formulated by the judgment of the House of Lords,⁴ according to the unanimous opinion of the judges, fixes the utmost period within which an executory devise may take effect to be a life or lives in being and twenty-one years thereafter, together with the period of gestation actually existing; a child *en ventre sa mère* being considered as a life in being.

Policy of the law requires limitation of power to create springing uses and executory devises.

Common-law rule against perpetuities.

an amendment to the charter of the corporation after the testator's death enlarging its capacity to take, will not affect its rights under the will: *Coggeshall v. Home*, 18 R. I. 696.

¹ *Jones v. Habersham*, 107 U. S. 174, 187 (this case was carefully reviewed by the New York court holding the other view); *Hanson v. Little Sisters*, 79 Md. 434, 440 (in which the court followed the federal case just mentioned in preference to the New York case); *Stickney's Will*, 85 Md. 79, 106; *Farrington v. Putnam*, 90 Me. 405 (decided in 1897) in which the court thoroughly reviews the authorities on both sides of the question and criticises the New York cases as based on too strict a policy, not generally approved elsewhere, and as being opposed to the weight of authority.

² *State v. Wiltbank*, 2 Harr. 18, 22; *State v. West*, 2 Harr. 151.

³ 1 Jarm. * 250: "The necessity . . . will be obvious if we consider for a moment what would be the state of a community in which a considerable proportion of the land and capital was locked up. That free and active circulation of prop-

erty, which is one of the springs as well as the consequences of commerce, would be obstructed; the improvement of land checked; its acquisition rendered difficult; the capital of the country gradually withdrawn from trade; and the incentives to exertion in every branch of industry diminished. Indeed, such a state of things would be utterly inconsistent with national prosperity; and these restrictions, which were intended by the donors to guard the objects of their bounty against the effects of their own improvidence, or originated in more exceptional motives, would be baneful to all." He adds in a note: "Perhaps these restrictions most frequently spring from the desire to exert a posthumous control over that which can be no longer enjoyed. *Te teneam moriens* is the dying lord's apostrophe to his manor, for which he is forging these fetters, that seem by restricting the dominion of others to extend his own."

⁴ In *Cadell v. Palmer*, 7 Bli. 202, 239. This case is also reported in 1 Cl. & Fin 372.

According to this rule, a gift to unborn persons postponed for a fixed term exceeding twenty-one years is void, although not preceded by a life; for a fixed term of years, however short, cannot be resorted to instead of the life or lives allowed by the rule.¹ Hence where bequests are made to a class, some of which are *in esse*, and capable of taking, and some are not, the whole bequest must fail, but otherwise where the bequest is to individuals under similar circumstances.² The validity of the gift must be tested by the possible, not the actual, events: if the limitation be to a class, and it is void as to any one of the class, it is void as to all.³ The rule also shows that an executory limitation to arise on an indefinite failure of issue of any person, living or dead, is void for remoteness;⁴ but otherwise if "failure of issue" refers to a definite time within the period allowed

Any term which by possibility might exceed this period renders the gift void.

by the rule,⁵ or where the terms used are "die without children," etc.⁶ It is to be noticed that the old common-law * rule that a limitation over on failure of issue means upon indefinite failure of issue, is gradually giving way to the presumption that "dying without issue" means, *prima facie*, without issue at the time of the death of the legatee or devisee; hence a limitation over is not necessarily void in such case.⁷ The common-law presumption has been changed by statute in some of the States.⁸

The rule against perpetuities is in full harmony with the spirit of American institutions, and is recognized, or affirmatively enacted, by

¹ *Palmer v. Halford*, 4 Russ. 403, 407. Mr. Jarman announces that the principle of this case applies to any, the most inconsiderable addition to the term of twenty-one years; therefore a gift, the vesting of which is postponed for twenty-one years and a day, is void: 1 Jarm. * 254; *Johnstone's Estate*, 185 Pa. St. 179, 184. In New York, where the statute allows no addition to two lives in being, it is held that one year *may* be longer than any life which could have been named by the testator; hence a trust to continue for one year from the death or marriage of the testator's wife is void: *Tucker v. Tucker*, 5 N. Y. 408, 417. So in California, where the limit of the rule is to "lives in being": *In re Walkerley*, 108 Cal. 627, citing a number of authorities from New York and elsewhere.

² *Albert v. Albert*, 68 Md. 352, 373.

³ *Coggins' Appeal*, 124 Pa. St. 10.

⁴ *Post*, § 439, p. * 949; *Fisk v. Keene*, 35 Me. 349, 355; *Rice v. Satterwhite*, 1 Dev. & B. Eq. 69; *Vaughan v. Dickes*,

20 Pa. St. 509, 512; *Mazyck v. Vanderhorst*, Bai. Eq. 48; *Brattleboro v. Mead*, 43 Vt. 556; *Huxford v. Milligan*, 50 Ind. 542, 549.

⁵ *Ackerman v. Vreeland*, 14 N. J. Eq. 23; *Toman v. Dunlop*, 18 Pa. St. 72, 76; *Hall v. Chaffee*, 14 N. H. 215; *Pinkham v. Blair*, 57 N. H. 226, 239; *Buchanon v. Buchanon*, 99 N. C. 308.

⁶ *Morgan v. Morgan*, 5 Day, 517, 520; *Nightingale v. Burrell*, 15 Pick. 104, 109; *Cruger v. Heyward*, 2 Desaus. 94, 111; *Presley v. Davis*, 7 Rich. Eq. 105; *McLeod v. Dell*, 9 Fla. 427, 442; *Matthis v. Hammond*, 6 Rich. Eq. 399.

⁷ *Post*, § 439, p. * 949; *Kimball v. Penhallow*, 60 N. H. 448, 451; *Earl, J.*, in *Palmer v. Horn*, 84 N. Y. 516, 519; *Mendenhall v. Mower*, 16 S. C. 303; *Miller's Estate*, 145 Pa. St. 561; *Smith v. Kimball*, 153 Ill. 368.

⁸ *Condict v. King*, 13 N. J. Eq. 375; *Chism v. Williams*, 29 Mo. 288, 299; *Davies v. Steele*, 38 N. J. Eq. 168; *Gambrell v. Forest Lodge*, 66 Md. 17.

Perpetuities prohibited in America by the respective constitutions of the States,

statute or constitutional provision, in probably all of the States. "Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed," is the language of some of their constitutions.¹

In Nevada, no perpetuities are allowed except for eleemosynary purposes;² and in North Carolina³ and Vermont the Constitution enjoins upon the General Assembly so to regulate entails as to prevent perpetuities.⁴ In Alabama,⁵ lands may be

conveyed to wife and children, or children only, severally, successively, and jointly, and to the heirs of the body of survivor if they reach majority, and in default thereof over; but conveyance to other persons cannot extend beyond three lives in being at the date of the conveyance, and ten years thereafter. In Connecticut⁶ and Ohio,⁷ no estate can be conveyed by deed or will to any person, but such as are in being at the time of making the will or deed, and their immediate issue or descendants. In California,⁸ Indiana,⁹ Michigan,¹⁰ Minnesota,¹¹ New York,¹² and Wisconsin, a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the person or persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the

estate of such person or persons may be determined before [917] they attain full age; otherwise, the period of suspension is limited to two lives in being in Michigan, Minnesota, New York, and Wisconsin;¹³ to lives in being in California; and in Minnesota, all future estates are void at their creation if suspended so that there is at any time no person in being capable of conveying an absolute estate in fee. In Michigan, Minnesota, and Wisconsin the statute is held not to apply to personal property;¹⁴ while in California and New York it is applicable to both real and personal property.¹⁵ In

¹ Const. Texas (Rev. St. 1895), art. i. § 26; Const. of Arkansas (Dig. of St. 1894), art. ii. § 19; Const. North Carolina, art. i. § 31.

² Const., art. xv. § 4.

³ Const. North Carolina (Code, 1883), art. ii. § 15.

⁴ Const. Vermont (Vt. St. 1894), ch. ii. § 36.

⁵ Code, 1896, § 2030.

⁶ Gen. St. 1888, § 2952. By "immediate issue and descendants" the statute is held to include only children: *Leake v. Watson*, 60 Conn. 498, 508. See also *Ketchum v. Corse*, 65 Conn. 85.

⁷ Bates' Ann. St. 1897, § 4200.

⁸ Civ. Code (1885), §§ 715, 772. *Crew v. Pratt*, 119 Cal. 131, 146.

⁹ 2 Ann. Ind. St. 1894, § 3383.

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¹⁰ How. St. 1882, § 5533; *Defrees v. Lake*, 109 Mich. 415, 430.

¹¹ 2 Gen. St. 1891, §§ 3968 *et seq.*

¹² *Banks & Bro.*, 1896, p. 1790, § 16.

¹³ The exception made by the statute of Wisconsin in favor of literary and charitable corporations organized under the laws of the State, is held not to include religious corporations; hence a devise to a religious corporation involving a perpetuity is void: *DeWolf v. Lawson*, 61 Wis. 469, 480.

¹⁴ *Palms v. Palms*, 68 Mich. 355, 379; *Tower's Estate*, 49 Minn. 371; *Webster v. Morris*, 66 Wis. 366, 382.

¹⁵ *In re Walkerly*, 108 Cal. 627, 656; the New York statute is express in its terms including personality.

Georgia,¹ Iowa,² Kentucky,³ and Maryland,⁴ the common-law rule is enacted. In other States, for instance, in Colorado,⁵ Florida,⁶ Illinois,⁷ Maine,⁸ Massachusetts,⁹ Missouri,¹⁰ New Jersey,¹¹ Pennsylvania,¹² South Carolina,¹³ and Tennessee,¹⁴ the existence of the rule against perpetuities is recognized by the courts. It will appear from the discussion of the subject of charitable uses created by wills, that the rule does not, generally, apply to them.¹⁵ The rule is said to relate to the vesting of an estate, and does not affect its continuance after it has become vested.¹⁶

The rule is directed against future contingent interests and has no reference to vested estates or such as begin within the period limited by the rule, no matter how long they may continue,¹⁷ although there are cases holding that the particular as well as the contingent devise is void where the contingency is or may be postponed beyond the limitation of the rule.¹⁸

In Louisiana trusts, or substitutions and *fidei commissa*, are prohibited by the code as being contrary to the policy of the law; hence a testamentary provision that executors shall hold the property of the testatrix, make necessary improvements, provide for the education and support of the minor legatees and administer until they attain majority, and then deliver the property to them, is within the prohibition of the code.¹⁹

§ 428. **Accumulation of the Income.**—The romantic disposition made in the celebrated will of Peter Thellusson, whereby the income of his ample estate was to be accumulated and added to the corpus for a period covering the life of every child and more remote descendant born or *en ventre sa mère* during his lifetime, and then, swelled to princely magnitude, to go to some unknown scion,²⁰ led to the enactment of a statute²¹ limiting the accumulation of rents, issues, profits, or produce of any

English statute limiting accumulation of income.

¹ Code, 1895, § 3102.

² Code, 1897, § 2901.

³ Gen. St. 1887, p. 834.

⁴ Rev. Code, 1879, p. 419, § 2.

⁵ *Chilcott v. Hart*, 23 Colo. 40, with a full discussion of the origin and applicability of the rule in that State.

⁶ *McLeod v. Dell*, 9 Fla. 427, 446.

⁷ *Lunt v. Lunt*, 108 Ill. 307, 313; *Hale v. Hale*, 125 Ill. 399, 409; *Howe v. Hodge*, 152 Ill. 252.

⁸ *Pulitz v. Livingston*, 89 Me. 359.

⁹ *Brattle Square Church v. Grant*, 3 Gray, 143; *Bates v. Bates*, 134 Mass. 110.

¹⁰ *Chism v. Williams*, 29 Mo. 288.

¹¹ *Detwiller v. Hartman*, 37 N. J. Eq. 347, 354.

¹² *Pennsylvania Co. v. Price*, 7 Phila. 465; *Hillyard v. Miller*, 10 Pa. St. 326, 335.

¹³ *Mangum v. Piester*, 16 S. C. 316, 323.

¹⁴ *Turner v. Ivie*, 5 Heisk. 222, 236; *Davis v. Williams*, 85 Tenn. 646.

¹⁵ *Post*, § 429.

¹⁶ *Phillips v. Harrow*, 93 Iowa, 92, 106.

¹⁷ *Johnstone's Estate*, 185 Pa. St. 179.

¹⁸ *Barnum v. Barnum*, 26 Md. 119; *Deford v. Deford*, 36 Md. 168, 176; *Fosdick v. Fosdick*, 6 Allen, 41; *Thorndike v. Loring*, 15 Gray, 391. See a full discussion of this subject in *Johnstone's Estate*, *supra*, citing authorities in support of the statement in the text.

¹⁹ *Succession of McCann*, 48 La. An. 145, 156; *Succession of Beauregard*, 49 La. An. 1176.

²⁰ *Thellusson v. Woodford*, 4 Ves. 227.

²¹ 39 & 40 Geo. III. c. 98.

estate to the life or lives of the donor or donors, or the term of twenty-one years from their death, or the minority of any person *in esse* at the time of such death, or the minority of those who would be entitled to the produce if of age. Similar limitations as to the accumulation of property have been enacted in some of the American States. In * Alabama,¹ [* 918] for instance, trusts for accumulation merely are limited to ten years, except for a minor in being at the time of its creation, and then to terminate with such minority. Pennsylvania has substantially re-enacted the English statute.² The statutes of New York regulating estates in real property avoid all accumulations of rents and profits of real estate for the benefit of one or more persons exceeding, if the accumulation be directed to commence on the creation of the estate out of which the rents and profits are to arise, the minority of one or more minors then in being; or if directed to commence at any time subsequent to the creation of the estate (within the time limited for the vesting of future estates and within the minority of the persons for whose benefit it is directed), the period of such minority.³ A similar provision is made in respect of personal property.⁴ These provisions, with slight deviations, are incorporated into the statutes of California,⁵ Michigan,⁶ Minnesota,⁷ and Wisconsin,⁸ at least so far as real estate is affected.

It has been held, under these statutes, that a provision directing an accumulation for minors in being beyond their minority is void for the excess only;⁹ but accumulations are allowed in favor of minors only, who will be entitled to take the rents and profits from which the accumulations arise;¹⁰ hence, if the effect of the accumulation is simply to swell the bulk of the estate, without designating such minor as the beneficiary, the direction to ac-

Minors in being, accumulation void for excess only; void *in toto* if accumulation is in favor of one not entitled to the rents and profits.

¹ Code, 1896, § 1031.

² Pep. & L. Dig. 1896, p. 1455, § 12. "Our act of 1853 was modelled after the Ripon Act (39 & 40 Geo. III. c. 98), and it avoids only the excess in transgressive trusts"; *Brown v. Williamson*, 36 Pa. St. 338, 341.

³ *Lovett v. Gillender*, 35 N. Y. 617, 620.

⁴ Banks & Bro. (9th ed.) p. 1793, § 37.

⁵ Civ. Code, § 722.

⁶ How. St. 1882, §§ 5553 *et seq.*

⁷ Gen. St. Minn. (Kelly, 1891) §§ 3993, 3994.

⁸ Sanb. & B. Ann. St. 1889, §§ 2061, 2062. The rule does not apply to personal estate: *Webster v. Morris*, 66 Wis. 366.

⁹ *Gilman v. Reddington*, 24 N. Y. 9, 19; *Hull v. Hull*, 24 N. Y. 647; *Brown v. Williamson*, *supra*; *Wilson v. Odell*, 58 Mich. 533, 536.

¹⁰ *Washington's Estate*, 75 Pa. St. 102, 106; *McKee's Appeal*, 96 Pa. St. 277, 285; *Pray v. Hegeman*, 92 N. Y. 508, 514, citing many New York cases; *Grim's Appeal*, 109 Pa. St. 391. The possibility of its being for a longer period than the statute allows renders the provisions in the will void and of no effect in Pennsylvania: *Schwartz's Appeal*, 119 Pa. St. 337, 342, 348. Where the accumulations are intended to be temporary, and in the interest of judicious management, the statute does not apply: *Hibbs' Estate*, 143 Pa. St. 217.

cumulate is void *in toto*.¹ So of accumulations for persons [* 919] not *in esse*.² There seems to be no essential difference * between the product of real and personal property in this respect.³

In the absence of statutory provisions on the subject, accumulations are in the United States still governed by the common law, because the statute of 39 & 40 Geo. III. was enacted after the declaration of American independence, and is of no force here.⁴

§ 429. **Gifts to Charitable Uses.**—Charity, says Jarman,⁵ has been defined to be a general public use.⁶ It may be of value to remember the comprehensive analytical statement of the definition given by Gray, J., when of the Supreme Court of Massachusetts: "A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government."⁷ Testamentary gifts to charitable uses are distinguishable from other testamentary dispositions in several particulars, owing to the high favor with which the law regards them, and which demands their most liberal construction with the view of accomplishing the intent and purpose of the donor; and this to an extent which will uphold and carry into effect trusts to charitable uses which cannot be upheld in ordinary cases.⁸

Legal charity is a gift to a general public use.

Testamentary gifts to charitable uses will be sustained which could not be sustained for ordinary purposes.

I. In the first place, the duration of a public or charitable trust is not affected by the rule against perpetuities which limits the inalienability of property under a private trust to a certain time, and avoids any attempt to exceed this period.⁹ Such a trust may be perpetual in its dura-

Rule against perpetuities not applicable to charitable devises.

¹ McKee's Appeal, *supra*; Pray v. Hegeman, *supra*; Barbour v. DeForest, 95 N. Y. 13, 16.

² Kilpatrick v. Johnson, 15 N. Y. 322, 324; but see Manice v. Manice, 43 N. Y. 303, 361, *et seq.*

³ Cook v. Lowry, 95 N. Y. 103, 107.

⁴ Gray, J., in Odell v. Odell, 10 Allen, 1, 6. See remarks of the court in St. Paul's Church v. Atty. Gen., 164 Mass. 188, 203, where the accumulation was, however, for a charitable purpose. The court states that even in such cases the limits of such accumulations are within the control of equity.

⁵ 1 Jarm. * 208, citing Jones v. Williams, Amb. 651.

⁶ "As convenient for the poor and the rich": Kent, Ch., in Coggeshall v. Pelton, 7 John. Ch. 292, 294; Wayne, J., in Perin v. Carey, 24 How. (U. S.) 465, 506.

⁷ Jackson v. Phillips, 14 Allen, 539, 556.

⁸ Story, Eq. Jur. § 1165; Abend v. Endowment Fund, 74 Ill. App. 654, 666; Sanderson v. White, 18 Pick. 328, 333; White v. Howard, 38 Conn. 342, 366; Attorney-General v. Jolly, 1 Rich. Eq. 99, 106; Claypool v. Norcross, 42 N. J. Eq. 545; Hunt v. Fowler, 121 Ill. 269, 281.

⁹ *Ante*, § 427.

tion,¹ and a change from one charity to another, upon
 * the happening of a certain event, has been held to confer [* 920]
 a valid gift upon the second charity after two hundred

years;² but if the gift is in the first instance to an individual, and then over to a charity upon a contingency which may not happen within the prescribed limit of time, the gift to the charity is void.³ So where property is vested in trustees for a charity, under circumstances which make it uncertain whether any interest will ever vest in the party intended to be benefited, the rule against perpetuities applies with full effect;⁴ but not where it is the duty and within the power of the trustees to convey at the proper time.⁵

In some of the States the rule against perpetuities is not relaxed in favor of charitable uses, but applies to them as fully as to ordinary testamentary dispositions. So held in Maryland,⁶ Michigan,⁷ Minnesota,⁸ New York,⁹ and formerly in

States in which
 rule against

¹ Estate of Hinckley, 58 Cal. 457, citing numerous authorities; *per* Gray, J., in Jackson v. Phillips, *supra*; Odell v. Odell, 10 Allen, 1, 6. If the charity as expressed becomes impossible of execution, another similar charity will be sustained by the courts: Academy v. Clemens, 50 Mo. 167, 172; *post*, § 432. The Supreme Court of the United States asserts this doctrine that charitable uses are not affected by the rule against perpetuity as existing for the District of Columbia; Ould v. Washington Hospital, 95 U. S. 303, recognizing the explosion of the contrary view announced in Baptist Association v. Hart, 4 Wheat. 1, and overruled in Vidal v. Girard, 2 How. (U. S.) 127. As to the analogous question of how far or how long funds may be directed to accumulate for a charitable purpose, before applicable thereto, see St. Paul's Church v. Atty.-Gen., 164 Mass. 188, and Ingraham v. Ingraham, 169 Ill. 432, 450, 463.

² Christ's Hospital v. Grainger, 16 Sim. 83, 101; s. c. on appeal, 1 Macn. & G. 460, 463; see Storr v. Whitney, 54 Conn. 342; Jones v. Habersham, 107 U. S. 174, 185; Lennig's Estate, 154 Pa. St. 209. So a fund distributable among a number of students was directed to be distributed among a smaller number by increasing the amount payable to each beneficiary, when there were not enough of the class specified to exhaust the fund: Theological Society v. Attorney-General, 135 Mass. 285, 289.

³ Merritt v. Bucknam, 77 Me. 253, 261; Brattle Square Church v. Grant, 3 Gray, 142, *dictum*, citing for authority the case of Commissioners of Charitable Donations v. De Clifford, 1 Dr. & War. 245, 254. See Hopkins v. Grimshaw, 165 U. S. 342, 355. But see also remarks and quotations of authorities by Durfee, C. J., in Almy v. Jones, 17 R. I. 265, 267. It is held that, in order to bring a charitable gift, which is to take effect in the future, within this rule, however, there must be a prior gift; hence a gift may be made for a charity to come into existence at some uncertain time in the future, provided there be no perpetuity in a prior taker: Crerar v. Williams, 145 Ill. 625, 646; Woodruff v. Marsh, 63 Conn. 125, 133, quoting from Russell v. Allen, 107 U. S. 163, 171; see also Webster v. Wiggin, 19 R. I. 73.

⁴ Jocelyn v. Nott, 44 Conn. 55, 59. But see cases cited in Ingraham v. Ingraham, 169 Ill. 432, 454.

⁵ Coit v. Comstock, 51 Conn. 352, 384; Ould v. Washington Hospital, 95 U. S. 303, 312; Inglis v. Sailor's Snug Harbor, 3 Pet. 99, 127, 135, Story, J., dissenting, 145.

⁶ Needles v. Martin, 33 Md. 609, 618.

⁷ Methodist Church v. Clark, 41 Mich. 730, 740.

⁸ Little v. Willford, 31 Minn. 173, 176.

⁹ Bascom v. Albertson, 34 N. Y. 584, 598, affirmed in Holmes v. Mead, 52 N. Y. 332, 338; Rose v. Rose, 4 Abb. App. Dec. 108, 112; see also Holland v. Alcock, 108 N. Y. 312.

Virginia.¹ The same is probably the case in North Carolina, where the statute of 43 Elizabeth is not in force, and West Virginia;² in Wisconsin the statute excepts from the rule donations to literary and charitable, but not to religious incorporations,³ or other charitable devises.⁴

perpetuities is not relaxed in favor of charities.

[* 921] * II. Another well-defined distinction between charitable and other testamentary gifts consists in the liberality with which charitable intentions are carried out, under descriptions of the donees and of the objects of the testator's bounty which must be held void for uncertainty in any but charitable gifts.⁵ It is one of the essential qualities of a charity that the beneficiaries be "an indefinite number of persons,"⁶ and it has been said that "the thing given becomes a charity where the uncertainty of the recipients begins."⁷ However uncertain, therefore, or indefinite or vague, the beneficial donees of a charity be, if the court is satisfied that the testator's object is a charitable use in the legal sense, and is enabled by the terms of the will to render the beneficiaries certain by means of trustees, appointed or to be appointed, such gift will not fail on the ground of uncertainty of the objects.⁸ But where the gift, although to a charitable use, is so indefinite as to be incapable of being executed by a judicial decree, it is invalid.⁹ Thus, a use to "the poor white citizens" of a county, to be distributed by agents appointed by the Orphan's Court, excepting from the benefit all residents of the poorhouse, has been held sufficiently to describe the objects;¹⁰ so a gift for the education of "pious, indigent youths, who are preparing themselves for the ministry of the gospel, and those only who strictly adhere to the Westminster Confession of

Indefiniteness not fatal to charitable gifts.

Instances of charitable gifts to indefinite persons held valid.

¹ *Kain v. Gibboney*, 101 U.S. 362. The cases relied on in this case as announcing the law of Virginia are overruled in *Trustees v. Guthrie*, 86 Va. 125, upon full discussion. *Dicta* in the latter case were, however, in turn, criticised in *Fifield v. Van Wyck*, 94 Va. 557.

² "Charitable bequests stand on the same footing with all others": *Wilson v. Perry*, 29 W. Va. 169, 188, citing Virginia cases.

³ *De Wolf v. Lawson*, 61 Wis. 469.

⁴ *Beurhaus v. Cole*, 94 Wis. 617, 631.

⁵ See *Burr v. Smith*, 7 Vt. 241, in which Williams, Ch., reviews the authorities at great length and discusses the history of the several elements involved in the doctrine of charitable uses, p. 276 *et seq.*; p. 286 *et seq.*, on the subject of the necessary indefiniteness of the objects.

⁶ See Gray's definition of a charity,

supra, p. * 919. See *Kent v. Dunham*, 142 Mass. 216, 217; *Johnson v. Holifield*, 79 Ala. 423, 426.

⁷ *McLean, J.*, in *Fontain v. Ravenel*, 17 How. (U.S.) 369, 384; *Perry on Trusts*, § 687; *Piper v. Moulton*, 72 Me. 155, 159.

⁸ *Perry on Trusts*, § 732; *Williams v. Pearson*, 38 Ala. 299, 306; *Camp v. Crocker*, 54 Conn. 21; *Hunt v. Fowler*, 121 Ill. 269, 277.

⁹ *Pritchard v. Thompson*, 95 N. Y. 76, 82; *Rhodes v. Rhodes*, 88 Tenn. 637, 643; *Fuller's Will*, 75 Wis. 431, 437.

¹⁰ *State v. Griffith*, 2 Del. Ch. 392, 408. Similar in effect: *Newson v. Starke*, 46 Ga. 88, commenting on the case of *Beall v. Drane*, 25 Ga. 430, which held otherwise; *Heuser v. Harris*, 42 Ill. 425, 431; *Craig v. Secrist*, 54 Ind. 419, 426; *Moore v. Moore*, 4 Dana, 354.

Faith" ¹ for the education of "colored children in the State of Indiana;" ² *for "the use, privilege, and benefit of a [* 922] public seminary;" ³ for the erection and maintenance and support of a suitable asylum, "to be used as an asylum for Protestant widows and orphans;" ⁴ "to be applied to foreign missions;" ⁵ a gift "for the purposes of the American Board of Commissioners of Foreign Missions, and to promote the pious objects thereof" ⁶ "for the benefit of the church;" ⁷ "for the furtherance and promotion of the cause of piety and good morals, or in aid of objects and purposes of benevolence and charity, public or private, or temporary, or for the education of deserving youths;" ⁸ for the support of "poor widows having no certain income, and women whose husbands had abandoned them unprovided for and without just cause;" ⁹ for "the orphan poor, and for other destitute persons of said county;" ¹⁰ to "such charities as shall be deemed most useful by the executor;" ¹¹ "for the distribution of good books among poor people in the back part of Pennsylvania;" ¹² "for the benefit of public schools" ¹³ and colleges; ¹⁴ "for the benefit of the poor;" ¹⁵ to the incorporated

¹ McCord v. Ochiltree, 8 Blackf. 15; to similar effect: Witman v. Lex, 17 Serg. & R. 88; Storrs School v. Whitney, 54 Conn. 342, 352.

² Lindley *ex parte*, 32 Ind. 367; but a devise in favor of "colored children, both male and female," is, without limit of any kind, void for vagueness and uncertainty; Grimes v. Harmon, 35 Ind. 198, 246. See Craig v. Secrist, *supra*, drawing the distinction between the last two cases: 54 Ind. 419, 426.

³ Curling v. Curling, 8 Dana, 38.

⁴ Fink v. Fink, 12 La. An. 301, 318.

⁵ Kinney v. Kinney, 86 Ky. 610.

⁶ Bartlett v. King, 12 Mass. 537, 540.

⁷ Attorney-General v. Trinity Church, 9 Allen, 422; First Universalist Society v. Fitch, 8 Gray, 421; "for the preaching of the gospel of the blessed Son of God as taught by the people known now as the Disciples of Christ": Sowers v. Cyrenius, 39 Oh. St. 29.

⁸ Saltonstall v. Sanders, 11 Allen, 446. To similar effect: Miller v. Teachout, 24 Oh. St. 525; see also Quinn v. Shields, 62 Iowa, 129, 133.

⁹ De Bruler v. Ferguson, 54 Ind. 549.

¹⁰ Board of Commissioners v. Rogers, 55 Ind. 297; so "for the education of the poor of S. county": Paschal v. Acklin, 27 Tex. 173, 200; or a devise for "poor children, for their tuition": Dye v. Church, 48 S. C. 444.

¹¹ Wells v. Doane, 3 Gray, 201. To similar effect: Howe v. Wilson, 91 Mo. 45; Powell v. Hatch, 100 Mo. 592; Kinike's Estate, 155 Pa. St. 101; Murphy's Estate, 184 Pa. St. 310; Sawtelle v. Witham, 94 Wis. 412. But in some States, where the discretion given to the executor or trustee is so unlimited that the charity depends solely upon his choice and preference, the gift is void for indefiniteness: Read v. Williams, 125 N. Y. 560, 568; Johnson v. Johnson, 92 Tenn. 559, 568; Wheelock v. American Tract Soc., 109 Mich. 141; Tilden v. Green, 130 N. Y. 28; People v. Powers, 147 N. Y. 104; Fifield v. Van Wyck, 94 Va. 557; and see also *post*, § 430, p. * 925.

¹² Pickering v. Shotwell, 10 Pa. St. 23; similarly, Simpson v. Welcome, 72 Me. 496.

¹³ Bell County v. Alexander, 22 Tex. 350, 360.

¹⁴ Perin v. Carey, 24 How. (U. S.) 465; Paschal v. Acklin, 27 Tex. 173.

¹⁵ Loring v. Marsh, 6 Wall. 337, 355; Hesketh v. Murphy, 35 N. J. Eq. 23. To this case the reporter annexes a valuable collection of about two hundred English and American cases, showing what bequests and devises have been held valid as charitable uses. See also Dascomb v. Marston, 80 Me. 223; Trustees v. Wilkinson, 36 N. J. Eq. 141; Hesketh v. Murphy, 36 N. J. Eq. 304; Webster v.

Presbyterian churches of New Orleans, "to the end that the poor of such respective churches may be cared for;"¹ and numerous other similar provisions, — have been sustained on this ground, where the ultimate beneficiaries could not have taken according to the rules applied in other cases. And it is held that, although the [* 923] trust may be carefully restricted to religious uses, if * a body or a definite number of persons is pointed out to receive and enjoy its benefits, it is not a public charity.²

III. A similar distinction exists in respect of the donees of the legal title in charitable trusts, the rule being, in most States, that, if the object of a charitable donation can be ascertained, its validity is not affected by the lack of a trustee;³ it is a maxim of courts that equity will not allow a certain and valid trust to fail for want of a trustee.⁴ Thus, where a corporation was held incompetent under its charter to execute a particular charitable trust, the court appointed trustees for that purpose;⁵ so, where a corporation, made a legatee to a charitable use, had ceased to exist before the testator's death;⁶ or a voluntary society under similar circumstances.⁷ So gifts in charity to unincorporated societies, incompetent to take for want of corporate powers at the time of the testator's death, have been sustained upon their subsequent incorporation,⁸ or by the appointment of trustees by the

If the object of a charitable gift can be ascertained, it will not fail for want of a trustee.

Corporations incompetent to take, having ceased to exist before testator's death.

So unincorporated societies may have trustees appointed, or take upon

Morris, 66 Wis. 366, 384; *Beurhaus v. Cole*, 94 Wis. 617. A devise "for a house for the maintenance of poor children" is not too indefinite: *Barkley v. Donnelly*, 112 Mo. 561; nor a gift of a fund to maintain a house for destitute and friendless children: *Woodruff v. March*, 63 Conn. 125. In *Kent v. Dunham*, 142 Mass. 216, a devise to trustees in trust for testator's children and their descendants who might be or become destitute, was held invalid.

¹ *Auch's Succession*, 39 La. An. 1043.

² *Old South v. Crocker*, 119 Mass. 1, 22; *Attorney-General v. Meeting-house*, 3 Gray, 1, 49.

³ *Perry on Trusts*, §§ 730, 731; *Bull v. Bull*, 8 Conn. 47, 51; *Williams v. Pearson*, 38 Ala. 299, 307; *Treat's Appeal*, 30 Conn. 113, 117; *Storrs v. Whitney*, 54 Conn. 342, 345; *Hunt v. Fowler*, 121 Ill. 269, 279; *Hoeffer v. Clogon*, 171 Ill. 462, 472; *Doughton v. Vandever*, 5 Del. Ch. 51, 63, 65.

⁴ *Levy v. Levy*, 33 N. Y. 97, 121; *Urmey v. Wooden*, 1 Oh. St. 160, 164.

⁵ *Walker v. Walker*, 25 Ga. 420, 428; *Dailey v. City*, 60 Conn. 314; *Preachers' Aid Society v. Rich*, 45 Me. 552, 559; *Washburn v. Sewall*, 9 Met. (Mass.) 280; *Swasey v. American Bible Society*, 57 Me. 523, 526; *Mason v. M. E. Church*, 27 N. J. Eq. 47, 53.

⁶ *Bliss v. American Bible Society*, 2 Allen, 334; *Brown v. Kelsey*, 2 Cush. 243, 250.

⁷ *Winslow v. Cummings*, 3 Cush. 358. See *Pawlet v. Clark*, 9 Cranch, 292, 325. So a bequest to an unincorporated institution maintained by a municipal corporation, known as "The Insane Asylum," and discontinued after the testator's death but before accepting the legacy, vests in the municipality for the use of the insane cared for by it: *Succession of Vance*, 39 La. An. 371. But a legacy to asylums described as in being cannot be considered as made to asylums to be created: *City v. Hardie*, 43 La. An. 251.

⁸ *Sanderson v. White*, 18 Pick. 328, 336; *Washburn v. Sewall*, 9 Met. (Mass.) 280; *McGirr v. Aaron*, 1 Pa. 49; *McIn-*

subsequent incorporation. court,¹ or by recognizing the donees or heirs as trustees.² Nor is a charitable gift revoked or annulled because the trustees fail to comply with certain conditions attached to the trust, unless the will so states,³ or where the trustee refuses to accept, though he has discretionary powers.⁴ It is, of course, competent for a testator to dispose of his property to individuals associated together for purposes not immoral, to be used by them for their own purposes; and payment by an executor to *an [* 924]

association of a fund bequeathed to them, although not incorporated, is valid.⁵ A direct gift, without limitation as to its future use, to an unincorporated charitable association, has been held good.⁶ Charities to societies to be incorporated are held valid.⁷ In West Virginia a bequest to the trustees of an unincorporated religious society and their successors was held void, and lapse of time and acquiescence to have no application in such a case.⁸

IV. Deferring the consideration of the validity or invalidity of charitable gifts in respect of the character and purpose of the gift itself to a later moment,⁹ it remains to suggest some of the limitations beyond which courts refuse to sustain such gifts on the ground of vagueness and uncertainty of either the beneficiaries thereunder, or of the direct donees where a trust is created. It is obvious that it is more difficult to uphold a trust in which neither the ultimate beneficiaries nor the instruments or agents to carry it out are clearly pointed out, than one in which either of these elements of the trust is specific and certain.¹⁰ But there is some diversity among the several States, and not always perfect unanimity among the courts of the same State, as to the extent to which courts will go in giving effect to testamentary charities,

Where either the ultimate beneficiaries, or the immediate donees or trustees are clearly indicated, courts will more easily supply the lack of definiteness.

tyre v. Zanesville, 9 Oh. 203; Zimmerman v. Anders, 6 Watts & S. 218; Inglis v. Sailors' Snug Harbor, 3 Pet. 99, 112; Tappan's Appeal, 52 Conn. 412.

¹ Urmev v. Wooden, 1 Oh. St. 160; McAllister v. McAllister, 46 Vt. 272, 280; Tucker v. Seaman's Aid Society, 7 Met. (Mass.) 188; Washburn v. Sewall, 9 Met. (Mass.) 280.

² Dexter v. Gardner, 7 Allen, 243; Bartlett v. Nye, 4 Met. (Mass.) 378; Kirk v. King, 5 Pa. St. 436, 440; Byers v. McCartney, 62 Iowa, 339.

³ Sickles v. New Orleans, 80 Fed. (C. C. A.) 868.

⁴ Sawtelle v. Witham, 94 Wis. 412.

⁵ Parker v. Cowdel, 16 N. H. 149.

⁶ Lilly v. Tobbein, 103 Mo. 477; Hadden v. Dandy, 51 N. J. Eq. 154. As

to the power of an unincorporated society to take a devise for charitable purposes, see also Dye v. Church, 48 S. C. 444 and authorities cited.

⁷ Swasey v. American Bible Society, 57 Me. 523; Universalist Society v. Kimball, 34 Me. 424; Milne v. Milne, 17 La. 46, 53; Sewall v. Cargill, 15 Me. 414; Pennoyer v. Wadhams, 20 Oreg. 274, 283, and cases cited; see Ingraham v. Ingraham, 169 Ill. 432, 454.

⁸ Mong v. Rousch, 29 W. Va. 119.

⁹ Post, § 430.

¹⁰ Downing v. Marshall, 23 N. Y. 366, 382; Bridges v. Pleasants, 4 Ired. Eq. 26. Heiskell v. Chickasaw, 87 Tenn. 668, pointing out that where both these elements are wanting, the gift must fail otherwise when either is present.

either by creating trustees where such are wanting, or ascertaining the ultimate recipients. Thus, it is held that in Connecticut the devise of a fund to be used at discretion "by the acting selectmen of B. for the special benefit of the worthy, deserving, poor, white, American, Protestant, Democratic widows and orphans residing in the town," is not too uncertain to be sustained;¹ while a bequest authorizing the executrix to disburse from the estate, in furtherance of the testator's wishes expressed to her, to such worthy persons and objects as she may deem proper, not exceeding \$5,000 in the total, as it is her pleasure to appropriate, is held void, because it is neither a trust nor a gift to the executrix.² So a bequest to the "pious indigent young men preparing for the ministry in New Haven," was held void for uncertainty.³ The proposition that a testator may confer on executors and on others an absolute * power of appointment and disposition over his property, mentioned as a familiar doctrine in an earlier Connecticut case,⁴ is expressly negatived in the case above referred to.⁵ But if the testator indicate a method or rule by which the persons to be benefited can be ascertained,—as, for instance, "the most needy of the brothers and sisters and their children,"—the court will carry out the testator's intention by executing the power if the executors have failed so to do.⁶ In Tennessee a bequest to an unincorporated, religious local association, without defining how such bequest is to be applied, is void for indefiniteness.⁷ In Iowa a right given to one "or his successor, to dispose of my real estate, and apply so much thereof to the church, or to the education and maintenance of poor children, as he in his wisdom may think proper and legal," was held void for uncertainty.⁸ So in Maryland gifts "for the relief and support of the indigent and necessitous poor persons who may from time to time reside within the limits of the 12th ward,"⁹ "for the education of free colored persons in the city of Baltimore,"¹⁰ for "feeding, clothing, and educating the poor children of Caroline County;"¹¹ "for the needy poor of said congregation,"¹² and "to be distributed among the real distressed private poor of

Instances of descriptions held sufficient or insufficient.

Gift in discretion of trustee.

¹ *Beardsley v. Selectmen*, 53 Conn. 489.

² *Bristol v. Bristol*, 53 Conn. 242, 254.

³ *White v. Fisk*, 22 Conn. 31, 50, *et seq.*

⁴ *Wait v. Huntington*, 40 Conn. 9, 11.

See *Goodale v. Mooney*, 60 N. H. 528.

⁵ *Bristol v. Bristol*, *supra*. See also *Read v. Williams*, 125 N. Y. 560, 568, in which the right and its limitation are stated; *Tilden v. Green*, 130 N. Y. 29; *Wheelock v. American Tract Society*, 109 Mich. 141. And see *ante*, § 429, p. * 922.

⁶ *Bull v. Bull*, 8 Conn. 47, 51.

⁷ *Rhodes v. Rhodes*, 88 Tenn. 637.

See, also, *Fuller's Will*, 75 Wis. 431;

Johnson v. Johnson, 92 Tenn. 559.

⁸ *Lepage v. McNamara*, 5 Iowa, 124, 141.

⁹ *Wilderman v. Baltimore*, 8 Md. 551.

¹⁰ *Needles v. Martin*, 33 Md. 609, 618.

¹¹ *Dashiel v. Attorney-General*, 6 Harr. & J. 1, 7.

¹² *Yingling v. Miller*, 77 Md. 104.

Talbot County,"¹ were all held void for uncertainty of the beneficiaries. By statutory intervention in this State, bequests for charitable uses are not now to be held void for indefiniteness of the donees, if the testator provided for the formation of a corporation to administer the gift;² but if the conditions of the act are not complied with, the old rule still prevails.³ In New York, a gift to a charity, if made to a competent trustee, and so defined as to be capable of execution, will be sustained, though it would be void for the want of an ascertained beneficiary under general rules of law,⁴ but is held void if no competent trustee is named.⁵ In this State it was recently enacted that no bequest or devise for charitable purposes, otherwise valid, shall be deemed invalid by reason of the indefiniteness or uncertainty of those designated as beneficiaries.⁶ "This statute indicates an intention on the part of the legislature," says O'Brien, J., in the case of *Dammert v. Osborn*,⁷ "to uphold and enforce charitable bequests not heretofore recognized as valid, and it may be regarded as the first step in the direction of modifying that body of law which this court has built up on the ruins of the system outlined in *Williams v. Williams*."⁸ The result which the second division of this court was constrained to reach in a recent case of public importance no doubt had some influence in creating the sentiment which is embodied in the law."⁹ It has already appeared, in connection with the application of the rule against perpetuity,¹⁰ and there will be occasion to show hereafter,¹¹ that in some of the States no distinction is made, in respect of the rules applicable in the construction of wills, between charitable and other gifts; and that the application of the doctrine of *cy près* and of the statute of 43 Eliz. c. 4, being recognized as valid in some and not in other States, produces considerable divergence in the results reached.

§ 430. What constitutes a Charitable Gift in the Legal Sense.—

The definition of legal charities formulated by Justice Gray¹²

Judge Gray's
definition of
charities.

* seems sufficiently comprehensive to include all [* 926]

cases that may come under the rules applied to

charities, and to exclude all cases to which they are not

applicable. As a convenient test, the preamble to the English stat-

¹ *Trippe v. Frazier*, 4 Har. & J. 446.

² *Chase v. Stockett*, 72 Md. 236.

³ *Yingling v. Miller*, 77 Md. 104.

⁴ *Beekman v. Bonsor*, 23 N. Y. 298;
Downing v. Marshall, 23 N. Y. 366, 382.

⁵ *Downing v. Marshall*, *supra*. The rules of law are very little, if at all, relaxed in favor of a charitable gift in this State: see *People v. Powers*, 147 N. Y. 104, in which the court, commenting on *Power v. Cassidy*, 79 N. Y. 602, say that in the latter case the court went to the extreme

limit of the rule in upholding the gift, and that the rule will not be extended beyond the facts in that case.

⁶ Laws, 1893, ch. 701.

⁷ 140 N. Y. 30, p. 43.

⁸ 8 N. Y. 525.

⁹ Referring to the *Samuel J. Tilden* will case: *Tilden v. Green*, 130 N. Y. 29.

¹⁰ *Supra*, p. * 921.

¹¹ *Post*, § 432.

¹² *Ante*, § 429, page * 919.

ute "to redress the mis-employment of lands, goods, and stocks of money heretofore given to certain charitable uses"¹ is usually resorted to, both in England and America, as containing a complete list of the donations or gifts which in law are considered charitable.² The purpose, object, and effect of a gift determine its charitable nature, whatever the private motive of the testator may have been.³ All purposes are charitable which are within the principle and reason of this statute; including, self-evidently, many objects neither mentioned nor distinctly referred to therein; and it is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature.⁴ The scope of the present treatise forbids an extensive citation of the very numerous cases arising upon the subject of charitable donations; nor does it seem profitable to dilate upon the scope, or attempt a close analysis, of the contents of the statute; but it may assist in the process of determining whether a gift constitutes a legal charity or not, to divide the charities mentioned in the statute into the several classes mentioned by Judge Gray, under one of which every valid charitable gift must be subsumable. Thus the donor's motive may be to relieve his fellow-beings from suffering physical pain or deprivation, which is recognized as charitable by the statute in mentioning the relief of aged, impotent, and poor people,⁵

English statute describing charities.

Charities may be such within the scope of the statute, though not so called in the will.

maintenance of sick and maimed soldiers and mariners, [* 927] relief and redemption * of prisoners and captives.⁶ Or the

¹ 34 Eliz. c. 4.

² "Some for relief of aged, impotent, and poor people, some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities, some for repair of bridges, ports, havens, causeways, churches, sea-banks, and highways, some for education and preferment of orphans, some for or towards relief, stock, or maintenance for houses of correction, some for marriages of poor maids, some for supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed, and others for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes."

³ *Smith's Estate*, 181 Pa. St. 109, 114, quoting from an earlier Pennsylvania case.

⁴ *Per Gray, J.*, in *Jackson v. Phillips*, 14 Allen, 539, 556.

⁵ Including gifts to the poor generally,

or of a particular town, parish, age, sex, or condition: *Saltonstall v. Sanders*, 11 Allen, 446, 455; poor emigrants and travellers passing through a city: *Chambers v. City of St. Louis*, 29 Mo. 543; poor relations: *Appleton, C. J.*, in *Swasey v. American Bible Society*, 57 Me. 523, citing English authorities, p. 527; a given number of aged widows and spinsters: *Thompson v. Corby*, 27 Beav. 649.

⁶ Redemption of British slaves in Turkey: *Attorney-General v. Ironmongers' Co.*, 2 Myl. & K. 576; s. c. 10 Cl. & Fin. 908; release of debtors from prison: *Attorney-General v. Painter-Stainers*, 2 Cox Ch. 51; benefit of disabled soldiers and seamen who served in the Union army during the rebellion, their widows and orphans: *Holmes v. Coates*, 159 Mass. 226. It was held in Virginia that devises in favor of charities, and particularly those in favor of freedom, ought to be liberally expounded; hence a devise of slaves for manumission was held a charitable devise, and sustained, although the direct donee

charitable motive may be to relieve against the evil consequences of poverty, which the statute mentions as aid to young tradesmen, craftsmen, and decayed persons, and for the marriages of poor maids. And again, the charity of the donor may have a broader basis and a higher aim in the desire to enhance and spread the blessings of civilization by the endowment of schools of learning, free schools, and scholarships in universities and colleges,¹ or to make the blessings of religious consolation and faith accessible to greater numbers;² or, in * general, to assist the State in [* 928]

could not have taken the gift under the ordinary rules of law: *Charles v. Hunnicutt*, 5 Call, 311. So in Mississippi, it was held that slaves, directed by will to be transported to Africa, thereby obtained an inchoate right to freedom, and the bequest was not void for want of capacity in the legatees to take: *Wade v. American Colonization Society*, 7 Sm. & M. 663, 694.

¹ "Almost all gifts for educational purposes are held to be charitable": *Perry on Trusts*, § 700, citing American cases. Says the court in *Webster v. Wiggin*, 19 R. I. 92, 98: "But the enumeration of that statute is not exhaustive. Colleges are expressly excluded from its provisions although the courts for a long time strained its language to include them." It was held by the United States Supreme Court, in a case from Pennsylvania, that the exclusion of all ecclesiastics, missionaries, and ministers of any sort from holding office in, or even visiting the same, or limitation of instruction to pure morality, general benevolence, a love of truth, sobriety, and industry are not so derogatory and hostile to the Christian religion as to make a devise for the foundation of such a college void: *Vidal v. Girard*, 2 How. (U. S.) 127, 199, *et seq.* Premiums for important discoveries, and useful improvements made public, are included among valid charities: *American Academy v. Harvard College*, 12 Gray, 582, 597. So a bequest for the civilization of Indians: *Magill v. Brown*, Brightly, 346, 405. For the education of the public in any branch of the sciences by the dissemination of the works of an author (such as Henry George) when they contain nothing of an illegal nature: *George v. Bradock*, 45 N. J. Eq. 757. Gifts for the promotion of the fine arts: *Almy v. Jones*,

17 R. I. 265, 269. A gift "for the erection and endowment of a free public library" in Chicago: *Crerar v. Williams*, 145 Ill. 625, 643. Donations to create a public sentiment that will put an end to negro slavery in the United States have been held valid as charitable uses: *Attorney-General v. Garrison*, 101 Mass. 223, 238; *Jackson v. Phillips*, 14 Allen, 539, 550. It is of interest to note the distinction drawn in the last two cases between the purpose of effecting the abolition of slavery, which is held a charitable purpose, and of securing the right of suffrage, in the former case to the negroes, in the latter to women, which is held to be against public policy: *Jackson v. Phillips*, *supra*, p. * 571. A fund for the removal of the prejudice and discrimination against the negro race is held to be a valid trust: *Lewis's Estate*, 152 Pa. St. 477.

² The statute, for reasons peculiar to the condition of England at the time of its enactment, is silent on the subject of religious uses as charities; the repair of churches, mentioned therein, is referable to that class of charities consisting of voluntary offerings in aid of the State, of which the church establishment was then a part. But both before and after its passage gifts for the advancement and dissemination of Christianity have been recognized as charitable by the courts of England: *Jarm.*, ch. ix. § 1; *Perry on Trusts*, § 701; *Gibbons v. Maltyard*, Poph. 6, 8; *Turner v. Ogden*, 1 Cox Ch. 316. And in England no distinction is now made in favor of or against any particular creed: see *ante*, § 424, p. * 908, so that the doctrines sought to be inculcated are not inconsistent with Christianity: *Briggs v. Hartley*, 14 Jur. 683. In America donations for the erection and repairing of churches, support of preachers, foreign

the fulfilment of its high office by voluntary offerings,¹ and benefiting civil society by the repair of bridges, havens, causeways, sea-banks, and highways,² or for the laying out or improvement of public parks³ a bequest "for a Catholic Reformatory for boys in this State" was held void in Connecticut as of too wide and uncertain signification, in the absence of facts lessening the uncertainty of the expression.⁴

§ 431. **Validity of the English Statute of Charitable Uses in America.** — The statute of 43 Eliz. c. 4, has been abolished, or never was in force in Maryland,⁵ Michigan,⁶ Minnesota,⁷ New York,⁸ Virginia,⁹ West Virginia,¹⁰ and, it seems, Wisconsin;¹¹ and charitable uses are, in these States, governed by the same rules as are applied to other devises and gifts, except in so far as the statute of the State may have introduced a change. The statute is held not to be in force, also, in Alabama,¹² California,¹³ Connecticut,¹⁴

States in which English Statute of Charitable Uses is abolished.

States in which it is not in force;

missions for the dissemination of the gospel, for the advancement of religion and morality, and like purposes, constitute a large proportion of testamentary dispositions, and are invariably upheld as charitable uses. It is a matter upon which the authorities differ, whether a bequest for the saying of masses for the repose of the soul is a charitable bequest: *ante*, § 424, where the cases are cited on this point.

¹ A bequest for "the benefit and advantage of my beloved country" is a valid charity: *Nightingale v. Goulbourn*, 2 Phillips, 594; *Mitford v. Reynolds*, 1 Phillips, 185, 190. So for the reduction of the national debt: *Newland v. Attorney-General*, 3 Mer. 683.

² *Hamden v. Rice*, 24 Conn. 350, 355. A legacy for planting and renewing shade trees is a good charitable bequest: *Cresson's Appeal*, 30 Pa. St. 437, 450; to purchase a fire-engine for a town: *Magill v. Brown*, Brightly, 346, 411; hose for a hose company: *Thomas v. Ellmaker*, 1 Pars. Eq. 98, 108.

³ Public park: *Bartlett*, Petitioner, 163 Mass. 509, 514; erection of monuments and of playhouses for children in a park: *Estate of Smith*, 181 Pa. St. 109.

⁴ *Hughes v. Daly*, 49 Conn. 34. This case also holds void a bequest "to the most deserving poor" of a town named, because no one was named to designate the beneficiaries, and no standard furnished to measure the merits; but holds good a bequest "for the building of a

Catholic convent," because the laws of the Roman Catholic Church are sufficient to determine when, where, and how such buildings are to be erected.

⁵ *Dashiell v. Attorney-General*, 5 Har. & J. 392, 401; *Rizer v. Perry*, 58 Md. 112, 116.

⁶ *Methodist Church v. Clark*, 41 Mich. 730, 741.

⁷ *Little v. Willford*, 31 Minn. 173, 176.

⁸ *Holmes v. Mead*, 52 N. Y. 332, 338; *Holland v. Alcock*, 108 N. Y. 312.

⁹ *Kain v. Gibboney*, 101 U. S. 362. In the cases of *Protestant Ep. Soc. v. Churchman*, 80 Va. 718, 780, and *Trustees v. Guthrie*, 86 Va. 125, the court assumed to overrule prior Virginia cases on this point, but in the case of *Fifield v. Van Wyck*, 94 Va. 557, the court pronounces these opinions on this point *obiter dicta* and adheres to the former law as established in that State.

¹⁰ By force of the repeal in Virginia; see *Wilson v. Perry*, 29 W. Va. 169, 188.

¹¹ *Ruth v. Oberbrunner*, 40 Wis. 238, 258; *McHugh v. McCole*, 72 N. W. 631. But see *Webster v. Morris*, 66 Wis. 366, 391.

¹² *Williams v. Pearson*, 38 Ala. 299.

¹³ *Estate of Hinckley*, 58 Cal. 457, 490, collecting many authorities from different States, and holding it doubtful whether the statute applies or not.

¹⁴ *Adye v. Smith*, 44 Conn. 60, 69. In this State its own statutes affirmatively validate all gifts in charity.

Delaware,¹ District of Columbia,² Indiana,³ Missouri,⁴ * New Hampshire,⁵ New Jersey,⁶ Ohio,⁷ Pennsylvania,⁸ [* 929] Rhode Island,⁹ Tennessee;¹⁰ but in these States the distinction between charitable uses and ordinary trusts, formerly ascribed, in many of the States, to the operation of this statute, is held to emanate from principles of public policy recognized at common law, but held declaratory of the common law. and announced by the courts before the enactment of the statute, which, in this respect, is but declaratory of the pre-existing common law.¹¹ Hence the same rules are applied, in these States, as if the statute were in force.

The statute is held to be in force in Kentucky,¹² Illinois,¹³ Maine,¹⁴ States in which it is in force. and Massachusetts,¹⁵ to which may be added a number of States in which not the statute itself, but its principles, as declaratory of common law in relation to charitable uses, are held to be the law of the State. Among these may be reckoned Arkansas,¹⁶ California,¹⁷ Georgia,¹⁸ Iowa,¹⁹ Louisiana,²⁰ Mississippi,²¹ North Carolina,²² South Carolina,²³ Texas,²⁴ and Vermont.²⁵

§ 432. *The Doctrine of Cy Près.* — There is no occasion, for the purposes of this treatise, to discuss the doctrine of *cy près* beyond suggesting the class of cases in which its application will validate a testator's charitable gift, which would otherwise be void. This class of cases is much less numerous in

¹ Doughten v. Vandever, 5 Del. Ch. 51, 63.

² Ould v. Washington Hospital, 95 U. S. 303, 309.

³ Erskine v. Whitehead, 84 Ind. 357.

⁴ Howe v. Wilson, 91 Mo. 45, 49.

⁵ Goodale v. Mooney, 60 N. H. 528, 533.

⁶ Taylor v. Bryn Mawr College, 34 N. J. Eq. 101, 104.

⁷ Perin v. Carey, 24 How. 466, 500.

⁸ Zimmerman v. Anders, 6 W. & S. 218.

⁹ Pell v. Mercer, 14 R. I. 412, 435.

¹⁰ "That statute is regarded by the courts as rather illustrative than exhaustive in its enumeration of such uses, and when resorted to for light is interpreted in a large way, according to its spirit, rather than its letter": *Almy v. Jones*, 17 R. I. 265, 269.

¹¹ *White v. Hale*, 2 Coldw. 77, 80.

¹² *Pell v. Mercer*, *supra*; *Russell v. Allen*, 107 U. S. 163, 166, *et seq.*; *Missouri Historical Society v. Academy*, 94 Mo. 459.

¹³ *Attorney-General v. Wallace*, 7 B. Mon. 611, 617, but is now repealed, and provision made by statute: *Kinney v.*

Kinney, 86 Ky. 610, 612; which statute is a virtual re-enactment of the English statute: *Ford v. Ford*, 91 Ky. 572, 576.

¹⁴ *Crerar v. Williams*, 145 Ill. 625, 644. *Andrews v. Andrews*, 110 Ill. 223, 230; *Hunt v. Fowler*, 121 Ill. 269, 276.

¹⁵ *Tappan v. Deblois*, 45 Me. 122, 128; but not as the basis of the equity power in cases of trusts: *Howard v. American Peace Society*, 49 Me. 288, 302.

¹⁶ To the extent of determining what are charitable uses: *Sanderson v. White*, 18 Pick. 328, 333.

¹⁷ *Grissom v. Hill*, 17 Ark. 483, 487.

¹⁸ *Estate of Hinckley*, 58 Cal. 457, 504.

¹⁹ *Beall v. Fox*, 4 Ga. 404, 422.

²⁰ *Johnson v. Mayne*, 4 Iowa, 180, 189; *Miller v. Chittenden*, 4 Iowa, 252.

²¹ *Fink v. Fink*, 12 La. An. 301.

²² *Wade v. American Colonization*, 7 Sm. & M. 663.

²³ *Miller v. Atkinson*, 63 N. C. 537, 539.

²⁴ *Attorney-General v. Jolly*, 1 Rich. Eq. 99, 107.

²⁵ *Bell County v. Alexander*, 22 Tex. 350, 359.

²⁶ *Burr v. Smith*, 7 Vt. 241, 286.

America than it is in England, where two sources of jurisdiction over charitable uses unite in the Court of Chancery. The king, [*930] *in the discharge of his high office as *parens patriæ*, administered all charities; and such of them as were not cognizable under the ordinary equity jurisdiction he superintended through the Lord Chancellor (or keeper of the king's conscience), who made little distinction between the charities administered under the king's prerogative and those established by him in the exercise of his ordinary judicial function in the Court of Chancery. There being no such authority in the chancery courts of America as is exercised in England under the prerogative of the Crown, "by sign manual,"¹ it follows that all charities depending for their validity upon the exercise of this prerogative are here void; including all gifts of a charitable nature, but illegal, as being contrary to public policy, or impossible of execution in the manner provided in the will, and all charities (including gifts for religious or educational purposes) without the appointment of a trustee, or indicating when, where, or how to be applied or used.² This leaves for the applicability of the doctrine that class of cases only where the testator has created a clear charity which becomes impracticable or illegal after vesting as a charity,³

Not applicable in America where a charity depends for its validity upon the exercise of royal prerogative.

Doctrine of *cy près* is applicable where there is a clear charity impracticable after it has vested.

¹ What of prerogative power vests in the government is said, in American States, to reside in the legislative branch: *Sohier v. Massachusetts Hospital*, 3 Cush. 483, 497. The Supreme Court of North Carolina once held that the political rights and duties of the king devolved, upon the severance from England, upon the people in their sovereign capacity, who placed it in the hands of the courts of equity: *Griffin v. Graham*, 1 Hawks, 96, 133; but soon took the opposite ground, that the doctrine of execution *cy près* does not exist in North Carolina: *McAuley v. Wilson*, 1 Dev. Eq. 276; *Holland v. Peck*, 2 Ired. Eq. 255, 259, *et seq.*

² *Estate of Hinckley*, 58 Cal. 457, 496; *Jackson v. Phillips*, 14 Allen, 539, 574; *Dickson v. Montgomery*, 1 Swan, 348, 361; *Attorney-General v. Jolly*, 1 Rich. Eq. 99, 108; *Fontain v. Ravenel*, 17 How. (U. S.) 369, 384; *Philadelphia v. Girard*, 45 Pa. St. 9, 28; *Adye v. Smith*, 44 Conn. 60, 70 (citing *White v. Fiske*, 22 Conn. 31, 54).

³ *Jackson v. Phillips*, 14 Allen, 539, 580. The charity in this case was "for the preparation and circulation of books," &c., to "create a public sentiment that will put an end to negro slavery in this country."

After the testator's death and the abolition of slavery by the Thirteenth Amendment of the Constitution of the United States, the executor filed a bill in equity for instructions, and the court held that the charity was not thereby terminated or destroyed, but that the funds remaining were to be applied to carry out the testator's intentions *cy près*, according to a scheme suggested by the master in chancery, by paying them over to an association to promote the education, support, and interests of the freedmen, lately slaves, in those States in which slavery had been abolished. A second bequest in the same will, "for the benefit of fugitive slaves who may escape from the slaveholding States," rendered inapplicable for the same reason, was directed to be executed *cy près* by being expended to the use of necessitous persons of African descent in the city of Boston and its vicinity, preference being given to such as had escaped from slavery.

Judge Gray, in discussing the authorities upon the doctrine of *cy près*, alluded to several similar cases decided in England. In one of them (*Attorney-General v. Ironmongers' Co.*, 2 Myl. & K. 576) a fund directed to be used in the redemption

or where the mode of *accomplishing it, as prescribed by [* 931] the testator, proves inadequate, illegal, or inappropriate.¹

It thus appears, that in America the doctrine of *cy près* can exist only as a judicial rule of construction, — to assist in *carrying out the testator's charitable intention*. Hence, if it be clear that the testator meant to confine the execution of his purpose to the exact method pointed out in the will, or if the charitable purpose is limited to a particular object or institution, then the substitution of another method would be subversive of his intention, and not a *cy près* execution of his purpose.² To this extent, and in this sense, the doctrine is recognized in California,³ Connecticut,⁴ Georgia,⁵ Illinois,⁶ Indiana,⁷ Kentucky,⁸ Massachusetts,⁹ Missouri,¹⁰ New Hampshire,¹¹ Ohio,¹² but repudiated in others. Pennsylvania,¹³ and Rhode Island.¹⁴ In many States

Cy près is in America a judicial rule of construction recognized in some States;

of British slaves in Turkey or Barbary was applied, with the approbation of the House of Lords (Ironmongers' Co. v. Attorney-General, 10 Cl. & Fin. 908) in the support of charity schools; the other, Lady Mico's Charity, was, in 1670, "to redeem poor slaves in what manner the executors should think most convenient." In 1827, the fund had accumulated a hundred fold, and was subsequently, capital and income, directed to be employed in purchasing and building school-houses for the education of the emancipated apprentices and their issue, &c.: Attorney-General v. Gibson, 2 Beav. 317, note.

¹ Robertson, Ch. J., in *Moore v. Moore*, 4 Dana, 354, 366.

² *Perry on Trusts*, § 723; *Teele v. Bishop*, 168 Mass. 341, and cases cited; *Brooks v. Belfast*, 90 Me. 318.

³ *Estate of Hinckley*, 58 Cal. 457, 496.

⁴ *Hayden v. Hospital*, 64 Conn. 320, 324.

⁵ By statute: "A devise or bequest to a charitable use will be sustained and carried out in this State; and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode in which he directs it to be done fails from any cause, a court of chancery may, by approximation, effectuate the purpose in a manner most similar to that indicated by the testator": Code, 1895, § 3338. See *Adams v. Bass*, 18 Ga. 130.

⁶ *Crerar v. Williams*, 145 Ill. 625, 652; *Hunt v. Fowler*, 121 Ill. 269, 276; *Henry Co. v. Winnebago*, 52 Ill. 454, 461; *Heuser v. Harris*, 42 Ill. 425, 434; and see,

as to the extent to which courts will not go in executing a charity *cy près*, *Gilman v. Hamilton*, 16 Ill. 225, 228; *Starkweather v. American Bible Soc.*, 72 Ill. 50, 59.

⁷ *Erschine v. Whitehead*, 84 Ind. 357, 362, qualifying or overruling *Grimes v. Harmon*, 35 Ind. 198, in so far as the latter case decides the power of *cy près* as a judicial rule: p. 367.

⁸ *Curling v. Curling*, 8 Dana, 38; *Attorney-General v. Wallace*, 7 B. Mon. 611. In *Kinney v. Kinney*, 86 Ky. 610, 614; *Holt, J.*, says: "It is true that the doctrine of *cy près*, as broadly administered by the English courts, has been rejected in this State."

⁹ *Theological Society v. Attorney-General*, 135 Mass. 285, 289; and see *Jackson v. Phillips*, and other Massachusetts cases, *supra*; *Minot v. Baker*, 147 Mass. 348 (holding a bequest to the executor "for such charitable purpose as he shall think proper," to be valid, and that after the executor's death the court would frame a scheme to carry out the trust); *Attorney-General v. Briggs*, 164 Mass. 561.

¹⁰ *Academy of Visitation v. Clemens*, 50 Mo. 167, 171; *Missouri Historical Society v. Academy*, 94 Mo. 459; *Women's Christian Ass'n v. Campbell*, 48 S. W. (Mo.) 960.

¹¹ *Academy v. Adams*, 65 N. H. 225.

¹² *McIntire v. Zanesville*, 17 Oh. St. 352, 366. But see *Board of Education v. Edson*, 18 Oh. St. 221, 226.

¹³ *Philadelphia v. Girard*, 45 Pa. St. 9, 27, pl. 4, 5, 6, 7.

¹⁴ *Pell v. Mercer*, 14 R. I. 412, 436, *et seq*

however, it is repudiated, even to the extent named, and [* 932] courts apply the same rules * in rejecting a will which cannot be carried out as are applied in gifts not charitable.

It is so held, for instance, in Alabama,¹ Delaware,² Iowa,³ Maryland,⁴ Michigan,⁵ Minnesota,⁶ New York,⁷ North Carolina,⁸ South Carolina,⁹ Tennessee,¹⁰ Virginia,¹¹ West Virginia,¹² and Wisconsin.¹³ In Louisiana, the doctrine of *cy près* does not seem to be recognized.¹⁴

§ 433. **Gifts of Benevolence or Private Charity.**—It will appear from the foregoing sections, that gifts of liberality and benevolence, or private charities, are not included in the class of testamentary dispositions which are favored by the law to the extent of excepting them from the rules governing ordinary devises and bequests in respect of the rule against perpetuities, mortmain, accumulations, certainty of intent as to the beneficiaries and method of execution, etc.¹⁵ Charities, in the legal sense, must contain some element of public benefit, open to an indefinite and vague number of persons, the particular beneficiaries to be selected or ascertained by a method or agency indicated by the testator.¹⁶ It has been held that an association for the purposes of mutual benevolence among its members only does not constitute an association for charitable uses;¹⁷ but the funds of a lodge accumulated for "the good of the craft," or "for the relief of indigent and distressed worthy masons, their widows and orphans," were

Gifts of liberality, benevolence, or private charities distinguished from charity in the legal sense.

Instances of uses held charitable, and of such as were not.

[* 933] held to be for a charitable * use.¹⁸ Thus, a trust to establish a school which is not free, but limited to particular

¹ Carter v. Balfour, 19 Ala. 814; Williams v. Pearson, 38 Ala. 299.

² Doughten v. Vandever, 5 Del. Ch. 51, 64.

³ Lepage v. McNamara, 5 Iowa, 124, 146; Miller v. Chittenden, 2 Iowa, 315, 370.

⁴ Kain v. Gibboney, 101 U. S. 362, 366; Dashiell v. Attorney-General, 5 Harr. & J. 392.

⁵ Methodist Church v. Clark, 41 Mich. 730, 741.

⁶ Little v. Willford, 31 Minn. 173, 176.

⁷ Bascom v. Albertson, 34 N. Y. 584, 590; Tilden v. Green, 130 N. Y. 29, 45, 67; People v. Powers, 147 N. Y. 104; Holland v. Alcock, 108 N. Y. 312, 324.

⁸ McAuly v. Wilson, 1 Dev. Eq. 276.

⁹ Pringle v. Dorsey, 3 S. C. 502, 508.

¹⁰ Green v. Allen, 5 Humph. 170, 202, 207.

¹¹ Kain v. Gibboney, 101 U. S. 362; Wheeler v. Smith, 9 How. (U. S.) 55, 80.

¹² Apparently: Wilson v. Perry, 29 W. Va. 169, 188.

¹³ Fuller's Will, 75 Wis. 431, 435; McHugh v. McCole, 72 N. W. 631; Ruth v. Oberbrunner, 40 Wis. 238, 257; Heiss v. Murphy, 40 Wis. 276, 292; but see Webster v. Morris, 66 Wis. 366, 391, holding the power to exist in Wisconsin as a "strictly judicial" power, not created by the statute of 43 Elizabeth, but as a part of the common law.

¹⁴ Succession of Vance, 36 La. An. 559; Nicholson's Succession, 37 La. An. 346.

¹⁵ Ante, §§ 429 et seq.

¹⁶ Wms. Ex. [1075]; 1 Jarm. * 208, * 211; Perry on Trusts, § 710.

¹⁷ Babb v. Reed, 5 Rawle, 151, 158; Coe v. Washington Mills, 149 Mass. 543.

¹⁸ Duke v. Fuller, 9 N. H. 536; see also Vander Volgen v. Yates, 3 Barb. Ch. 242, 290; Indianapolis v. Grand Master, 25 Ind. 518, 522; King v. Parker, 9 Cush. 71, 81.

individuals, is not a charitable trust;¹ but a trust to erect a school-house for the perpetual use of the parties to the deed and the inhabitants residing nearer to that than to another, and such other persons as the inhabitants might see fit to admit, is a good charity;² and, *a fortiori*, a fund to establish a school for the *gratis* instruction of the poor children of a parish.³ So a devise to a corporation to distribute the rents among twenty-four persons named, as they may need assistance, is not a charity;⁴ if a trust is for any particular person, it is not a charity, indefiniteness being of its essence.⁵

The word "benevolent," when used to describe the purposes of a trust, may or may not create a legal charity, according to the testator's intention, as inferable from the context. When "Benevolent" may or may not mean a charity. coupled with the word "charitable," or an equivalent word, or when it is used in such connection, or with reference to such public institutions or corporations as to indicate the intention, it may have the same meaning as "charitable;"⁶ but of itself, without anything in the context to qualify or restrict its ordinary meaning, it includes acts dictated by kindness, goodwill, or a disposition to do good, the objects of which have no relation to education, learning, or religion, relief of the needy, sick, or afflicted, public works or the relief of public burdens, and cannot be deemed charitable in the technical legal sense.⁷ Hence, if the trust is in such general terms that the fund may be applied at the discretion of the trustees, not only to purposes strictly charitable, but also to other indefinite purposes of benevolence or liberality, it cannot be sustained as a charitable trust, because the court cannot compel the application of any part to charitable uses where the trustees have * the option to apply it wholly to purposes of a [* 934] different kind.⁸ "Private charity," for the same reason, is held to create a trust which the courts cannot carry into effect, and is not among the charities recognized as legal in the sense of a public charity.⁹ So a trust for the erection of a monument, tomb, or vault

¹ Attorney-General v. Hewer, 2 Vern. 387.

² Wright v. Linn, 9 Pa. St. 433.

³ Attorney-General v. Williams, 4 Bro. Ch. R. 394.

⁴ Liley v. Hey, 1 Hare, 580.

⁵ Philadelphia v. Fox, 64 Pa. St. 169, 182.

⁶ Per Gray, J., in Chamberlain v. Stearns, 111 Mass. 267; same in Saltonstall v. Sanders, 11 Allen, 446, 465, 470; Fox v. Gibbs, 86 Me. 87; People v. Powers, 147 N. Y. 104; Murphy's Estate, 184 Pa. St. 310; "charitable" coupled with "ben-

efit" makes a charitable devise: Tappan's Appeal, 52 Conn. 412, 416.

⁷ Per Gray, J., in Chamberlain v. Stearns, 111 Mass. 267, 268; Thomson v. Norris, 20 N. J. Eq. 489, 523.

⁸ De Camp v. Dobbins, 29 N. J. Eq. 36, 46; Adye v. Smith, 44 Conn. 60; Vezey v. Jamson, 1 Sim. & Stu. 69, 71; Nash v. Morley, 5 Beav. 177, 183; Stratton v. Physio-Medical College, 149 Mass. 505, 507.

⁹ Ommanney v. Butcher, 1 Turn. & Russ. 260, 273; Gray, J., in Saltonstall v. Sanders, 11 Allen, 446, 464. But a be-

for the donor or his family, or for keeping them in repair, is not a charitable use,¹ but will be enforced if not void as a perpetuity.² Bequests for the purchase and repair of burying-grounds, the providing and overseeing of which is regarded as a religious duty, are good charities.³ A devise to keep testator's house open for the reception of ministers and others, "travelling in the service of truth" is held not a charitable use.⁴

quest may be a public charity, notwithstanding the testator uses the term "private charities": *Bullard v. Chandler*, 149 Mass. 532, 541.

¹ *Bates v. Bates*, 134 Mass. 110, 113; *Hornberger v. Hornberger*, 12 Heisk. 635; *Hoare v. Osborne*, L. R. 1 Eq. 585, 588; *Fisk v. Attorney-General*, L. R. 4 Eq. 521, 524; *Dawson v. Small*, L. R. 18 Eq. 114, 117; *Kelley v. Nichols*, 17 R. I. 306, 318; *Johnson v. Holifield*, 79 Ala. 423; *Piper v. Moulton*, 72 Me. 155, 159. Bequests for repair of the family vault have

also been held good charitable uses: *Swasey v. American Bible Society*, 57 Me. 523, 527; *Ford v. Ford*, 91 Ky. 572 (distinguishing between a monument for the testator's family, which is held valid, and for himself, which was not passed upon).

² *Fite v. Beasley*, 12 Lea, 328, 331; *Detwiller v. Hartmann*, 37 N. J. Eq. 347, 352; and is now held valid under the statute of Massachusetts: *Green v. Hogan*, 153 Mass. 462.

³ *Dexter v. Gardner*, 7 Allen, 243, 247.

⁴ *Kelley v. Nichols*, 17 R. I. 306, 318.

OF CARRYING WILLS INTO EFFECT.

CHAPTER XLVIII.

LEGAL INCIDENTS AFFECTING DEVISES AND LEGACIES.

§ 434. **Lapse of Testamentary Gifts by the Death of the Donee before that of the Testator.**—Among the consequences of the ambulatory nature of wills is the failure, or lapse, of a devise or legacy if the donee die before the testator, because the gift cannot take effect until the testator's death, and if the devisee or legatee is then dead, he cannot be benefited thereby.¹ As a general rule, therefore, the devise or bequest to one who dies before the testator becomes void,² even if the testator knew the legatee to be dead when making the will.³ The reason of the rule applies to all cases in which the capacity of the donee to take the devise or legacy has * ceased to exist before the will takes effect. [* 936] Hence the legacy to a corporation lapses if its charter has expired before the testator's death;⁴ so also, a gift to one of consumable articles for life, or so long as she shall remain unmarried, lapses by her marriage before the testator dies;⁵ likewise a specific legacy renounced by the legatee.⁶ The rule includes the bequest of debts

If donee die before the testator, gift cannot take effect.

Rule extends to all cases in which the donee's capacity to take has ceased to exist before testator's death, or where legacy is renounced.

¹ The American rules governing in cases where the testator and legatee perish in the same calamity are announced *ante*, § 207, p. *446.

² *Trippe v. Frazier*, 4 Harr. & J. 446; *Gore v. Stevens*, 1 Dana, 201, 205; *Dunlap v. Dunlap*, 4 Desaus. 305, 314; *Ballard v. Ballard*, 18 Pick. 41, 43; *Hatcher v. Robertson*, 4 Strobh. Eq. 179; *Alexander v. Waller*, 6 Bush, 330, 345; *Martin v. Lachasse*, 47 Mo. 591, 593; *Colburn v. Hadley*, 46 Vt. 71.

³ *Dildine v. Dildine*, 32 N. J. Eq. 78, 80; *Barnett's Appeal*, 104 Pa. St. 342.

Whether this rule applies in case of statutory exceptions to the doctrine of lapsed legacies, see § 435, p. *940.

⁴ *Andrew v. Bible Society*, 4 Sandf. 156, 174; *Crum v. Bliss*, 47 Conn. 592, 602.

⁵ *Andrew v. Andrew*, 1 Colly. 686, 691.

⁶ *Peckham v. Newton*, 4 Atl. 758; s. c. 15 R. I. 321, 324. A renounced legacy goes into the residue and passes as such to the residuary legatee: *post*, § 437, p. *944. But a legacy to two as joint tenants during their joint lives, and then to the survivor for his life, on the

due from the legatee to the testator, which lapses by the death of the debtor before that of the testator,¹ unless the intention be clearly expressed in the will, that the testator directs the debt to be forgiven, remitted, or released at all events, in which case the debtor's representative ought to have the benefit thereof.² The insertion after the name of the legatee of the words "his heirs," "executors or administrators," "assigns," or the like, will not prevent the application of the rule, in so far as they may be regarded as the expression of the testator's intention to pass to the legatee the absolute property in the estate;³ but if they are so used by the testator as to indicate his intention that the persons designated should take by substitution in case of the first-named legatee's intermediate death, — not by succession, but by appointment of the testator, — the gift will not lapse, but go to the person so indicated.⁴ That the use of the word "or," where there is a gift to one *or* his representatives, *or* his heirs, etc., is generally held to imply a substitution of the representative, heir, etc., in case of the donee's death during the testator's lifetime, has already been stated.⁵ The direction that the legacy shall not lapse in case the legatee die before the legacy is payable, is sufficient to prevent the lapse, if some other recipient thereof is pointed out;⁶ but the declaration that

The words "heirs," "executors or administrators," "assigns," etc., coupled with that of a donee, are inoperative, unless they are intended to take by substitution.

Direction that devise shall not lapse is not *per se* sufficient to avoid lapse.

[* 937] * the devise or bequest shall not lapse does not *per se* prevent such lapse.⁷

The rule that a devise or legacy lapses upon the death of the donee before the will takes effect does not extend to cases where the devise or legacy is to two in succession, and fails as to the first by reason of his death during the testator's lifetime; but in such case the next in succession takes upon the testator's death.⁸ If the limitation over be executory, how-

Devise to two in succession does not lapse by death of the first donee;

refusal of one of the legatees to take the legacy with the obligations imposed by the testator if accepted, becomes an estate for life in the other legatee: *Pendleton v. Kinney*, 65 Conn. 222.

¹ *Maitland v. Adair*, 3 Ves. 231; *Izon v. Butler*, 2 Price, 34, 40.

² *Sibthorp v. Moxom*, 3 Atk. 580.

³ Because those taking by representation are not entitled to what the person whom they represent never had: *Kimball v. Story*, 108 Mass. 382, 384; *Dickinson v. Purvis*, 8 Serg. & R. 71; *Barnett's Appeal*, 104 Pa. St. 342; *Maxwell v. Featherston*, 83 Ind. 339; *Hand v. Marcy*, 28 N. J. Eq. 59; *Keniston v. Adams*, 80 Me. 290; *In re Wells*, 113 N. Y. 396.

⁴ *Davis v. Taul*, 6 Dana, 51, 53; *Gittings v. McDermott*, 2 Myl. & K. 69, 73; *Rivenett v. Bourquin*, 53 Mich. 10; *Gibbon v. Gibbon*, 40 Ga. 562, 572; *Copron v. Copron*, 6 Mackey, 340.

⁵ *Ante*, § 417 and authorities.

⁶ *Ware v. Fisher*, 2 Yeates, 578, 584; *Sibley v. Cook*, 3 Atk. 572; *Bargner v. Brown*, 133 Ind. 391.

⁷ Because the only mode of excluding the title of him whom the law constitutes the successor, in the absence of testamentary disposition, is to give it to some one else: *ante*, § 418.

⁸ *Yeaton v. Roberts*, 28 N. H. 459, 468, citing English authorities; *West v. Williams*, 15 Ark. 682, 691; *Goodall v. Mc*

ever, and the legatee taking absolutely die in the lifetime of the testator, but after the event has happened upon the non-occurrence of which the limitation over depends, the legacy will lapse.¹

A devise or legacy to a class, though as tenants in common and not as joint tenants, does not lapse by reason of the death of one or more of the individuals constituting the class before the testator.² The distinction between a gift to a class as such, and to several individuals who may constitute a class, is that in the former case the testator intends to benefit those who constitute the class, excluding all others; while in the latter his purpose is to benefit the several individuals named, whether they constitute a class or not; the class designation serving as *descriptio personæ*.³ Hence if it appear that the testator intended to provide for a number of persons as a class, although the estate is devised or bequeathed to the individuals by name, the share of any of them dying before the testator will not lapse, but go to the survivors of the class;⁴ but where the gift is * to several persons by name, a presumption arises, in the absence of any indications in the language of the will to the contrary, that it is to them severally and *nominatim*, and not collectively, although the persons named may constitute a class.⁵

§ 435. **Statutory Exceptions in Favor of Representatives of Deceased Legatees.**—The several States have provided by statute that

Lean, 2 Bradf. 306; May's Appeal, 41 Pa. St. 512, 522; Wager v. Wager, 96 N. Y. 164, 171; Huber v. Mohn, 37 N. J. Eq. 432; Britton v. Thornton, 112 U. S. 526, 533; Glover v. Condell, 163 Ill. 566, 581.

¹ Prescott v. Prescott, 7 Met. (Mass.) 141, 145; Doo v. Brabant, 4 T. R. 706; Williams v. Jones, 1 Russ. Ch. 517; McGreery v. McGrath, 152 Mass. 24.

² Crecelius v. Horst, 78 Mo. 566, affirming s. c. in 9 Mo. App. 51, 54. Where the gift or devise is to a class, as tenants in common, with no provision for survivorship, and one or more of the class die after the gift or devise has taken effect in interest, and before the time of distribution, the shares of those so dying will go to their heirs, devisees, or distributees: McCartney v. Osburn, 118 Ill. 403, 418; Ballentine v. Wood, 42 N. J. Eq. 552, 558; Morris v. Bolles, 65 Conn. 45. In such case the gift to tenants in common is deemed not to be given to a class, but to them individually, and hence they have vested interests: Parker v. Glover, 42 N. J. Eq. 559, 561.

³ Barber v. Barber, 3 Myl. & Cr. 688, 697; Jackson v. Roberts, 14 Gray, 546.

In America a legacy to two or more persons individually named, without words from which a different intention appears, will usually be construed as creating a tenancy in common and not a joint tenancy, and hence the death of one of the legatees before the testator will cause his legacy to lapse: Stetson v. Eastman, 84 Me. 366, and cases cited, showing the divergence from the English rule.

⁴ Schaffer v. Kettell, 14 Allen, 528, 530; Delafield v. Shipman, 34 Hun, 514; Manier v. Phelps, 15 Abb. N. C. 123; Page v. Gilbert, 32 Hun, 301; Jackson v. Roberts, *supra*; Hood v. Boardman, 148 Mass. 330, 336; Chase v. Peckham, 17 R. I. 385; Brown's Estate, 86 Me. 572, and cases cited.

⁵ Twitty v. Martin, 90 N. C. 643, 645, citing earlier North Carolina cases; Dildine v. Dildine, 32 N. J. Eq. 78, 80; Mofett v. Elmendorff, 152 N. Y. 475, 485; Hoppock v. Tucker, 59 N. Y. 202, 208; Collins v. Bergen, 42 N. J. Eq. 57; Church v. Church, 15 R. I. 138, 140; Rockwell v. Bradshaw, 67 Conn. 8; Frost v. Courtis, 167 Mass. 251.

the rule mentioned in the preceding section shall not apply in cases where the devise or bequest is to children, grandchildren, or other descendants of the testator who die before him, leaving issue living at the time of his death. In California¹ the statute providing for the exception uses the term "devisee," while in other States both devisees and legatees are mentioned; but there seems to be no doubt that legatees are likewise included in the statute of California.² But in South Carolina, where the word "legacy" is used in the statute, it is held that this word must be understood in its technical sense, not including a devise; hence in this State a devise of land to a son lapses if he dies before the testator.³ The exception is confined to donees who are children or other *descendants*⁴ of the testator in Alabama,⁵ Arizona,⁶ Arkansas,⁷ Colorado,⁸ Connecticut,⁹ Idaho,¹⁰ Illinois,¹¹ Indiana,¹² Kentucky,¹³ Mississippi,¹⁴ New York,¹⁵ North Carolina,¹⁶ Pennsylvania,¹⁷ and Texas;¹⁸ to children and other *relatives* in California,¹⁹ [* 939] Kansas,²⁰ Maine,²¹ Massachusetts,²² Michigan,²³ * Minnesota,²⁴ Missouri,²⁵ Montana,²⁶ Nebraska,²⁷ Nevada,²⁸ New Jersey,²⁹ Ohio,³⁰ Oregon,³¹ Utah,³² Vermont,³³ Washington,³⁴ and Wisconsin.³⁵ It is held, under these statutes, that the term "relative" applies only to relations by consanguinity.³⁶ The

Statutory exceptions to the rule of lapse.

Gift to a class.

¹ Civ. Code, § 1310.

² Estate of Pfuelb, 48 Cal. 643.

³ Pratt v. McGhee, 17 S. C. 428.

⁴ Nephews and nieces are not included under this term: Van Gieson v. Howard, 7 N. J. Eq. 462; Armstrong v. Moran, 1 Bradf. 314; nor does it include collateral kindred, such as a brother: West v. West, 89 Ind. 529; Hester v. Hester, 2 Ired. Eq. 330, 339; Barnett's Appeal, 104 Pa. St. 342, 348.

⁵ Code Ala. (Civ.) 1896, § 4257.

⁶ Rev. St. Ariz. 1887, ¶ 3243.

⁷ Dig. of St. Ark. 1894, § 7402.

⁸ Mills' Ann. St. 1891, § 4660.

⁹ But including brother and sister in the last revision: Gen. St. Conn. 1888, § 541.

¹⁰ Rev. St. Idaho Terr. 1887, § 5747.

¹¹ St. & C. Ann. St. Ill. 1896, p. 1433, ¶ 11.

¹² Ann. Ind. St. 1894, § 2741.

¹³ Ky. St. 1894, § 4841; whether the legatee died before or after the will was made: Chenault v. Chenault, 88 Ky. 83, overruling (p. 91 of the opinion) Sheets v. Grubbs, 4 Met. 339.

¹⁴ Miss. Ann. Code, 1892, § 4491.

¹⁵ Banks & Bro. (7th ed.) p. 2287, § 52.

¹⁶ Code, 1883, § 2144.

¹⁷ Bright. Purd. Dig. p. 1711, § 14.

Devises and legacies to brothers and sisters, or the children of a deceased brother or sister, do not lapse in case of the death of such donees before the testator, if the latter leave no lineal descendants: *Ib.*, p. 1711, § 15.

¹⁸ Sayles' Tex. St. 1897, § 5347.

¹⁹ Civ. Code, § 1562.

²⁰ 2 Gen. St. Kans. 1897, ch. 110, § 55.

²¹ Rev. St. 1883, p. 609, § 10.

²² Pub. St. 1882, p. 750, § 23.

²³ How. St. 1882, § 5812.

²⁴ Gen. St. Minn. 1891, § 5633.

²⁵ Rev. St. 1889, § 8879.

²⁶ Mont. Const., Codes & St. 1895, § 1755.

²⁷ Cons. St. 1893, § 1210.

²⁸ Rev. St. 1885, § 3017.

²⁹ Since 1887: Only testator's descendants, and brothers and sisters or their descendants are included: Murphy v. McKeon, 53 N. J. Eq. 406, referring to the statute as amended.

³⁰ Bates' Ann. St. 1897, § 3017.

³¹ Code, 1887, § 3077.

³² Rev. St. Utah, 1898, § 2764.

³³ Vt. St. 1894, § 2558.

³⁴ Gen. St. 1891, § 1467.

³⁵ Sanb. & B. Ann. 1889, § 2289.

³⁶ Estate of Pfuelb, 48 Cal. 643; Esty

circumstance that the gift was to the legatee as one of a class does not prevent the operation of the statute.¹ In South Carolina,² the exception applies only to such *children* of the testator as may not have been equally apportioned with other children during their lifetime; while in Georgia,³ New Hampshire,⁴ Rhode Island,⁵ Tennessee,⁶ Virginia,⁷ and West Virginia,⁸ the operation of the rule is not allowed in the case of *any legatee* or *devisee* who, although dying before the testator, leaves lineal descendants surviving at the time of the testator's death. The effect of these statutes is to vest in the lineal descendants⁹ of the deceased legatee or devisee the interest which the latter would have been entitled to if *in esse* when the will took effect;¹⁰ and it is held that the illegitimacy of such lineal descendant is no objection.¹¹ But, as in all cases of testamentary disposition the testator's intention controls mere rules of construction, so these statutes will not be allowed to divert the gift contrary to the ascertained intention of the testator. Hence, if it appear that the testator intended no legatee to take unless he survived him, the legacy to one dying before the testator must lapse, although the legatee leave issue living.¹² In Iowa¹³ and Maryland¹⁴ the rule that legacies or devises lapse by the death of the legatee or devisee is entirely abolished by

v. Clark, 101 Mass. 36, 38; *Prather v. Prather*, 58 Ind. 141; *Horton v. Earle*, 162 Mass. 448; *Renton's Estate*, 10 Wash. 533; *Prather v. Prather*, 58 Ind. 141; *Cleaver v. Cleaver*, 39 Wis. 96, 99; *Keniston v. Adams*, 80 Me. 290, 294; *Elliot v. Fessenden*, 83 Me. 197; *Mann v. Hyde*, 71 Mich. 278, 281; *Bramell v. Adams*, 47 S. W. (Mo.) 931, 935.

¹ *Stockbridge, Petitioner*, 145 Mass. 517; *Strong v. Smith*, 84 Mich. 567; *Bradley's Estate*, 166 Pa. St. 300; *Moses v. Allen*, 81 Me. 268, 278; *Woolley v. Paxson*, 46 Oh. St. 307, 316, citing authorities *pro* and *con*. A contrary rule is arrived at under the statute of Georgia, which is held not to apply to a deceased member of a class: *Martin v. Trustees*, 98 Ga. 320, 327.

² Rev. St. S. C. 1893.

³ Code, 1895, § 3330.

⁴ Publ. St. 1891, ch. 186, § 12.

⁵ Publ. St. 1882, p. 472, § 14.

⁶ Code, 1884, § 3036.

⁷ Code, 1887, § 2523.

⁸ Code, 1891, ch. 77, § 12.

⁹ The statute applies only when the legatee leaves lineal descendants: *Ballard v. Ballard*, 18 Pick. 41, 43; *Fisher v. Hill*,

7 Mass. 86; *Dixon v. Cooper*, 88 Tenn. 177. The mother of the legatee is not a "lineal descendant" within the meaning of these statutes: *Morse v. Hayden*, 82 Me. 228; but an adopted child is: *Warren v. Prescott*, 84 Me. 483.

¹⁰ *Moore v. Dimond*, 5 R. I. 121, 128; *Hoke v. Hoke*, 12 W. Va. 427, 468, *et seq.*; *Darden v. Harrill*, 10 Lea, 421, 428.

¹¹ Where an illegitimate child can take: *Goodwin v. Colby*, 64 N. H. 401.

¹² *Strong v. Smith*, 84 Mich. 567, 570; *Daboll v. Field*, 9 R. I. 266, 287; *Eberts v. Eberts*, 42 Mich. 404, 407; *Lefler v. Rowland*, 1 Phill. Eq. (N. C.) 143.

¹³ Code, 1897, § 3281. The term "devisee" includes "legatee" by general statute. Under this section it was held that where a devisee dies before the testator, leaving a widow and a brother, the brother is, but the widow is not, included as an heir of the devisee: *Blackman v. Wadsworth*, 65 Iowa, 80.

¹⁴ *Halsey v. Convention*, 75 Md. 275, 283 (holding that the persons entitled are those living at the testator's death, and entitled to the estate of the legatee, as if he died intestate; and that the will of the deceased legatee cannot affect the case).

[* 940] statute, the heirs of * such taking by representation, unless a contrary intention appear from the will. In Louisiana,¹ North Dakota,² and Oklahoma,³ the common-law rule avoiding devises and legacies in case the testamentary donee dies before the testator, is substantially enacted by statute.

Where the legacy is directed by statute to go to the children or other descendants of a deceased legatee, they take directly, to the exclusion of his executors or administrators, in the same proportions as if they took as his heirs at law or distributees, the widow taking no interest therein.⁴ But whether they take absolutely, or subject to the equities existing against the primary legatee, the authorities are not agreed. It is argued, on the one hand, that upon the death of the legatee under the will, the statute vests the legacy in the child or other statute-made legatee, who is entitled in his own right, not in right of the primary legatee, and is not therefore chargeable with the debts due the testator by the original legatee.⁵ On the other hand it is held, in the language of Van Fleet, V. C., that "the statute-made legatee is a mere substitute; . . . he takes the primary legatee's place as a beneficiary under the will, and should, according to the ordinary rule prevailing in like cases, bear his burdens and be subject to the equities which would have existed against him." Hence any debts owing by the deceased legatee to the testator are to be deducted from the legacies to which the substituted legatees are entitled.⁶ A similar diversity of opinion exists in respect of grandchildren claiming their father's share in the distribution of an intestate grandfather's estate, where the father died indebted to the grandfather.⁷

Children under these statutes, take directly in exclusion of executors, administrators, and widow of deceased legatee; either absolutely, as in some States,

or subject to deduction of debts owing by the deceased legatee to the testator.

Although the terms of the statute may refer to the death of a legatee after the making of a will, it is generally construed as including also cases where the legatee was dead at the time of its execution;⁸ but it is held in North Carolina and

Exceptions hold good,

¹ Voorhies' Civ. Code, 1889. Lapsed legacies are in the Louisiana law known as *caduca*, the term by which such legacies as were diverted from the course intended by the testator were designated in the civil law: Just. Inst. (by Sandar) lib. ii. tit. xx.

² Rev. Code, N. Dak. 1895, § 3710.

³ St. Okl. 1893, § 6229.

⁴ Jones v. Jones, 37 Ala. 646, 648, *et seq.*; Cook v. Munn, 12 Abb. N. C. 344; Wallace v. Du Bois, 65 Md. 153, 161; Glenn v. Belt, 7 Gill & J. 362, 367.

⁵ Carson v. Carson, 1 Met. (Ky.) 300;

Tuttle v. Tuttle, 2 Dem. 48; Cook v. Munn, *supra*; Smith v. Smith, 5 Jones Eq. 305.

⁶ Denise v. Denise, 37 N. J. Eq. 163, 168.

⁷ Post, § 554; *ante*, § 71.

⁸ Nutter v. Vickery, 64 Me. 490, 498; Minter's Appeal, 40 Pa. St. 111, 114; Darden v. Harrill, 10 Lea, 421, 428; Barnes v. Huson, 60 Barb. 598, 613; Wildberger v. Cheek, 94 Va. 517. And it makes no difference that such ancestor is only referred to as one of a class: Moses v. Allen, 81 Me. 268.

though legatee was dead when will was executed.

Rhode Island that a legacy to a person dead at the time of the execution of the will, being void *ab initio*, is not aided by the statute.¹ A similar conclusion seems to have been reached in Massachusetts, but without any discussion as to the effect of the statute.²

* § 436. **The Doctrine of Lapse as affected by the Contin- [* 941]
gent or Vested Character of the Devise or Legacy.** — If a

Legatee of a contingent legacy dying before the contingency happens, though after the testator, the legacy lapses.

testamentary gift has once vested in the donee, it is clear that it will go to his heirs or personal representatives if he should die before he is put in possession thereof. We have also seen that, if the donee die before the gift can vest, it will lapse.³ Thus, as in the case of a simple devise or legacy the death of the donee before the will

can take effect will cause the gift to lapse, so in the case of a contingent devise or legacy the same result will follow the death of the devisee or legatee before the happening of the event upon which the gift becomes absolute, although his death occur after that of the testator. Whether a legacy is vested or contingent depends upon the language of the will creating it; and the following rules, formerly applied in the ecclesiastical courts, are recognized in

Bequest payable at a certain time vests on testator's death.

America in aid of its construction: First, that a bequest payable at a given time certain to arrive creates an interest vesting on the testator's death (as *debitum in præsentì solvendum in futuro*), transmissible to the

legatee's representatives; ⁴ second, legacies *given at a certain age, or if, when, in case, or provided* the legatees attain such age, or any future definite period, annex the time to the substance of the gift, so that the legacy depends on the legatee's being alive at the time so fixed; ⁵ in other words, a legacy is to be taken as contingent or vested, just as

Bequest at a certain age, or if, when, etc., vests on the happening of the contingency.

¹ *Lindsay v. Pleasants*, 4 Ired. Eq. 320, 322; *Scales v. Scales*, 6 Jones Eq. 163, 166; *Twitty v. Martin*, 90 N. C. 643, 646; *Almy v. Jones*, 17 R. I. 265, 271.

² *Howland v. Slade*, 155 Mass. 415.

³ *Ante*, § 434.

⁴ *Brown v. Brown*, 44 N. H. 281; *Willis v. Roberts*, 48 Me. 257; *Caldwell v. Kinkead*, 1 B. Mon. 228, 231; *Corbin v. Wilson*, 2 Ash. 178, 208; *Reed v. Buckley*, 5 Watts & S. 517; *Johnson v. Baker*, 3 Murphy, 318; *Cox v. McKinney*, 32 Ala. 461, 465; *Collier's Will*, 40 Mo. 287, 326; *Bushnell v. Carpenter*, 92 N. Y. 270, 273; *McCartney v. Osburn*, 118 Ill. 403, 421; *Silvers v. Canary*, 114 Ind. 129; *Crosby v. Crosby*, 64 N. H. 77. But where the legacy is charged upon real

estate, and payable *in futuro*, it is held not to vest until the time of payment (unless postponed for the convenience of the estate) and hence lapses if the legatee die before such time arrives: *Garland v. Smiley*, 51 N. J. Eq. 198, and cases cited.

⁵ *Bowman's Appeal*, 34 Pa. St. 19, 23, citing earlier Pennsylvania cases; *Childs v. Russell*, 11 Met. (Mass.) 16; *Spence v. Robbins*, 6 Gill & J. 507; *Pyle's Appeal*, 102 Pa. St. 317, 321; *Allen v. Whitaker*, 34 Ga. 6; *Green v. Green*, 86 N. C. 546; *Clayton v. Somers*, 27 N. J. Eq. 230 (holding the rule not changed by a provision for the payment of such legacy out of the realty); *McCartney v. Osburn*, *supra*; *Scofield v. Olcott*, 120 Ill. 362.

the contingency, if any, is annexed to the gift, or to the payment of it;¹ and so in respect of the devise of remainders in real [* 942] estate.² It has often been said, and *insisted on for various reasons, that the law favors the vesting of estates, particularly when given to children, or those standing in like relation to the testator;³ but this favor is not to be allowed to interfere with the intent of the testator, as it may be gathered from the will.⁴

The law favors the vesting of estates.

It is to be observed, in connection with the statement of the above rules, that some cases seem to constitute exceptions thereto, and that the rules themselves are always subservient to the intention of the testator. Thus, if it appear clearly from the context, that the testator meant the time of payment to be the time when the legacy vests, no interest will be transmissible to the executor or administrator, or, in case of a devise, to the heir, if the donee should die before the period designated, although words of immediate gift be used in the will.⁵ So if the event upon which payment is directed is uncertain as to its taking place.⁶ And, on the other hand, where a testator gives a legacy

The rules must be applied with reference to the context in the will.

¹ *Pennock v. Eagles*, 102 Pa. St. 290, 294; *Carper v. Crowl*, 149 Ill. 465.

² *Collier's Will*, 40 Mo. 287, 323; *Pike v. Stephenson*, 99 Mass. 188, 190, citing numerous cases; *Re Mahan*, 98 N. Y. 372, 376; *Ducker v. Burnham*, 146 Ill. 9; *McArthur v. Scott*, 113 U. S. 340, 384, 406; *Scott v. West*, 63 Wis. 529, 568; *Sager v. Galloway*, 113 Pa. St. 500. *Post*, § 439. In *Sellar v. Reed*, 88 Va. 377, 379, the court say: "These rules as to legacies, however, which were borrowed from the civil law, do not altogether apply to devises of realty; and in case of a mixed gift of realty and personalty, the rules relating to devises control." In *Heilman v. Heilman*, 129 Ind. 59, 62, the court, after citing Indiana cases, questioning whether any distinction still exists between the rules of construction governing gifts of realty and personalty, hold that where the same clause operates on both kinds of property the same construction will be applied.

³ "Because the convenience of the legatees and the interests of society are opposed to the tying up of property and keeping it out of commerce," says Judge Gaston, in *Vanhook v. Vanhook*, 1 Dev. & B. Eq. 589, 596; and because the law "presumes that testators naturally desire that the families of legatees who die

before the time for actual receipt of the legacy shall succeed to the provision made for their parents;" and "because it will not intend that the testator meant to die partially intestate." See, to similar effect, *Underwood v. Dismukes*, Meigs, 299, 308; *Wenger's Estate*, 143 Pa. St. 615; *Leighton v. Leighton*, 58 Me. 63, 67; *Gray, J.*, in *Gardiner v. Guild*, 106 Mass. 25, 28; *Van Dyke v. Vanderpool*, 14 N. J. Eq. 198, 207; *Collier's Will*, 40 Mo. 287, 321; *Tayloe v. Mosher*, 29 Md. 443, 457; *Byrnes v. Stilwell*, 103 N. Y. 453, 460; *Scofield v. Olcott*, 120 Ill. 362. It makes no difference as to the vesting, that the gift is to trustees in trust: *Neilson v. Bishop*, 45 N. J. Eq. 473. The law favors the vesting at the earliest period consistent with the terms of the will: *Kellett v. Shepard*, 139 Ill. 433, 443; *Bowditch v. Ayrault*, 138 N. Y. 223; *Bruce v. Bissell*, 119 Ind. 525, 529; *Gingrich v. Gingrich*, 146 Ind. 227; *Bigley v. Watson*, 98 Tenn. 353, 359.

⁴ *Richardson v. Wheatland*, 7 Met. (Mass.) 169, 171; *Robinson v. Palmer*, 90 Me. 246.

⁵ *Candler v. Dinkle*, 4 Watts, 143; *Mackie v. Alston*, 2 Desaus. 362; *Jones v. Price*, 3 Desaus. 165; *Stone v. Massey*, 2 Yeates, 363, 368; *In re Rogers*, 94 Cal. 526.

⁶ *Dies incertus in testamento conditionem*

or devise to a person at a future time, but gives him the intermediate interest or profit, or directs it to be applied for his benefit, the intention to give the principal at all events will be inferred, and the legacy or devise held to be vested.¹ * So, also, where [* 943] the postponement of the gift is wholly for the benefit or convenience of the fund, it will be deemed vested.²

§ 437. Devolution of Void and Lapsed Devises and Legacies.—

A distinction is observed in respect of devises void from the beginning, because there never was a devisee competent to take, and such as were good when made but became inoperative for some after-arising cause, and therefore *lapsed*. This distinction led to the recognition of a difference in the rights of heirs and residuary devisees respectively to void and lapsed devises. The testator was presumed to have given to the residuary devisee all that he intended him to have, and that therefore he *intended him to have no more*; hence the heir at law was held entitled to lapsed devises;³ but since a void devise does not constitute a testamentary act, the property mentioned therein cannot be said to have *been given* to any one, and must therefore be included in what is given to the residuary devisee.⁴ This distinction is Ignored in Maryland, ignored in Maryland, where Chancellor Hanson, in an early case, held that there is “no solid distinction between the case of a lapsed devise and the case of a devise void by the rules of law, it being manifest in both cases that the testator *did not intend the land de facto devised to go to the residuary devisees*,” and accordingly decreed a void devise to go to the heirs at law.⁵ This case is followed in Maryland to this day, notwithstanding the statute⁶ (which will be noticed in connection with the statutes of other States on this subject), but the rule is held not to apply to personal property,

facit: Marr v. McCullough, 6 Port. 507, 519; Colby v. Duncan, 139 Mass. 398.

¹ Per Potts, J., in Gifford v. Thorn, 9 N. J. Eq. 702, 732; Fonereau v. Fonereau, 3 Atk. 645; Van Wyck v. Bloodgood, 1 Bradf. 155, 175; Sammis v. Sammis, 14 R. I. 123, 129; Toms v. Williams, 41 Mich. 552, 565; Provenchere's Appeal, 67 Pa. St. 463, 466; Reed's Appeal, 118 Pa. St. 215, 221; Collier's Will, 40 Mo. 287, 321; Everett v. Mount, 22 Ga. 323, 328; Newberry v. Hinman, 49 Conn. 130. But such intention will not be inferred from a gift of part of the interest only, or where the interest is from another fund: Anderson v. Felton, 1 Ired. Eq. 55, 60; to same effect, Colt v. Hubbard, 33 Conn. 281, 286.

² Hoar, J., in Fuller v. Winthrop, 3 1030

Allen, 51, 60; Post v. Herbert, 27 N. J. Eq. 540, 544; Wedekin v. Hallenberg, 88 Ky. 114; Heilman v. Heilman, 129 Ind. 59, 66; Tayloe v. Mosher, 29 Md. 443, 454; Scofield v. Olcott, 120 Ill. 362, 373; Carper v. Crowe, 149 Ill. 465, 483; Little's Appeal, 117 Pa. St. 14 27.

³ Morris v. Underdown, Willes, 293, citing earlier English cases.

⁴ Doe v. Sheffield, 13 East, 526, 534, *et seq.*; Ferguson v. Hedges, 1 Harr. 524, 528; Stephenson v. Ontario Asylum, 27 Hun, 380, 383.

⁵ Ligan v. Carroll, 3 H. & McH. 333, 334; affirmed by Court of Appeals, p. 338.

⁶ Tongue v. Nutwell, 13 Md. 415, 427; Deford v. Deford, 36 Md. 168, 179; Rizer v. Perry, 58 Md. 112.

which, as in other States, goes to the residuary legatees.¹ and Missis-
 A similar rule seems to prevail in Mississippi.² sippi.

The distinction recognized in the American States, as well as in
 England before the Wills Act of 1838, between void or lapsed de-
 vises of real estate on the one hand, and void or lapsed
 legacies of personal estate on the other, arises
 [*944] * naturally out of the doctrine assigning real
 estate to the heir or devisee, and personal estate

Distinction be-
 tween void or
 lapsed devises
 and void or
 lapsed legacies.

to the executor or administrator. If real estate is not devised, it
 descends to the heir; hence the heir is held to take, to
 the exclusion of residuary devisees, in the absence of
 statutory modification of the rule, all void and lapsed
 devises not otherwise disposed of by the will.³ But as to the perso-

Heir takes real
 estate not dis-
 posed of by
 will.

nal estate, the executor anciently took it for the purpose of disposing
 of it according to the testator's direction, and was allowed to retain
 for his own benefit any surplus remaining after paying funeral ex-
 penses, testamentary charges, debts, and legacies;⁴ it was natural,
 therefore, that the residuary legatee should have a better right
 thereto than the executor. Hence the rule is, that as to the person-
 alty the will speaks from the time of the testator's
 death, and the residuary legatee takes not only what is
 undisposed of by the terms of the will, but that which
 becomes undisposed of at the death by disappointment
 of the intention of the will.⁵ This, whatever be its origin, is the
 rule still in force generally in the United States.⁶ It is obvious,
 however, that, if the residuary legacy itself lapses, the
 testator, as to that, died intestate; hence where the will
 gives to several persons specific shares of the residue,
 the share of such of them as may die before the testator will go to
 the next of kin.⁷ A general residuary bequest or devise does not

Personalty not
 disposed of
 goes to the
 residuary
 legatee.

Except residu-
 ary legacies
 lapsed.

¹ Cox v. Harris, 17 Md. 23, 31; Orrick v. Boehm, 49 Md. 72, 105.

² Tatum v. McLellan, 50 Miss. 1, 13.

³ Brewster v. McCall, 15 Conn. 274, 298; Van Kleeck v. Dutch Church, 20 Wend. 457, 469, *et seq.* (see this case for a thorough discussion of the principle, and review of the authorities); Rizer v. Perry, *supra*; Yard v. Murrey, 86 Pa. St. 113; Stonestreet v. Doyle, 75 Va. 356, 367; Massey's Appeal, 88 Pa. St. 470; Harker v. Rielly, 4 Del. Ch. 72, 90; Johnson v. Holifield, 82 Ala. 123, 127, *et seq.*

⁴ Wms. Ex. [1474].

⁵ Leach, V. C., in Jones v. Mitchell, 1 Sim. & Stu. 290, 294.

⁶ *In re Benson*, 96 N. Y. 499, 509;

Crerar v. Williams, 145 Ill. 625, 641; *Succession of Burnside*, 35 La. An. 708, 719, 723; *Fite v. Beasley*, 12 Lea, 328, 332; *Word v. Mitchell*, 32 Ga. 623; *Holbrook v. McCleary*, 79 Ind. 167; *Tindall v. Tindall*, 24 N. J. Eq. 512; *Sandford v. Blake*, 45 N. J. Eq. 247; *Vandewalker v. Rollins*, 63 N. H. 460; *Johnson v. Holifield*, 82 Ala. 123, 127; *Mann v. Hyde*, 71 Mich. 278, 282; *Batchelder, Petitioner*, 147 Mass. 465; including legacies renounced by the legatee: *Peckham v. Newton*, 15 R. I. 321; *Devecmon v. Shaw*, 70 Md. 219; even if the renounced legacy be an income for life: *Sawyer v. Freeman*, 161 Mass. 543.

⁷ *Hard v. Ashley*, 117 N. Y. 606, 616; *Booth v. Baptist Church*, 126 N. Y. 215,

include any part of the residue which fails, whether by lapse, illegality, or revocation.¹ So if the testator, in terms, limits the residuary bequest to what remains after paying specific legacies, if any of the legacies are void, there will be another residue which is undisposed of.²

* § 438. **The Devolution of Void and Lapsed Devises and [* 945] Legacies as affected by Statutes.**—There has been occasion

to remark, in earlier parts of this treatise,³ that the distinction existing at common law between the administration of real and of personal property is abolished in some States by statute. It would seem to follow, and it has been so held, that in such States the common-law rules based upon this distinction do not apply. So in Texas a lapsed legacy is held not to go to the residuary legatee, but, if no intention to give it to any particular person can be gathered from the will, it will pass under the Statute of Descent and Distribution.⁴

An English statute directing that, in the absence of a contrary intention apparent from the will, all void and lapsed devises shall be included in the residuary devise, if any,⁵ has substantially put real estate and personal property on the same footing in respect of void and lapsed devises and legacies. Statutes to the same effect exist in California,⁶ North Carolina,⁷ Pennsylvania,⁸ Virginia,⁹ and West Virginia.¹⁰ A statute to exactly the reverse effect is enacted in Kentucky.¹¹ It seems that in this State, before the revision of its statutes in 1852, the common-law rule (giving void and lapsed legacies to the residuary legatee, though otherwise as to real estate) was enforced.¹² The statute provides, that, in the absence of a contrary intent apparent in the will, real or personal estate, the devise of which shall for any reason be incapable of taking effect, goes to the

244; *Ward v. Dodd*, 41 N. J. Eq. 414; *Frazier v. Frazier*, 2 Leigh, 642, 650; *Watson Society v. Johnson*, 58 Md. 139, 143; *In re Valdez*, L. R. 40 Ch. D. 159; *Gray's Estate*, 147 Pa. St. 67, applying the rule, but regretting its existence. Says Mitchell, J., on p. 74: "The rule thus established does not commend itself to sound reasoning, and is a sacrifice of the settled presumption" against partial intestacy, "and also of the plain actual intent, shown in the appointment of a general residuary legatee, that his next of kin shall not participate in the distribution," &c.

¹ *Burnet v. Burnet*, 30 N. J. Eq. 595, 599; *Waln's Estate*, 156 Pa. St. 194; *Church v. Church*, 15 R. I. 138; *Garthwaite v. Lewis*, 25 N. J. Eq. 351.

² *Kerr v. Dougherty*, 79 N. Y. 327,

346; *In re Benson*, 96 N. Y. 499, 510; *Moss v. Helsley*, 60 Tex. 426, 437; *Silcox v. Nelson*, 24 Ga. 84, 90; *Devecmon v. Shaw*, 70 Md. 219.

³ *Ante*, § 337.

⁴ *Moss v. Helsley*, 60 Tex. 426, 437.

⁵ 1 Vict. c. 26, § 25.

⁶ Civ. Code, §§ 1332, 1333 (referring to real and personal estate).

⁷ Code, 1883, § 2142; *Saunders v. Saunders*, 108 N. C. 327.

⁸ Laws, 1879, p. 88; *Bright. Purd. Dig.* 1883, p. 1713, § 24.

⁹ Code, 1887, § 2524.

¹⁰ Code W. Va. 1887, ch. 77, § 13; *Carney v. Kain*, 40 W. Va. 758, 817.

¹¹ Ky. St. 1894, § 4843.

¹² *Cunningham v. Cunningham*, 18 B. Mon. 19, 21.

heir or distributee.¹ In Ohio, the statute provides that where one of several residuary devisees, children, or relatives of the testator dies in the lifetime of the testator without leaving issue, the devise shall rest in the surviving residuary devisees, unless a different intention is indicated by the will.²

A number of States have enacted statutes making devises, as well as legacies, operate upon all the real estate owned by the testator at his death.³ Mr. Kent suggests that these provi-

[* 946] sions may have the effect of destroying the application of some of the distinctions in respect of void and lapsed legacies and devises, "and give greater consistency and harmony to the testamentary disposition of real and personal estates."⁴

Statutes effacing the distinctions between devises and legacies,

This view has been realized to a greater or less extent; it is mostly held that in respect of the time from which a will speaks these statutes have wiped out the distinction between devises and legacies.⁵ But courts differ widely, not only among the several States, but in the States themselves, as to the effect of this encroachment upon the common-law rule giving void, or even lapsed, devises to the heir at law in preference to the residuary devisee. It is denied, on the one hand, that the statutes have any greater effect than to authorize the construction of the will with reference to the testator's property at the time of his death, as if he had died immediately after writing it; from which it follows, that the heirs are not excluded from taking void or lapsed devises or legacies by a residuary clause, unless such appears to be the testator's intention.⁶ On the other hand, it is held in numerous States, that the effect of directing the will to speak and take effect as to realty as well as personalty as if executed immediately before the death of the testator is, in removing the distinction between real and personal estate, to sink all void and lapsed devises and legacies into the residuum, unless the contrary intention is indicated in the will.⁷

held, in some States, not to affect the common-law rule giving void and lapsed devises to the heir;

but in others, to sink all void and lapsed devises and legacies into the residuum.

¹ Woods v. Woods, 1 Met. 512, 515.

² Bates' Ann. Oh. St. 1898, § 5971.

³ See enumeration of the States having such statutes, ante, § 419.

⁴ 4 Kent, * 542.

⁵ "There is now no difference between real and personal estate," says Ellsworth, J., in Canfield v. Bostwick, 21 Conn. 550, 554; McNaughton v. McNaughton, 34 N. Y. 201, 204; Drew v. Wakefield, 54 Me. 291, 296.

⁶ Pond v. Bergh, 10 Pai. 140, 149; Pruden v. Pruden, 14 Oh. St. 251, 253; Massey's Appeal, 88 Pa. St. 470 (overruling earlier Pennsylvania cases holding contra);

Mitcheson's Estate, 19 Phila. 32; Rizer v. Perry, 58 Md. 112, 121, 134 (affirming former cases, but intimating that but for them the court would feel inclined to hold differently).

⁷ Cruikshank v. Home, 113 N. Y. 337, 354; Reeves v. Reeves, 5 Lea, 653, 655. (with a dissenting opinion by Freeman, J., on the point that the will under consideration contained no residuary clause); Smith v. Curtis, 29 N. J. L. 345, 348; Molineaux v. Reynolds, 55 N. J. Eq. 187; Patterson v. Swallow, 44 Pa. St. 487, 490 (but this case was subsequently disavowed and overruled in Williams v. Neff, 52 Pa. St. 326, Yard

* § 439. **Remainders, and Executory Devises and Bequests.** [* 947]

— If a testator give to one a particular prior estate, and to

Devise of what remains after a particular prior estate to another gives a *vested* remainder, if the prior estate is to terminate upon an event certain, and a *contingent* remainder, if upon an event not certain.

another what remains upon the termination of the prior estate, the remainder is *vested* if the words creating it point merely to the deferred possession or enjoyment, and will be so construed if they dispose of the ulterior estate expressly in an event certain upon which the prior estate is to determine; but the remainder is *contingent* if limited to an uncertain person, or dependent upon an uncertain event. In the former case, both the prior and ulterior estate vest at the testator's death, — that of the one in possession, and that of the other in remainder; in

the latter case, the ulterior estate does not vest in the remainderman before the contingency upon which it depends has occurred.¹

On feudal principles, as embodied in the common law, there can be no remainder without seisin in either the remainderman or the tenant of the particular estate, from which “imperative feudal dogma of

Devise of a future interest not preceded by a freehold estate is an executory devise.

the common law,” as Washburn terms it,² arises the doctrine, that the devise of a future contingent interest, not preceded by a freehold estate devised in the same will, or any future interest directed to take effect at a time not coincident with the limitation of the prior estate of freehold, can only take effect as an executory devise.³ So

Executory devise or bequest is such a future interest in land or chattels as may be given by will, but in no other mode.

of personal property, in which a remainder may likewise be limited after a prior estate.⁴ Hence an executory devise (or bequest) is said to be such a limitation of a future estate or interest in lands or chattels as the law admits in the case of a will, though contrary to the rules of law in other conveyances.⁵

It is usually held, in accordance with the prevalence of authorities, that a valid executory devise cannot, at common law, be limited after a fee upon the contingency of the non-execution of an absolute disposing power vested in the first taker; and that such a limitation over is void in its creation.⁶ It is difficult to understand why this

v. Murray, 86 Pa. St. 113, and *Massey's Appeal*, *supra*); *dictum* by Wilde, J., in *Prescott v. Prescott*, 7 Met. (Mass.) 141, 146, approved in subsequent cases, and ruled as law (in reference to real as well as personal estate) in *Lovering v. Lovering*, 129 Mass. 97, 100; *Drew v. Wakefield*, 54 Me. 291, 296; *Learned, P. J.*, in *Hillis v. Hillis*, 16 Hun, 76, 79; *Johnson v. Holifield*, 82 Ala. 123, in which the court says that, in the absence of the statute to the contrary, “we should be disposed, . . . in view of the effect of the statute to make will speak at the time of the testator's death,

. . . to favor a construction which operates to abolish the distinction in this respect between real and personal estates”: p. 129.

¹ See *ante*, § 436.

² 2 Washb. Real Prop., ch. 4, § 1, pl. 1.

³ 1 Jarm. *864.

⁴ *Smith v. Bell*, 6 Pet. 68, 78; *Van Horne v. Campbell*, 100 N. Y. 287, 305; *Evans's Appeal*, 51 Conn. 435, 438; *McCall v. Lee*, 120 Ill. 261, 268; *Glover v. Condell*, 163 Ill. 566, 589.

⁵ 1 Fearn on Rem. 386.

⁶ *Van Horne v. Campbell*, 100 N. Y. 287, 309.

should be more than a rule of construction. Obviously, the [*948] limitation of a remainder upon a fee is *inconsistent, and it would follow that, if the creation of a fee simple estate in the first taker is the deliberate intention of the testator, the limitation over is void as repugnant thereto. Yet the limitation over is recognized as a valid executory devise, if the testator intended to create an ulterior estate upon a contingency named,—the fee given to the first taker becoming, in such case, a base or determinable fee, or fee simple qualified.¹ Thus, the intention of the testator, apparent from the whole will, is recognized as controlling a disposition in one clause thereof, which is inconsistent with another clause or part. Why, then, does not the same principle govern where the testator *clearly intended* to give an estate to one in fee, with full power to dispose thereof, but upon condition that, if in a certain contingency he had not carried out the power, the estate should go to another? That the same result should follow in the latter as in the former case, on the ground that the testator's intention, if ascertainable, is the only guide to be followed, was expressly held by the Supreme Court of the United States in an opinion delivered by Chief Justice Marshall.² This decision is not, however, generally followed on this point, and has been expressly disavowed in several States;³ and the doctrine, that a devise over, after a fee with power of absolute disposition is void, is sustained in most States.⁴ *A fortiori*, the exercise of the power by the first donee extinguishes the limitation over; hence, if the power to the first taker include disposition by will, the devise over will be void, if the prior donee leave a will devising or bequeathing his estate;⁵ but unless the testator contemplate giving such

Devise over after fee with power of absolute disposal is in most States void.

¹ Rap. & L. Law Dict., "Fee."

² *Smith v. Bell*, 6 Pet. 68, 75. And see also the dissenting opinion of Chief Justice Ruger, in *Van Horne v. Campbell*, 100 N. Y. 287, 310, *et seq.*; *McMurry v. Stanley*, 69 Tex. 227; *John v. Bradbury*, 97 Ind. 263; *Brockley's Appeal*, 4 Atl. R. 210; *Harbison v. James*, 90 Mo. 411; *In re Stringer's Estate*, L. R. 6 Ch. Div. 1, 15, *et seq.*, quoted with approval in *Walker v. Pritchard*, 121 Ill. 221, 234; *Healy v. East Lake*, 152 Ill. 424; *Mansfield v. Shelton*, 67 Conn. 390; *Chase v. Ladd*, 153 Mass. 126. It was held in *Leggett v. Firth*, 53 Hun, 152, that in New York the common-law rule is now abrogated by statute.

³ *Copeland v. Barron*, 72 Me. 206, 210; *Gifford v. Choate*, 100 Mass. 343, 346; *McRee v. Means*, 34 Ala. 349, 375; *Wead v. Gray*, 78 Mo. 59, 62; but was approved in later Missouri cases: *Harbison v. James*,

90 Mo. 411, 426; *Lewis v. Pittman*, 101 Mo. 281, 292, and other cases.

⁴ *Rona v. Meier*, 47 Iowa, 607; *Burbank's Will*, 69 Iowa, 378; *Mulvane v. Rude*, 146 Ind. 476, 482; *Fullemer v. Watson*, 113 Ind. 18, 20; *Jones v. Bacon*, 68 Me. 34; *Mitchell v. Morse*, 77 Me. 423; *Howard v. Carusi*, 109 U. S. 725, 730; *Cole v. Cole*, 79 Va. 251, 253; *Wilson v. Turner*, 164 Ill. 398; *Wolfer v. Hemmer*, 144 Ill. 554; *McCallister v. Bethel*, 97 Ky. 1; *Bean v. Myers*, 1 Coldw. 226; *Read v. Watkins*, 11 Lea, 158, 161; *Cornwell v. Cornwell*, 126 Mo. 355; *McKenzie's Appeal*, 41 Conn. 607; *State v. Smith*, 52 Conn. 557, 562; *Stowell v. Hastings*, 59 Vt. 494; *Combs v. Combs*, 67 Md. 11, 16.

⁵ *Bowen v. Dean*, 110 Mass. 438; *Burbank v. Sweeney*, 161 Mass. 490; *Forsythe v. Forsythe*, 108 Pa. St. 129.

power of disposition by will, the limitation over, if otherwise good, will not * be defeated in such case.¹ It should be ob- [* 949] served, that the rule does not apply to a power of disposition given to the donee of an estate expressed to be for life only; the addition of the power does not enlarge the life estate into a fee, and the devise over will be good.² The same consequence seems to follow where the power superadded is itself qualified.³

Whether a devise over constitutes a remainder or an executory devise frequently depends upon the question whether it is limited upon indefinite or definite failure of issue; and it is to be observed, that the law, as already shown,⁴ will not construe a limitation into an executory devise when it can take effect as a remainder, any more than a remainder to be contingent when it can be taken to be vested.⁵ If the failure intended is an indefinite failure of issue, the limitation over is generally construed to be a remainder void under the rule against perpetuities;⁶ but if it is a definite failure of issue, to constitute a valid executory devise,⁷ whether the failure of issue is made definite by statute,⁸ or the intention is expressed in the will,⁹ or inferable from the context;¹⁰ and so if the limitation over be on death without

¹ John v. Bradbury, 97 Ind. 263.

² Benesch v. Clark, 49 Md. 497, 504; Foos v. Scarf, 55 Md. 301, 310; Collins v. Wickwire, 162 Mass. 143; Parks v. American Society, 62 Vt. 19, 22; Wiley v. Gregory, 135 Ind. 647; Wooster v. Cooper, 53 N. J. Eq. 682; Mulvane v. Rude, 146 Ind. 476, 482; Cory v. Cory, 37 N. J. Eq. 198, 203; Burleigh v. Clough, 52 N. H. 267, 271; Weir v. Smith, 62 Tex. 1, 9; Wetter v. Walker, 62 Ga. 142, 144; Green v. Hewitt, 97 Ill. 113; R. I. Trust Co. v. Bank, 14 R. I. 625, 628; Hamlin v. U. S. Express Co., 107 Ill. 443; Anderson v. Hall, 80 Ky. 91, 95; Russell v. Eubanks, 84 Mo. 82; Evans v. Folks, 135 Mo. 397. *Contra* in Virginia: Farish v. Wayman, 91 Va. 430, and authorities there cited; and, it seems, in Alabama: Hood v. Bramlett, 105 Ala. 660.

³ Copeland v. Barron, 72 Me. 206, 208; Stuart v. Walker, 72 Me. 145, 149; Smith v. Van Ostrand, 64 N. Y. 278, 285; Candler v. Candler, 2 Dem. 124; Richardson v. Paige, 54 Vt. 373; Stowell v. Hastings, 59 Vt. 494; Holsen v. Rockhouse, 83 Ky. 233.

⁴ *Supra*, § 439.

⁵ Burleigh v. Clough, 52 N. H. 267,

273; Johnson v. Valentine, 4 Sandf. 36, 43; Bradish, Pres., in Moore v. Lyons, 25 Wend. 119, 126; Parker v. Parker, 5 Met. (Mass.) 134, 138; Wolfe v. Van Nostrand, 2 N. Y. 436, 442; Criley v. Chamberlain, 30 Pa. St. 161, 167; Harvard College v. Balch, 171 Ill. 275.

⁶ *Ante*, § 427; Vaughan v. Dickes, 20 Pa. St. 509, 514; Jackson v. Billinger, 18 John. 368, 381; Morehouse v. Cotheal, 21 N. J. L. 480, 485; Van Vechten v. Pearson, 5 Pai. 512.

⁷ Morris v. Potter, 10 R. I. 58, 69; Hill v. Hill, 74 Pa. St. 173, 176; Guernsey v. Guernsey, 36 N. Y. 267, 274; Jackson v. Chew, 12 Wheat. 153, 163; Russ v. Russ, 9 Fla. 105, 133; Hart v. Thompson, 3 B. Mon. 482, 487; Garland v. Watt, 4 Ired. L. 287; Burfoot v. Burfoot, 2 Leigh, 119, 129; Vanderzee v. Slingerland, 103 N. Y. 47.

⁸ McRee v. Means, 34 Ala. 349, 377; see *ante*, § 427.

⁹ Bradhurst v. Bradhurst, 1 Pai. 331, 345.

¹⁰ *Ante*, § 427; Hall v. Chaffee, 14 N. H. 215; Pinkham v. Blair, 57 N. H. 226, 239; Atty.-Gen. v. Wallace, 7 B. Mon. 611,

[* 950] * issue before a particular age,¹ or before another shall reach a particular age,² or on death unmarried and without issue,³ or on death before another without issue,⁴ or before coming into possession.⁵

A devise or bequest to two persons, but "in case of the death of either of them to their children," refers to death in the lifetime of the testator, and the devisees surviving the testator take an absolute interest.⁶ So an immediate devise, with a limitation over in case of the death of the first devisee, refers to death in the lifetime of the testator,⁷ or when the legacy or fund is by the terms of the will payable,⁸ unless indications are found in the context of the will which take them out of the rule.⁹ Where the devise over is not dependent upon the event of death simply, but upon death in connection with some collateral event, or death without issue, or without children, the tendency of the courts is to lay hold of slight circumstances to take it out of the rule above stated, and give effect to the natural import of the words under the circumstances.¹⁰ The rule applies only when the first gift is absolute and unrestricted,¹¹ not when the first taker is given a life estate.¹²

It is stated by Jarman, and said to be well settled in America,¹³ that where a devise over fails, and the terms of the first devise are sufficient to carry the whole interest, the preceding estate becomes absolute; and it has also been held, that where personal property has been bequeathed for life, with limitation over on a contingency, the first taker will, on failure of the contingency, take an absolute estate.¹⁴

If devise over fails, precedent estate becomes absolute.

Thus, if a contingent executory gift over cannot by possibility take

616; *Berg v. Anderson*, 72 Pa. St. 87, 91; *In re New York, L. & C. R. Co.*, 105 N. Y. 89, and authorities; *Coe v. James*, 54 Conn. 511.

¹ *Bell v. Scammon*, 15 N. H. 381, 391; *Scott v. Price*, 2 Serg. & R. 59, 62; *Booker v. Booker*, 5 Humph. 505, 510; *Dallam v. Dallam*, 7 Harr. & J. 220, 240; *Baker v. McLeod*, 79 Wis. 534.

² *In re Sanders*, 4 Pai. 283.

³ *Deihl v. King*, 6 Serg. & R. 29; *Jesup v. Smuck*, 16 Pa. St. 327, 338.

⁴ *Hilleary v. Hilleary*, 26 Md. 274, 287.

⁵ *Person v. Dodge*, 23 Pick. 287, 291; *Harris v. Potts*, 3 Yeates, 141, 147.

⁶ *Jones v. Webb*, 5 Del. Ch. 132, reviewing the authorities.

⁷ *Wills v. Wills*, 85 Ky. 486; *Stevenson v. Fox*, 125 Pa. St. 568; *In re New York L. & W. R. Co.*, 105 N. Y. 89; *Johnes v. Beers*, 57 Conn. 295; *Nelson v. Russell*, 135 N. Y. 137; *Wright v. Charley*, 129

Ind. 257; *Meacham v. Graham*, 98 Tenn. 190, 208.

⁸ *Bishop v. McClelland*, 44 N. J. Eq. 450, 452; *Woelpper's Appeal*, 126 Pa. St. 562; *Matter of Baer*, 147 N. Y. 348.

⁹ *Shadden v. Hembree*, 17 Oreg. 14, 25, and cases cited; *Mead v. Maben*, 131 N. Y. 255.

¹⁰ *Vanderzee v. Slingerland*, 103 N. Y. 47, and authorities; but these circumstances must be such that a court can reasonably say there is good and fair ground upon which to base an alteration of the rule: *Washbon v. Cope*, 144 N. Y. 287, 289, referring to the New York cases; see many cases cited in *Fowler v. Duhme*, 143 Ind. 248, on p. 261.

¹¹ *Fowler v. Ingersoll*, 127 N. Y. 472, 478.

¹² *Mullarky v. Sullivan*, 136 N. Y. 227.

¹³ 2 Redf. on Wills, 265, pl. 9.

¹⁴ *Berickson v. Garden*, 5 Del. Ch. 323.

effect, as if it be void for remoteness, or the executory devisee die before the testator, the prior donee takes the whole estate.¹ And

If prior estate lapse or fail, the gift over takes effect as an executory devise.

Defeat of a particular estate accelerates the estate expectant thereon.

conversely, if the prior estate lapse or fail, and thus defeat a gift over as a remainder, as where, for instance, a widow refused to take the life estate willed to her, the gift over will take effect as an executory devise.² The defeat of a particular estate, void in its creation by reason of being limited to a person incapable by law of taking, or who refuses to take, operates to accelerate the remainders immediately expectant thereon,³ which then vest upon the death of the testator; but the acceleration does not affect possession or enjoyment, if by the terms of the devise over it is to take effect at a particular time.⁴ It may also be mentioned that the common-law rule that a general devise of real estate, without defining the estate, or the addition of the words

General devise conveys testator's interest.

"heirs," &c., conveyed only a life estate, is not in force, or is abolished in most, if not all, the American States; such a devise conveys all the interest the testator

had.⁵

Cases are very numerous in which the testator gives the estate to

¹ *Drummond v. Drummond*, 26 N. J. Eq. 234, 238; *Brattle Square Church v. Grant*, 3 Gray, 142, 156; *Howe v. Hodge*, 152 Ill. 252, 279.

² *Thompson v. Hoop*, 6 Oh. St. 480, 487, citing English cases; *Goddard v. Goddard*, 10 Pa. St. 79; *Eaton v. Straw*, 18 N. H. 320.

³ *Yeaton v. Roberts*, 28 N. H. 459, 468; *Sauter v. Muller*, 4 Dem. 389; *Bullard v. Shirley*, 153 Mass. 559; *Sammis v. Sammis*, 14 R. I. 123; so where the widow renounces a life estate, and elects to take under the statute: *Adams v. Gillespie*, 2 Jones Eq. 244, 248; *Randall v. Randall*, 85 Md. 430 (holding her renunciation equivalent to her death); *Macknet v. Macknet*, 24 N. J. Eq. 277, 289; *State v. Smith*, 16 Lea, 662, 667; *Capron v. Capron*, 6 Mackey, 340; *Ferguson's Estate*, 138 Pa. St. 208. The effect of the widow's election to take against the will, where there are definite and also residuary legacies payable at her death, is in Pennsylvania equivalent to her death; the definite legacies cannot be postponed until the widow's death, so that the income may be transferred to the residuary legatees during her lifetime: *Vance's Estate*, 141 Pa. St. 201; see on this point *ante*, § 119, p. *273; but as to when acceleration will not obtain as

against a disappointed legatee, see *Latta v. Brown*, 96 Tenn. 343, and the authorities therein reviewed. If the widow elects to take the value of her life estate in money, it accelerates the expectant estate: *Howell v. Ackerman*, 89 Ky. 22.

⁴ Thus, where a division is delayed during the minority, not on account of the minor, but for purposes independent of him, the minority being used as a measure of time, the division will not be accelerated by the minor's death: *Robinson v. Greene*, 14 R. I. 181, 189; *McDaniel v. McDaniel*, 91 Ky. 157. Under similar circumstances, the renunciation by the widow of a life estate was held not to accelerate the remainder: *Hinkley v. House of Refuge*, 40 Md. 461. This doctrine is not an arbitrary one, but is founded on the presumed intention of the testator that the remainderman should take on the failure of the previous estate, notwithstanding the prior donee may be still alive, and is applied in promotion of the presumed intention of the testator, and not in the defeat of his intention: *Blatchford v. Newberry*, 99 Ill. 11, 48.

⁵ It is so provided in the statutes of the various States. See also *Mulvane v. Rude*, 146 Ind. 476, 480; 29 Am. & Eng. Enc. 430.

his widow for life if she continue a widow, and over *if she shall marry*. The rule is, that in such [* 951] cases the * widow takes an estate *durante viduitate*; the gifts over are vested remainders, taking effect on her marriage, or, if she die unmarried, at her death.¹

Devise to widow for life if she do not marry, but over if she does.

Under the general rule, that an absolute gift by will, followed by a limitation over on the death of the devisee or legatee, is not affected by the gift over unless the latter can take effect,² it is held that a gift to two daughters, "and in case of the death of either . . . then . . . to her children," creates an absolute estate in the daughters, with a conditional limitation over in the nature of an executory devise to the children on the death of either; hence the purchaser from one of the daughters takes no title as against her children.³

§ 440. **Devises and Legacies on Condition.**—It requires no particular form of words to annex a condition to a devise or legacy; it is sufficient if the testator's intention to that effect appear.⁴ Conditions are either precedent or subsequent; if the former, the donee takes no vested interest before the condition is performed;⁵ if the latter, the interest vesting before is divested by non-performance or breach of the condition.⁶ Whether a condition be the one or the other is sometimes difficult to ascertain, for there are no technical appropriate words to mark the distinction; it is always a question of intention, to be found from the language of the will.⁷ If the act on which the estate depends does not necessarily precede the vesting of the estate, but may accompany or follow it, the condition is subsequent.⁸ Two general rules are stated by Chief Justice Marshall, which may assist in the construction of wills on this point: "It is a general rule that a devise in words of the present time, as, 'I give to A. my

Legatee with condition precedent takes no interest before condition is performed; with condition subsequent, the interest is divested on non-performance of condition.

¹ *Manderson v. Lukens*, 23 Pa. St. 31; *Chapin v. Marvin*, 12 Wend. 538; *Gibson v. Land*, 27 Ala. 117, 126; *Chappel v. Avery*, 6 Conn. 31; *Bates v. Webb*, 8 Mass. 458.

² *Alston v. Davis*, 2 Head, 266.

³ *Hottell v. Browder*, 13 Lea, 676; see also *Buck v. Paine*, 75 Me. 582; *Kelley v. Meins*, 135 Mass. 231.

⁴ *Tower's Appropriation*, 9 W. & S. 103, 105; *Cannon v. Apperson*, 14 Lea, 553, 566. As to whether legacies are vested or contingent, see *ante*, § 436, and authorities.

⁵ *Burns v. Clark*, 37 Barb. 496; *Acherley v. Vernon, Willes*, 153.

⁶ *Finlay v. King*, 3 Pet. 346, 376; *Acherley v. Vernon, Willes*, 153, 155.

⁷ *Stickney's Will*, 85 Md. 79, 102; *Underhill v. Saratoga Co.*, 20 Barb. 455; *Robbins v. Gleason*, 47 Me. 259, 273; *Jackson v. Kip*, 8 N. J. L. 241; *Reuff v. Coleman*, 30 W. Va. 171.

⁸ *Tappan's Appeal*, 52 Conn. 412, 419; *Bell County v. Alexander*, 22 Tex. 350, 364; *Brigham v. Shattuck*, 10 Pick. 306; *Reuff v. Coleman, supra*; *Stickney's Will, supra*; a gift on condition that the legatee is to reform his intemperate habit within a certain time after testator's death, is a condition subsequent: *Burnham v. Burnham*, 79 Wis. 557.

* lands in B.' imports, if no contrary intent appears, an im- [* 952] mediate interest, which vests in the devisee on the death of the testator. It is also a general rule, that if an estate be given on a condition, for the performance of which no time is limited, the devisee has his life for performance."¹ Thus, if the condition imposed is impossible of execution without enjoyment of the estate, or is of a contingent nature so that it is uncertain whether it will ever be required, it cannot be a condition precedent, although words so indicating be annexed to the gift.² So, if it be evident that the testator only intended to make the condition imposed (as, for instance, the payment of debts, etc.) a charge upon the property devised, the devisee will be entitled to the property, and may be compelled to perform the condition.³ In cases of conditions subsequent, the performance of the condition is excused if it be made impossible by the act of God,⁴ and may be waived by the party to be benefited thereby.⁵ So, where a devisee takes land upon condition to pay a valuation for the payment of certain legacies, he will be excused from paying the valuation if the land be consumed in discharge of the testator's debts.⁶ So, likewise, where the thing to be done is mentioned only as the consideration or motive inducing the testator to make it, and does not substitute a condition

¹ *Finlay v. King*, 3 Pet. 376; *Stickney's Will*, 85 Md. 79, 102.

² *Stark v. Smiley*, 25 Me. 201, 207; *Birmingham v. Lesan*, 77 Me. 494, 497.

³ *Burnett v. Strong*, 26 Miss. 116, 123; *Creswell v. Lawson*, 7 Gill & J. 227, 239; *Cheairs v. Smith*, 37 Miss. 646, 664; *Bowman v. Long*, 23 Ga. 242, 247; *Birmingham v. Lesan*, 77 Me. 494, 498; *Hogeboom v. Hall*, 24 Wend. 146; *Marwick v. Andrews*, 25 Me. 525, 529; *Smith v. Jewett*, 40 N. H. 530; *Lindsey v. Lindsey*, 45 Ind. 552, 557; *Pearcy v. Greenwell*, 80 Ky. 616; *Casey v. Casey*, 55 Vt. 518. See on this subject, *post*, § 491, and authorities.

⁴ *Merrill v. Emery*, 10 Pick. 507, 511; *Parker v. Parker*, 123 Mass. 584, 586; *George v. George*, 47 N. H. 27, 45; *McLachlan v. McLachlan*, 9 Pai. 534, 537; *Hammond v. Hammond*, 55 Md. 575; *Culin's Appeal*, 20 Pa. St. 243; *Morse v. Hayden*, 82 Me. 227 (excusing performance of a condition to maintain another, who died before the testator), 229; *Hoss v. Hoss*, 140 Ind. 551 (holding likewise, though there was a further condition, that the legatee should agree with the executor to maintain another).

⁵ *Rush v. Rush*, 40 Ind. 83, 89, citing 1040

authorities; so where a devise was conditioned to support the testator's daughter, who was married when the devisee came into possession, her subsequent receipt of maintenance from her husband was held to waive her right against the devisee, but the obligation revived upon the husband's death: *Dickson v. Field*, 77 Wis. 439; so the refusal by the beneficiary to permit the devisee to support her as conditioned in the will, will excuse the performance of the condition: *Bryant v. Dungan*, 92 Ky. 627; see as to the effect of being prevented from performing a condition by another, *Huckabee v. Swoope*, 20 Ala. 491, 496; *Bonner v. Young*, 68 Ala. 35, 39; *Page v. Frazer*, 14 Bush, 205; *Finley v. Bent*, 95 N. Y. 364. A condition subsequent by which a legacy may be terminated by the action of a third person over whom the legatee has no control, is looked upon with disfavor by the courts, and will not be enforced if relief can be reasonably given against the condition: *White's Estate*, 163 Pa. St. 388, 401. As to the effect of conditions precedent which are made impossible by the act of a third person, see *infra*.

⁶ *Laurens v. Lucas*, 6 Rich. Eq. 217.

or contingency upon which the will is to take effect, the failure will not avoid the gift.¹

On the other hand, if a devise of one thing be in lieu or in consideration of another, that which is to be done by the devisee constitutes a condition precedent.² So if, by the terms of the [* 953] * will, a thing is required to be done by the devisee or legatee before he gets the estate;³ if, for instance, the gift is of anything to be selected by the donee, the selection is a condition precedent.⁴ We have seen that a gift to an executor, or trustee, *eo nomine*, is upon condition that he qualify and act as such, and is construed as a condition precedent, implied if not expressed, unless a different intention may be inferred from the nature of the legacy, or other circumstances arising in the will.⁵ As the performance of a condition subsequent, which has been rendered impossible, is excused,⁶ and the estate to which it is annexed thereby made absolute, the impossibility of performing a condition precedent destroys the devise or bequest itself even though there be no default or *laches* on the part of the devisee or legatee.⁷ But if the party who imposes the condition himself makes its performance impossible or unnecessary, it ceases to be binding, and the estate conveyed is discharged therefrom;⁸ and it is said that this principle is applicable

A condition precedent made impossible destroys the gift,

unless the party imposing the condition himself make it impossible.

¹ *Martin v. Martin*, 131 Mass. 547; *Bonner v. Young*, *supra*; *Case v. Hall*, 52 Oh. St. 24, 32; *Terry v. Smith*, 42 N. J. Eq. 504, and see cases there appended by the reporter.

² *Willes, C. J.*, in *Acherley v. Vernon*, *Willes*, 153; *Den v. Hance*, 11 N. J. L. 244; *Mayall*, Appellant, 29 Me. 474, 478; *Worman v. Teagarden*, 2 Oh. St. 380, 386. So where it appeared that the sole motive of a devise was that the devisee should take care of the mother of the testatrix, and by way of remuneration therefor, and she died before the testatrix, the devise was held to fall with the object for which it was made: *Burleyson v. Whitley*, 97 N. C. 295.

³ *Campbell v. McDonald*, 10 Watts, 179; *Reeves v. Craig*, 1 Winst. 209; *Booth v. Baptist Church*, 126 N. Y. 215, 242; *Den v. Messenger*, 33 N. J. L. 499 (holding the condition that the legatee should live with the testator's wife, and conduct himself in a proper manner, to be broken, and the devise thereby forfeited); *West v. Moore*, 37 Miss. 114, 128; *Drayton v. Grimke*, Rich. Eq. Cas. 321; *Nevius v. Gourley*, 95 Ill. 206; *Cannon v. Apperson*, 14 Lea, 553, 567; *State v. Blake*, 69 Conn.

64, 72 (legacy to State conditioned on its acceptance); *Merrill v. Wisconsin College*, 74 Wis. 415; *Johnson v. Warren*, 74 Mich. 491; so if a legacy is given to a son on condition that the testator's wife should not take against the will, the wife's action is a condition precedent: *Carr's Estate*, 138 Pa. St. 352. The devise of a remainder, provided the devisee pay all of the testator's debts, was held to be a condition subsequent: *Phillips v. Wood*, 16 R. I. 274; and in *Stickney's Will*, 85 Md. 79, it was held that a condition in a residuary gift, which required the legatee, as a condition to the vesting of the legacy, to release certain claims against third parties, was a condition subsequent.

⁴ *Vaughan v. Vaughan*, 30 Ala. 329, 333.

⁵ *Ante*, § 423, near end of section.

⁶ *Supra*, p. * 952.

⁷ 2 Jarm. * 9; *Wms. Ex.* [1263]; *Allen, J.*, in *Martin v. Ballou*, 13 Barb. 119, 132, and authorities; *Marshall, C. J.*, in *Taylor v. Mason*, 9 Wheat. 325, 350.

⁸ *Young v. Hunter*, 6 N. Y. 203, 207, and authorities; *Jones v. Ches. & O. R. R. Co.*, 14 W. Va. 514, 522.

to real and personal estate given by will.¹ So where a testator made a devise conditioned upon the reconciliation of the devisee with her brother within one year after her husband's death, it was held that, if the devisee * made advances in good faith to- [* 954] ward such reconciliation, such offer would be equivalent to a performance of the condition, although the brother might reject the same.² And where a testator, for the benefit of his son rather than of the estate, directed payment of a certain percentage of the profit of his estate to be made to his son, if the latter performed certain specified services in connection with the estate, in such manner as would satisfy three persons named, and it was shown that the son was ready, willing, and capable to perform the services mentioned, but was prevented solely by the action of the executors, who refused to allow him so to do, and that the only reason why the parties named did not express their satisfaction as required was because the services had not been performed, it was held that it was the testator's intention, under such circumstances, that the son's offer and willingness should be accounted to him as performance, and place him just where performance of the condition would have placed him.³ It may also be mentioned, that if a gift absolute in form as regards the testator's estate is followed by a condition restricting its mode of enjoyment to secure certain objects for the benefit of the legatee, the gift prevails although such objects fail; but if the gift is not absolute in form as between the legatee and the estate, then if the mode of enjoyment fails, the legacy fails also, and will constitute a part of the testator's estate, as not having, in such event, been disposed of.⁴

The rule, that, where no time is limited for the performance of a condition, the devisee has his whole life for the performance, has already been mentioned.⁵ Hence a devise upon condition is not barred by lapse of time, when no time is named within which the condition may be performed.⁶

§ 441. **Repugnant Conditions.** — A condition which is inconsistent with the estate to which it is attached is void, and the estate devised

¹ Theobald on Wills, 264.

² Page v. Frazer, 14 Bush, 205, 209.

³ Seeley v. Hinck, 65 Conn. 1.

⁴ Wms. Ex. [1288], with citation of English authorities. Thus, a legacy to a school district, "provided the schoolhouse shall be located one half-mile from where it now stands," lapsed by the erection of a new schoolhouse upon the site of the old one: *Jacobs v. Bradley*, 36 Conn. 365, 370. And so a legacy to a church and society "so long as they maintain their present essential doctrines and principles of faith and practice," which were then

Unitarian, is forfeited by a change to a Trinitarian system of faith and practice: *Inhabitants of Princeton v. Adams*, 10 Cush. 129, 132. And a legacy to a town "strictly on this condition, namely, that said town shall support permanently a Unitarian clergyman" fails altogether when the town cannot lawfully support such a clergyman: *Bullard v. Shirley*, 153 Mass. 559.

⁵ *Supra*, p. * 952, Marshall, C. J., in *Finlay v. King*, 3 Pet. 346, 376.

⁶ Page v. Whidden, 59 N. H. 507, 510.

or bequeathed passes absolutely.¹ Thus, a devise to the testator's children "in case the same continue to inhabit the town of Hurley, otherwise not," is void.² So a condition against alienation;³ or that the land shall [* 955] not be liable to execution or * attachment,⁴ or to the law of descent,⁵ or which restricts the use of an absolute gift.⁶ In Maryland the devise of land to one and the heirs of his body "so long as they hold and till the same," was held to be unaffected by the condition imposed, as the latter was an attempt to restrain alienation.⁷

A condition inconsistent with the nature of the estate granted is void, and the estate passes free of the condition.

Instances of repugnant conditions held void.

The American decisions on the question of what repugnancy in the condition to a devise or bequest will render the condition void, are not uniform. It is held, on the one hand, that a condition against alienation for a specified time, or to a particular person, may be valid;⁸ but it is now generally held, that the condition is equally void, whether the restriction be indefinite or for a certain time only.⁹ The

Condition against alienation to a particular person or for a specified time held valid;

¹ 4 Kent, * 131. The Chancellor seems to ascribe this rule to the requirements of public policy. "Conditions are not sustained," he says, "when they are repugnant to the nature of the estate granted, or infringe upon the essential enjoyment and independent rights of property, and tend manifestly to public inconvenience. A condition annexed to a conveyance in fee, or by devise, that the purchaser or devisee should not alien, is unlawful and void. . . . If the grant be upon condition that the grantee shall not commit waste, or not take the profits, or his wife not have dower, or the husband his curtesy, the condition is repugnant and void, for these rights are inseparable from the estate in fee."

² " . . . because of its repugnancy to the estate devised, or as being highly unreasonable, or for its uncertainty, or on account of its being nugatory and inoperative, the same being imposed on the heirs at law without any limitation or devise over": *Newkerk v. Newkerk*, 2 Caines, 345, 352; to like effect, *Pardue v. Givens*, 1 Jones Eq. 306.

³ *Reifsnnyder v. Hunter*, 19 Pa. St. 41, 44; *Gleason v. Fayerweather*, 4 Gray, 348; *Hall v. Tufts*, 18 Pick. 455; *Schermerhorn v. Negus*, 1 Denio, 448; *Lovett v. Gillender*, 35 N. Y. 617; *Brothers v. McCurdy*, 36 Pa. St. 407 (holding a condition against offering to alien for a par-

ticular purpose void); *Lane v. Lane*, 8 Allen, 350, 353.

⁴ *Blackstone Bank v. Davis*, 21 Pick. 42; *Van Osdel v. Champion*, 89 Wis. 661.

⁵ *Moore v. Sanders*, 15 S. C. 440.

⁶ *Wilson v. Turner*, 164 Ill. 398.

⁷ *Stansbury v. Hubner*, 73 Md. 228, the court calling attention to the absence of a devise over for failure to perform the condition subsequent.

⁸ *Stewart v. Barrow*, 7 Bush, 368, 371; *Langdon v. Ingram*, 28 Ind. 360; *Wilde, J., in Simonds v. Simonds*, 3 Met. (Mass.) 558, 562; *Stewart v. Brady*, 3 Bush, 623; *McKinster v. Smith*, 27 Conn. 628; *Blackstone Bank v. Davis*, 21 Pick. 42; *Robinson v. Randolph*, 21 Fla. 629, 645.

⁹ *Twitty v. Camp*, 1 Phill. Eq. 61; *Walton v. Torrey*, 1 Harr. Ch. 259; *Roosevelt v. Thurman*, 1 John. Ch. 220, 228; *Zillmer v. Landguth*, 94 Wis. 607; see *Mandlebaum v. McDonell*, 29 Mich. 78, in which *Christiancy, J.* (p. 87), discusses the principle and reviews the authorities, and comes to the conclusion that "the only safe rule of decision is to hold . . . that a condition or restriction which would suspend all power of alienation for a single day is inconsistent with the estate granted, unreasonable, and void." See also *Doebler's Appeal*, 64 Pa. St. 9, 17; *Singerly's Estate*, 14 Phila. 313; *Anderson v. Cary*, 36 Oh. St. 506. Says Judge Gray, in *Potter v. Couch*, 141 U. S. 296, 315, "on principle,

held void. divergence seems to be attributable to the different views taken by judges upon the quality of the rule ; — whether it be a rule of law, inexorably attaching certain consequences to the use of certain expressions, which the testator cannot prevent “ by any declaration, no matter how plain, of a contrary intention,”¹ in which case the utter invalidity of any repugnant condition necessarily follows ; or whether it be regarded as a rule of construction simply to assist the expounder in reaching the testator’s meaning. In the latter case, the question will be whether the gift was intended to be limited by the condition. If this intention be clearly apparent, and if the condition itself be not obnoxious to some principle of public policy * rendering it nugatory,² the devise must necessarily be controlled by the condition.³ For a condition plainly expressed, unambiguous in its terms, and not in violation of any rule

Devise may be limited by means of a trust so as not to be liable for donee’s debts.

of law, may not be rejected, however injudicious it may seem.⁴ Thus, although, as we have seen, a condition that the land devised shall not be liable to execution or attachment is void, because in contravention of the law which makes a man’s property liable for his debts, yet a donor may so limit, by means of a trust, the enjoyment of his gift, that the estate granted shall not be liable for the donee’s debts.⁵ But to be

and according to the weight of authority, a restriction, whether by way of condition or devise over, not forbidding alienation to particular persons or for particular purposes only, but against any and all alienation whatever during a limited time, of an estate in fee, is void, as repugnant to the estate devised to the first taker, by depriving him during that time of the inherent power of alienation.” So in *Latimer v. Waddle*, 119 N. C. 370, the court holds that though authorities may hold that restrictions against alienating to certain individuals may be valid, yet a restraint upon alienation for a certain time, is void ; the court criticises Washburn’s statement as not supported by the authorities he cites : p. 376 of the opinion. And in *Jones v. Port Co.*, 171 Ill. 502, 507, the court says that although as to restriction of alienation for a limited time of life estates there is some conflict in the decisions, yet as to estates in fee the authorities are uniform in holding such conditions void.

¹ As *Sharswood, J.*, in *Doebler’s Appeal*, *supra*, describes the effect of the rule in *Shelley’s Case* to be in *Pennsylvania*.

² As to illegal conditions, see *post*, §§ 442, 443.

³ See *ante*, as to the effect of a power to dispose granted in connection with a fee simple estate, and followed by a devise over, § 439.

⁴ *Morgan v. Darden*, 3 Dem. 203.

⁵ *Lampert v. Haydel*, 96 Mo. 439, affirming same case, 20 Mo. App. 616 ; *Smith v. Towers*, 69 Md. 77 ; *Leigh v. Harrison*, 69 Miss. 923 ; *Pickens v. Dorris*, 20 Mo. App. 1 ; *Rife v. Geyer*, 59 Pa. St. 393, 395, citing *Pennsylvania* cases ; *White v. White*, 30 Vt. 338, 343 ; *Fisher v. Taylor*, 2 Rawle, 33, 36 ; *Nickell v. Handly*, 10 Gratt. 336, 339 ; *Garland v. Garland*, 87 Va. 758 ; *Robert v. Stevens*, 84 Me. 325 ; *Meek v. Briggs*, 87 Iowa, 610 ; *Leavitt v. Beirne*, 21 Conn. 1, 8 ; *Easterly v. Keney*, 36 Conn. 18 ; *Wylie v. White*, 10 Rich. Eq. 294 ; *Steib v. Whitehead*, 111 Ill. 247, 250 ; *Thackara v. Mintzer*, 100 Pa. St. 151 ; *Hardenburg v. Blair*, 30 N. J. Eq. 645, 661 ; *Broadway v. Adams*, 133 Mass. 170. In some cases no distinction is made whether the property is devised in trust, or placed directly in the hands of the donee : *Emerson v. Marks*, 24 Ill. App. 642, 644.

valid, and to protect the interest of the *cestui que trust* from the reach of his creditors, such interest must be of such a nature as to be inalienable during the existence of the trust.¹ A provision in a will that the bounty bestowed upon one person shall go to another in an event which would subject it to the claims of creditors, is valid;² and it was held in Kentucky, that, where an estate was devised to executors to pay the testator's son a monthly allowance for his support, neither the beneficiaries nor his creditors could thwart the testator's intention by subjecting any part of the fund for the payment of his debts, although a number of monthly payments had accumulated.³ And a similar decision was recently made in Missouri.⁴ But in such case the surplus not needed for the support may be reached by a creditors' bill.⁵ In some of the States, the rule announced in England, that a donor creating a life estate cannot take away its incidents (including power of voluntary and liability to involuntary alienation)⁶ is adhered to.⁷

[*957] * It is evident that an estate given in clear and decisive terms cannot be taken away by subsequent words not so clear and decisive; hence an inconsistent condition, the terms of which are not binding and perfectly clear, will not affect the gift to which it is annexed.⁸

An inconsistent condition vaguely expressed will not affect the gift.

§ 442. **Conditions obnoxious to Public Policy.**—It is evident that the law cannot sanction the encouragement of acts forbidden, or the omission of duty commanded by it; hence any condition which requires the performance of an illegal act to entitle the doer to a devise or legacy is necessarily void.⁹ The consequences of illegal conditions are the same as if they were impossible of performance;¹⁰ if precedent, the devise itself is void, because by its terms it is not to become operative until, or

Conditions requiring unlawful act are void.

¹ Hallett v. Thompson, 5 Pai. 583, 586; Nichols v. Eaton, 91 U. S. 716, 722, *et seq.* See also Bland v. Bland, 90 Ky. 400, 408; Baker v. Keiser, 75 Md. 332.

² Bramhall v. Farris, 14 N. Y. 41, 45. This case is put on the ground of the distinction, drawn by Lord Eldon, "between the disposition to a man *until he becomes a bankrupt and then over*, and an attempt to give him property and to prevent his creditors from obtaining any interest in it although it is his": Brandon v. Robinson, 18 Ves. 429, 432. Comstock, J., delivering the opinion, also cites Shee v. Hale, 13 Ves. 404; Lewes v. Lewes, 6 Sim. 304; and Graves v. Dolphin, 1 Sim. 66. And see also Bull v. Kentucky Bank, 90 Ky. 452.

³ Pope v. Elliott, 8 B. Mon. 56.

⁴ Partridge v. Cavender, 96 Mo. 452.

⁵ Clute v. Bool, 8 Pai. 83; Pope v. Elliott, *supra*.

⁶ Brandon v. Robinson, 18 Ves. 429, 433.

⁷ Woolley v. Preston, 82 Ky. 415; Rudd v. Hagan, 86 Ky. 159 (based on § 21, art. i., ch. 63, Gen. St. Ky.); McCormick Har. Co. v. Gates, 75 Iowa, 343; Tillinghast v. Bradford, 5 R. L. 205, 211; Heath v. Bishop, 4 Rich. Eq. 46; Smith v. Moore, 37 Ala. 327; Mebane v. Mebane, 4 Ired. Eq. 131; Robinson v. Randall, 21 Fla. 629, 645.

⁸ Roseboom v. Roseboom, 81 N. Y. 356; Clark v. Leupp, 88 N. Y. 228; *In re Hohman*, 37 Hun, 250. See *ante*, § 418.

⁹ 2 Redf. on Wills, 284, pl. 8.

¹⁰ See *ante*, § 440.

unless, the condition is performed; if subsequent, the gift is absolute, because the condition is void.¹ If the legatee, however, be a mere trustee to carry out the illegal or void condition, taking no beneficial interest in the estate, then the void bequest does not go to the legatee beneficially, but there will be a resulting trust to the heir.²

A distinction was once observed between conditions involving a *malum prohibitum*, and such as require a *malum in se*. A condition precedent of the latter class, requiring, for instance, the killing of a man, the burning of a house, or the like, is not only void itself, but also destroys the gift; while a condition against a rule or the policy of the law simply, though void itself, left the gift absolute. But the latter rule, introduced by the ecclesiastics from the civil law, was never recognized by the common law, which makes no distinction between *malum prohibitum* and *malum in se* in this respect.³

Whether a condition to a bequest requiring religious qualification is against the policy of the law in the United States is not clearly settled. It was so held in Virginia, upon the ground that a restriction imposed as a condition upon

Condition imposing a religious qualification is against public policy,

* the enjoyment of a bequest, requiring that the [* 958]

legatee shall be a member of any religious sect or denomination, is directly violative of the policy of the law guard-

but held valid in some instances.

ing the rights of conscience.⁴ But the Supreme Court of South Carolina reversed the decision of the Circuit Court holding the above doctrine, in a case involving, aside from the question of public policy, great hardship to the legatee.⁵

So in Maryland, a condition that the legatee should withdraw from the priesthood or membership of any order or society connected with the Roman Catholic Church is held valid.⁶ The Supreme Court of the United States held that a condition excluding ecclesiastics, ministers, and missionaries from a college founded by the testator is not void in Pennsylvania.⁷

A condition that the donee shall not live with, nor contribute to the support of, his wife, is not only contrary to public policy and

A condition that donee shall not live with nor support his wife held void, and the gift valid in equity.

good morals, but in direct violation of the law, and is therefore void; and although, being a condition precedent, it would at the common law destroy the gift, yet in equity, as under the civil law, the condition is void, and the gift good as to personalty.⁸ So in Michigan and

¹ Carter v. Carter, 39 Ala. 579, 584; 290, relying on Mitchell v. Mitchell, 18 Spencer v. Dennis, 8 Gill, 314, 321; Conrad v. Long, 33 Mich. 78.

² Cheairs v. Smith, 37 Miss. 646, 647; Lusk v. Lewis, 32 Miss. 297, 303.

³ Wms. Ex. [1264].

⁴ Maddox v. Maddox, 11 Grat. 804, 814.

⁵ Magee v. O'Neil, 19 S. C. 170, 185.

⁶ Barnum v. Baltimore, 62 Md. 275,

Md. 405, 411, and Ex parte Dickson, 1 Sim. (N. S.) 37, in both of which the condition was against the devisee's becoming a nun.

⁷ Vidal v. Girard, 2 How. (U. S.) 127, 197.

⁸ Potter v. McAlpine, 3 Dem. 108, 124.

And see Whiton v. Harmon, 54 Hun, 552.

Nebraska, a devise conditioned that a wife should live apart from her husband was held good, and the condition void.¹ But where the intention of the testator is to protect the wife against want in case of separation, not to make separation the consideration for his bounty, the condition is valid.²

But a condition to support the wife on separation is good.

In Louisiana, there is provision in its Code forbidding donations between a concubine and her paramour in excess of one-tenth of their respective movables; it is held under this statute, that a bequest of the concubine's estate to her paramour must be cut down to one-tenth

in favor of a legitimate child, whether the concubinage was [* 959] open and notorious or otherwise.³ It * was held in New York, that the gift of property by a testator to one whom he supposed to be his wife, but who knew at the time of the marriage ceremony that she could not be, is inoperative because of her fraud.⁴

It seems to be held in England, that conditions against disputing the will are to be regarded *in terrorem* only when annexed to bequests of personal property, if there be no legacy over to another upon breach of the condition; but that they are valid as to real estate, whether there be a gift over or not.⁵ In America, the preponderance of authority seems

Conditions against disputing the will valid, if there is a gift over;

to incline in favor of their validity in either case. It is held in Pennsylvania, that clauses of this nature should be strictly construed, and are not favored either at law or in equity, because they contemplate the forfeiture of estates

held valid, but are not favored in some American States;

already vested; that they are not sufficient to work intestacy if there is no gift over, and cannot be enforced even though there be a gift over, or a direction that the forfeited estate fall into the residue, if *probabilis causa litigandi* exist.⁶ So in South Carolina and Virginia it is held that such a condition is *in terrorem*, unless there is a devise over;⁷ and in New York the question has been made dependent upon the *fides* of the litigants, holding the condition void against a proceeding in good faith;⁸ but other cases

otherwise in others.

¹ Conrad v. Long, 33 Mich. 78; Hawke v. Enyart, 30 Neb. 149, 160.

² Cooper v. Remsen, 5 John. Ch. 459; Thayer v. Spear, 58 Vt. 327; Born v. Horstmann, 80 Cal. 452.

³ The law is obviously intended to protect the legitimate, monogamous family, which civilization deems essential to the welfare of the State: Succession of Hamilton, 35 La. An. 640, citing art. 1481 of the Revised Civil Code.

⁴ Trilby v. Trilby, 2 Dem. 514.

⁵ 2 Redf. on Wills, 298, pl. 34.

⁶ Chew's Appeal, 45 Pa. St. 228, 232.

⁷ Mallet v. Smith, 6 Rich. Eq. 12, 18. The Chancellor rendering the opinion,

Wardlaw expressed it as his own opinion, "that a condition subsequent of this description is void, whether there be a devise over or not, as trenching on the 'liberty of the law,' Shep. Touchst. 132, and violating public policy," in all of which Chancellor Johnstone fully concurred. In Virginia such conditions, when annexed to legacies of personalty are *in terrorem* only, if no gift over, and a direction that in case of contest the legacy shall revert to the estate is not such a gift over as renders the condition valid: Fifield v. Van Wyck, 94 Va. 557.

⁸ Jackson v. Westerfield, 61 How. Pr. 399, 407; see Rank v. Camp, 3 Dem. 278,

in this State seem to recognize the entire validity of such conditions,¹ except when aimed against infants, in which case the condition is void as against public policy.² In New Jersey it was held that the testator cannot control the provisions of the law in this, nor any other respect;³ but on appeal the decree was unanimously reversed, and the provision in a will, that "if any or either of my children shall enter a caveat against this my will, he or they shall pay the expense of both sides," was held to be a good condition, without a gift over, against a devisee.⁴ In other States the validity of such conditions is fully asserted. In several of them the condition is held valid whether there is a * legacy over or [* 960] not, and that there is no difference between real and personal property in this respect.⁵ In Alabama, it was held that one who actively interferes in behalf of the contestant by advising and abetting him is equally within the prohibition to contest the will, and his interest under the will is thereby forfeited, although the contest was abandoned before it came to a trial.⁶ In Vermont, the agreement by an heir at law to forbear further opposition to the probate of a will on the promise of the executor to pay him \$5,000, was held valid, and the promise of the executor not within the Statute of Frauds.⁷ The rule that one cannot claim the benefit of a will and also claim against it, is fully applicable;⁸ hence a condition annexed to a devise not to claim under certain documents bars the devisee if he asserts the claim; and such a condition is clearly lawful.⁹ So where a legacy was to revert and pass to another in case the legatees should bring a certain action, the acceptance and enjoyment of the legacy was held to estop the legatees from bringing the action.¹⁰ And an agreement by an heir apparent not to contest any will that might be made by another person is valid, and will estop such heir from contesting

No one can claim both under and against a will.

281. It was held in the case of *Vandervoort*, 62 Hun, 612, where a testator stated, that he was not indebted to any legatee, and that if any legatee presented a claim against the estate, all legacies and devises should be forfeited by him, that where in fact testator was indebted, and the legatee established the claim, the direction forfeiting the share was void, because predicated upon the erroneous presumption that no debt existed and because a personal legacy, where there is no gift over, does not fail because of the taking effect of a condition subsequent.

¹ *Matter of Stewart*, 1 Connolly, 412; *Bryant v. Thompson*, 59 Hun, 545.

² *Bryant v. Thompson*, *supra*.

³ *Hoit v. Hoit*, 40 N. J. Eq. 478.

⁴ *Hoit v. Hoit*, 42 N. J. Eq. 388.

⁵ *Bradford v. Bradford*, 19 Oh. St. 546; *Thompson v. Gaut*, 14 Lea, 310.

⁶ *Donegan v. Wade*, 70 Ala. 501.

⁷ *Bellows v. Sowles*, 57 Vt. 164.

⁸ *Frederick v. Gray*, 10 Serg. & R. 182, 186; *Hyde v. Baldwin*, 17 Pick. 303, 307; *Hoit v. Hoit*, 42 N. J. Eq. 388, 391. But a bill filed to obtain the true construction of the provisions in a will cannot be regarded as an attempt to defeat its provisions: *Black v. Herring*, 79 Md. 146.

⁹ *Rogers v. Law*, 1 Black, 253, 261. To same effect, *Hapgood v. Houghton*, 22 Pick. 480; *Brownson v. Gifford*, 8 How. Pr. 389, 392.

¹⁰ *Shivers v. Goar*, 40 Ga. 676.

any will purporting to have been duly executed.¹ Says the Federal Supreme Court, speaking through Brewer, J.: "When a testator declares in his will that his several bequests are made upon the condition that the legatees acquiesce in the provisions of his will, the courts wisely hold that no legatee shall without compliance with that condition waive his bounty, or be put in a position to use it in the effort to thwart his expressed intent."²

A condition that the devisee should assume a certain name is a valid condition subsequent, whether at a certain age,³ or upon coming into possession of the estate.⁴

§ 443. **Conditions in Restraint of Marriage.** — By the civil law, all conditions in wills in restraint of marriage are void, whether they are precedent or subsequent, with or without a gift over, and however qualified.⁵ This rule, says Williams,⁶ seems at one time to have been adopted by the ecclesiastical courts of England, and in a great measure by the courts of equity. The jurisdiction of the English ecclesiastical courts was confined to personal property; real estate was subject to the rules of the common-law courts, where this doctrine of the civil law never prevailed. Although these also deny validity

Conditions in restraint of marriage void at the civil law.

to conditions in *general* restraint of marriage, [* 961] even if followed by a devise over, * yet they give effect to such conditions as require the consent of guardians or relatives to marriage, either at a particular or at any age; and conditions that the devisee shall not marry a specified person, or before a stated age, or in a particular manner, or the like, so that the restraint is not of marriage in general, are held lawful.⁷ The consequence of the dual nature of the jurisdiction has been to produce numerous and subtle more or less artificial and arbitrary distinctions. The tendency of modern decisions, however, both in England and America, is in general accordance with the policy dictated by the interdependent relations between the State and the family: the healthy condition of the former rests upon the recognition of the integrity of the latter; hence the law annuls testamentary dispositions in discouragement of marriage, which constitutes the basis of the family.⁸ Conditions in *general* restraint of marriage, whether of man or woman, are therefore held void.⁹ But when a man or woman, having once

Restraint of marriage generally also void at common law, but good as to particular conditions.

Policy in England and America requires the annulment of testamentary dispositions discouraging marriage.

¹ *In re Garcelon*, 104 Cal. 590.

² *Smithsonian Inst. v. Meech*, 169 U. S. 398, 415.

³ *Taylor v. Mason*, 9 Wheat. 325; *Drayton v. Grimke*, Rich. Eq. Cas. 321.

⁴ *Webster v. Cooper*, 14 How. (U. S.) 488, 500.

⁵ 2 Jarm. * 44.

⁶ Wms. Ex. [1275].

⁷ See *infra*, p. * 963.

⁸ *Ante*, § 6.

⁹ "The preservation of domestic happiness, the security of private virtue, and the rearing of families in habits of sound morality and filial obedience and reverence, are deemed to be objects too im-

Devises in discouragement of second marriages not opposed to public policy.

married, and thus laid the foundation for a family, is deprived of husband or wife by death or divorce, neither ethics nor morality demands a second marriage as a matter of duty to society or the State; hence conditions in discouragement of second marriages are not in violation of public policy, and are usually upheld.¹ If there be children of the first marriage, the motive and object of a father or mother in providing against the diverting of the property bequeathed to the surviving spouse into a new family are obvious, and commend themselves as wise and just.² Thus conditions that widows shall not marry were early held valid; ³ but * there was considerable conflict in England as well as America on this point, decisions being numerous both ways, turning generally upon the distinction whether the condition was precedent or subsequent, and whether there was a devise over or not.⁴ At first, the validity of conditions against second marriages was recognized only in case of a husband providing for his widow, as an exception to the general rule avoiding all conditions in restraint of marriage; then it was extended to the case of a son making the will in favor of his mother; then it was held to be a general exception by whomsoever the bequest may have been made.⁵ It is now held, that there is no substantial difference between a condition imposed in restraint of a second marriage of a woman, and a like condition in restraint of a second marriage of a man; both are alike valid and effectual.⁶ While the preponderance of adjudications at this day undoubtedly sustains conditions in restraint of the testator's widow's second marriage whether there is a gift over or not,⁷ and, *a fortiori*, where there is a devise over,⁸ the

portant to *society* to be weighed in the scale against individual or personal will": Birch, J., in *Williams v. Cowden*, 13 Mo. 212, 213. The judge proceeds to describe a condition against the marriage of the testator's daughter as "a continued reward for that species of immorality to avert which the institution of marriage was so divinely ordained and has been so wisely upheld." See also *Otis v. Prince*, 10 Gray, 581.

¹ "Devises in restraint of second marriages are not opposed to the policy of our law, nor are they contrary to good morals": *Labarre v. Hopkins*, 10 La. An. 466; *Little v. Birdwell*, 21 Tex. 597, 610.

² *Walsh v. Mathews*, 11 Mo. 131, 137; *Coppage v. Alexander*, 2 B. Mon. 313; *Snider v. Newson*, 24 Ga. 139, 144; *Frey v. Thompson*, 66 Ala. 287, 292.

³ *Baggallay, J. A.*, in *Allen v. Jackson*, L. R. 1 Ch. D. 399, 403.

⁴ See *Bostick v. Blades*, 59 Md. 231, and authorities cited, p. 233.

⁵ *Per Baggallay, J. A.*, in *Allen v. Jackson*, *supra*; see *Newton v. Marsden*, 2 J. & Hem. 356, 360, and cases there commented on.

⁶ *Allen v. Jackson*, *supra*; *Bostick v. Blades*, 59 Md. 231 (contrary to former decisions in this State: see *Waters v. Tazewell*, 9 Md. 291, 309, avoiding a condition in restraint of marriage in a deed).

⁷ See cases *supra*; also *Clark v. Tenison*, 33 Md. 85, 93; *Knight v. Mahoney*, 152 Mass. 522; *Duncan v. Philips*, 3 Head, 415; *Herd v. Catron*, 97 Tenn. 662; *Luigart v. Ripley*, 19 Oh. St. 24; *Cornell v. Lovett*, 35 Pa. St. 100, 106; *Holmes v. Field*, 12 Ill. 424, 426 (in respect of guardianship to cease upon a widow's marriage); *Vance v. Campbell*, 1 Dana, 229.

⁸ *Phillips v. Medbury*, 7 Conn. 568,

subtle and contrarious distinctions on this subject indulged in by courts have by no means disappeared from our jurisprudence. An opinion rendered by Brent, J., at *nisi prius*, and affirmed by the Court of Appeals of Maryland, gives a very clear and concise statement of the rule deducible as being in harmony with the preponderance of authority: "If either real or personal estate be devised upon a condition precedent to the vesting of the estate, coupled with a devise over upon breach of the condition, the devise or bequest is good, and the restraint effectual to defeat the estate. If the estate be real, the condition precedent in restraint of marriage will be good, whether there be a devise over or not, and whether the restraint be general or qualified. If the estate be personal, the condition [*963] *precedent, in general restraint of marriage, will be void if there be no limitation over, but if there be a limitation over it will be good. In regard to conditions subsequent, if they be in general restraint of marriage, and there is no limitation over, they are void as to both real and personal estate. If in general restraint of marriage, and there is a limitation over, they are void as to personal estate. But as to real estate the cases are in conflict. The later and better opinion, however, seems to be, that even in that case the limitation over should prevail. If the condition subsequent be in limited and qualified restraint of marriage, it will be good, provided it be accompanied by a limitation over. If there is no limitation over, it will be construed as *in terrorem* only, and not an imperative condition."¹ The distinction between real property (governed by the rules of the common law, which allows conditions in restraint of marriage) and personal property (governed by the Roman law, as observed in ecclesiastical courts), is recognized in some of the States² and denied in others;³ so, in some States, conditions against remarriage of a widow, whether with⁴ or in the absence of a limitation over, were held to be *in terrorem* only, and void;⁵ but the cases so holding mostly distinguish also between the restraint as a condition, which they will not allow, and the restraint as a limitation, which is valid. Thus, under a bequest to a widow *if she do not marry*, she takes the legacy whether she marries or not;

Statement of the modern rule approved by the Supreme Court of Maryland.

572; Pringle v. Dunkley, 14 Sm. & M. 16; O'Neale v. Ward, 3 Harr. & McH. 93; Hughes v. Boyd, 2 Sneed, 512, 515; Selden v. Keen, 27 Gratt. 576.

¹ Gough v. Manning, 26 Md. 347, 351. See also the opinion of Andrews, Ch. J., in Hogan v. Curtin, 88 N. Y. 162, 171, accounting for the incongruity of the various decisions in England and America.

² See cases *supra*; Commonwealth v. Stauffer, 10 Pa. St. 350; Randall v. Marble,

69 Me. 310 (the principal distinction in this case is made between gifts to children and those to a testator's widow: p. 311); Shackelford v. Hall, 19 Ill. 212, 214.

³ Dumey v. Schoeffler, 24 Mo. 170; Dumey v. Sasse, 24 Mo. 177; Vaughn v. Lovejoy, 34 Ala. 437.

⁴ Hoopes v. Dundas, 10 Pa. St. 75.

⁵ Cases *ubi supra*; Parsons v. Winslow, 6 Mass. 169, 178; Maddox v. Maddox, 11 Gratt. 804, 810.

but if the bequest is *until she marry*, she will forfeit it by her remarriage.¹

A condition against the devisee's marriage to a particular person, or to one of a class of persons,² or before a particular time,³ or without the consent of a guardian or mother,⁴ is valid, and will be upheld.

* Conditions in restraint of marriage have also engaged legislative consideration: a devise or bequest to a wife with a condition against a subsequent marriage is enacted to stand, but the condition to be void, by statute, in Indiana.⁵

§ 444. **Classification of Legacies.** — The distinction between *specific* and *general* legacies is, that the former single out the particular or specific thing which the testator intends the donee to have, no regard being had to its value;⁶ while the latter are payable out of the general assets, the chief element of the gift being its quantity or value.⁷ Thus a gift of "240 shares of stock in the Cayuga County Bank," the testator owning a greater number of such shares, is a general legacy, because the particular shares which the legatee is to have are not pointed out, and the legacy is satisfied by the transfer of *any* of the shares of such stock which the testator owned, to the required number;⁸ but a gift of "all the money left in the West Side Bank after carrying out the directions in the first three clauses of this my will," is a specific legacy, which the legatee is entitled to *in specie*.⁹ So a gift of "whatever sum may be on deposit" in a bank, etc.,¹⁰ the "personal property on the farm and in the house at the time of my decease,"¹¹ "one carriage," the testator owning but one,¹² and, generally,

Gifts of specific things are specific legacies;

gifts payable out of general assets, general legacies.

Things distinguishable by the terms of the bequest from the remainder of the estate are given specifically.

¹ *Bruch's Estate*, 185 Pa. St. 194; *McIlvaine v. Gethen*, 3 Whart. 575; *Hawkins v. Skeggs*, 10 Humph. 31; *Niblack, J.*, in *Hibbits v. Jack*, 97 Ind. 570; *Mann v. Jackson*, 84 Me. 400, 404, 407 (holding that irrespective of the literal words used, if the intention be not to promote celibacy, but to create a limitation of the estate, because by marriage other support would be furnished the legatee, the provision is valid).

² *Graydon v. Graydon*, 23 N. J. Eq. 229, 236; *Phillips v. Ferguson*, 85 Va. 509.

³ *Shackelford v. Hall*, 19 Ill. 212.

⁴ *Collier v. Slaughter*, 20 Ala. 263, 269; *Hogan v. Curtin*, 88 N. Y. 162, 170.

⁵ 1 Ann. Ind. St. 1894, § 2737. As to the effect of this statute, see *Crawford v. Thompson*, 91 Ind. 266, 274; *Stilwell v. Knapper*, 69 Ind. 558. It is held not to

militate against a devise to the testator's wife "so long as she shall remain my widow": *Hibbits v. Jack*, 97 Ind. 570.

⁶ *Bradford v. Haynes*, 20 Me. 105; *Fidelity Trust Co.'s Appeal*, 108 Pa. St. 492, 499; *Wallace v. Wallace*, 23 N. H. 148, 154.

⁷ Abb. Law Dict. "General Legacy."

⁸ *Tift v. Porter*, 8 N. Y. 516; *Sponsler's Appeal*, 107 Pa. St. 95, 100; *Evans v. Hunter*, 86 Iowa, 413.

⁹ *Larkin v. Salmon*, 3 Dem. 270; to similar effect, *Maybury v. Grady*, 67 Ala. 147, 153.

¹⁰ *Towle v. Swasey*, 106 Mass. 100, 106; to same effect, *Tomlinson v. Bury*, 145 Mass. 346; *Barber v. Davidson*, 73 Ill. App. 441.

¹¹ *Getman v. McMahon*, 30 Hun, 531; *McFadden v. Hefley*, 28 S. C. 317.

¹² *Everitt v. Lane*, 2 Ired. Eq. 548. But

where the thing given is distinguishable, by the terms of the bequest, from the remainder of the estate, are held to be specific.¹ Not the bequest of all the testator's property, for that is general in its nature; nor the bequest of all that may remain after taking out a designated portion; but of all things so * described as to enable them to be segregated from the mass of the testator's property and distinctly pointed out.² Hence the person claiming the benefit of a specific legacy must prove by competent evidence the existence and identity of the legacy stated in the will.³

Specific devises and legacies differ in their effect from general legacies chiefly in two important particulars. The great advantage of the former, to the legatee, consists in their immunity from abating with general legacies, which will be more fully considered hereafter;⁴ but they are also subject to the disadvantage of having no recourse against the general estate in case the thing given be lost, adeemed, or from any cause lessened in value, for recompense or satisfaction.⁵ Thus, according to the cases selected by Williams for illustration, if a testator gives a sum in stock standing in his name, and he has not the stock described, the legacy fails;⁶ but if he gives a sum in stock of a particular kind generally, and have none at the time of his death, although he had the precise amount at the time of executing the will, the legacy must be made good out of the estate if there are assets.⁷ Since a specific legacy will pass to the legatee in such form as the testator leaves it, a specific legacy of a coupon bond carries with it an overdue negotiable coupon attached thereto.⁸ So where there is a bequest not merely of a sum due on a particular security, but of the security itself, as a bond and mortgage, it carries with it the arrears of interest due at the time of the testator's death.⁹

Effect of the distinction between specific and general legacies.

the soundness of this decision is questioned in *Tift v. Porter*, *supra*.

¹ *Tomlinson v. Bury*, 145 Mass. 346, 347; *Kelly v. Richardson*, 100 Ala. 284; *Wallace v. Wallace*, *supra*, holding a bequest to the testator's wife of "five hundred dollars in personal property, such as she may select," to be a specific bequest.

² *Mayo v. Bland*, 4 Md. Ch. 484, 487; *Dean v. Rounds*, 18 R. I. 436; *Perry v. Maxwell*, 2 Dev. Eq. 488, 501.

³ *Barber v. Davidson*, 73 Ill. App. 441, 446.

⁴ *Post*, § 452.

⁵ *Armstrong's Appeal*, 63 Pa. St. 312, 315; *Towle v. Swasey*, 106 Mass. 100, 106; *Hood v. Haden*, 82 Va. 588, 598.

⁶ *Evans v. Tripp*, 6 Madd. 64. "A

gift of my gray horse," says Leach, V. C., "in this case, will pass a black horse, which is not strictly gray, if it be found to have been the testator's intention that it should pass by that description; but if the testator has no horse, the executor is not to buy a gray horse."

⁷ *Bronsdon v. Winter*, 1 Amb. 57. Says Williams, continuing the illustration used by Vice-Chancellor Leach, *supra*: "If the bequest is of 'a horse,' and no horse be found in testator's possession at the time of his death, the executor is bound, provided the state of the assets will allow him, to procure a horse for the legatee."

⁸ *Ogden v. Pattee*, 149 Mass. 82.

⁹ *Fleming v. Carr*, 47 N. J. Eq. 549.

There is a third class of legacies, known by the name given them in the civil law as *demonstrative* legacies, differing from general and partaking of the nature of specific legacies in that they are not liable to abate with general legacies upon a deficiency of assets, and on the other hand differing from specific and partaking of the quality of general legacies in so far as, if the fund fail, the legatee will be entitled to receive the legacy out of the general assets. A demonstrative legacy is a pecuniary legacy, or legacy of quantity, the particular fund or personal property being pointed out from which it is to be taken or paid.¹ It appears from this statement, payable out of the general assets if testator himself call in the fund, that if the testator direct a pecuniary bequest *to [*966] be paid out of a fund designated, and himself collect or call in the whole or part of such fund before his death, the bequest will not be thereby adeemed or diminished, but will be payable in full so far as the general assets admit.²

The intention of the testator is, of course, decisive in determining whether a legacy belongs to one or another of these classes, as the division itself into classes is but the means of carrying such intention into effect. Hence, if a legacy be given with reference to a particular fund only as pointing out a convenient mode of payment, it is considered demonstrative, and the legatee will not be disappointed though the fund totally fail; but where the gift is of the fund itself, in whole or in part, or so charged upon the object made subject to it as to show an intent to burden that object alone with the payment, it is esteemed specific, and consequently liable to be adeemed by the alienation or destruction of the object.³ Courts proceed upon the presumption that the testator intended a real benefit to the legatee, and hence incline to consider legacies as general, rather than specific, if the language of the will admits of such construction.⁴ So pecuniary legacies are usually considered as general;⁵ for instance, a legacy of \$2,000 "or the value thereof in property,"⁶ unless testator indicate the contrary.

¹ 2 Civ. Code, Cal. § 1357, pl. 2; Gilmer v. Gilmer, 42 Ala. 9, 16; Walton v. Walton, 7 John. Ch. 258, 262; Martin v. Osborne, 85 Tenn. 420; Gelbach v. Shively, 67 Md. 498, 501; Additon v. Smith, 83 Me. 551; Byrne v. Hume, 86 Mich. 549; Newcomb's Will, 98 Io. 175.

² Corbin v. Mills, 19 Gratt. 438, 469; Boykin v. Boykin, 21 S. C. 513, 533; Smith v. Smith, 23 Ga. 21; Johnson v. Goss, 128 Mass. 433, 436; Frank v. Frank, 71 Iowa, 646.

³ Bell, J., in Walls v. Stewart, 61 Pa. St. 275, 281; Morris v. Garland, 78 Va. 215, 222; Davis v. Crandall, 101 N. Y. 311, 319; Wilcox v. Wilcox, 13 Allen, 252, 256;

Boston Co. v. Plummer, 142 Mass. 257; Metcalf v. Framingham, 128 Mass. 370; Humphrey v. Robinson, 52 Hun, 200.

⁴ Cases *supra*; Giddings v. Seward, 16 N. Y. 365, 367; Balliet's Appeal, 14 Pa. St. 451, 461; Lake v. Copeland, 82 Tex. 464, 468; Hammer's Estate, 158 Pa. St. 632; Johnson v. Conover, 54 N. J. Eq. 333, 339; Cogdell v. Widow, 3 Desaus. 346, 373; Smith v. Lampton, 8 Dana, 69, 71.

⁵ Perkins v. Mathes, 49 N. H. 107, 114; Sessoms v. Sessoms, 2 Dev. & B. Eq. 453; Pell v. Ball, 1 Speers Ch. 48, 55; Mathis v. Mathis, 18 N. J. L. 59, 62, 66.

⁶ Fagan v. Jones, 2 Dev. & B. Eq. 69.

or of a plantation "together with so much money as with the plantation shall equal in value," etc.¹ But pecuniary legacies may be specific, if the specific money is indicated, *e. g.* the money to be recovered by decree in a certain suit,² or a certain sum "out of the portion or share of my father's estate that may come to me,"³ or to be recovered from a person [* 967] named,⁴ or the avails of a * certain bond or mortgage,⁵ or fund remaining after expiration of a life interest therein,⁶ or a sum to be paid out of the proceeds of a certain claim against the government.⁷

Stocks, securities, or shares in corporations are specifically bequeathed, if they are clearly referred to as distinguished from such stocks, etc., generally; the word "my" is sometimes sufficient, if qualifying the stock, annuity, etc., bequeathed, to make a specific bequest, as "one-half of all *my* stock," etc.⁸ So also if the words be "all *my* right, interest, and property in thirty shares which I own," etc.;⁹ or if referred to as standing in the testator's name, "as per certificate No.," etc.;¹⁰ but all such rules must yield to the testator's intention, if that is clearly ascertained.¹¹ The mere fact of possession by the testator, at the date of his will, of bonds or stocks of equal or larger amount than the legacy, will not of itself make the legacy specific.¹² A bequest of a certain sum of money to a legatee, with a direction to the executors to invest the same in a homestead for said legatee, does not convert the same into a specific devise by the doctrine of equitable conversion.¹³

All devises of real estate, including chattels real, are said to be specific in their effect.¹⁴ But this doctrine is materially affected by

¹ Jenkins v. Hanahan, 2 Cheves, 129, 138.

² Chase v. Lockerman, 11 Gill & J. 185, 209.

³ Gelbach v. Shively, 67 Md. 498.

⁴ Gilbraith v. Winter, 10 Oh. 64. Or owing to the testator by another: Hayes v. Hayes, 45 N. J. Eq. 461. It is said, however, that "there is a broad distinction between the gift of a debt as a debt and the sum of money produced when the debt has been recovered," on the ground that in the first instance the legacy is specific, and its collection before the testator's death adeems it; while in the other it will pass the fund in its altered state: Littig v. Hance, 81 Md. 416, 432; see on this point *post*, § 446, and cases there cited.

⁶ Gardner v. Printup, 2 Barb. 83, 85. And see *supra*, p. * 964.

⁶ Stevens v. Fisher, 144 Mass. 114, 127.

⁷ Georgia Infirmary v. Jones, 37 Fed. R. 750.

⁸ Loring v. Woodward, 41 N. H. 391, 395; Ford v. Ford, 23 N. H. 212, 214, referring to many cases; Brainerd v. Cowdrey, 16 Conn. 1, 6; Hood v. Haden, 82 Va. 588, 599.

⁹ Walton v. Walton, 7 Johns. Ch. 258.

¹⁰ Ludlam's Estate, 13 Pa. St. 188; see Howell v. Hooks, 4 Ired. Eq. 188, as to a note held by the testator against a person named.

¹¹ Kunkel v. Macgill, 56 Md. 120; Morton v. Murrell, 68 Ga. 142.

¹² Osborne v. McAlpine, 4 Redf. 1; Capron v. Capron, 6 Mackay, 340; Ives v. Canby, 48 Fed. R. 718.

¹³ McFadden v. Hefley, 28 S. C. 317, 321.

¹⁴ Wms. Ex. [1169]; 2 Redf. on Wills, 145; Wallace v. Wallace, 23 N. H. 149,

Common-law rule declaring all devises of real estate specific modified by modern statutes.

the abrogation of the common-law rule from which it emanates, limiting the operation of the devise of real estate to such as the testator was seised of at the time he executed the will.¹ In States where the will passes real estate acquired after its execution, no devise of lands will be considered as specific, unless it be specifically described; at least not so far as after-acquired lands are in question.² The same effect is ascribed to the English statute of 1 Vict. c. 26, § 25;³ and the American view seems to be that the enactment of these statutes places real and personal property, in this respect, on the same level.⁴ The bequest of a rent out of a term of years is in the same category with the devise of the land;⁵ but if it be evident that the testator means to give *an annuity at all events*, the legacy will be held to be general to the extent of entitling the legatee, if the fund should fail, to have his legacy made good out of the general assets.⁶ General legacies do not become specific by being charged upon or payable out of proceeds of real estate; yet if the testator intended to bequeath specifically the proceeds of a freehold directed by him to be sold, the legacy will be held to be specific.⁷

Residuary legacies are bequests by which the testator disposes of what is left after the satisfaction of debts and prior legacies.⁸ It is

Residuary legacies.

evident, that a bequest of all the testator's personal property, after other bequests, is not specific, simply

154; *Wyman v. Bridgen*, 4 Mass. 150, 154; *Laurens v. Read*, 14 Rich. Eq. 245, 260. This rule was held not to apply to a term of years embraced in a general residuary clause: *Shreve v. Shreve*, 17 N.J. Eq. 487.

¹ As to the statutes abolishing this rule, see *ante*, § 419.

² *Floyd v. Floyd*, 29 S. C. 102, 107; 3 Redf. on Wills, 367 (note 36); 4 Kent Comm. 541 (notes 1) 13th ed. Says the Supreme Court of Alabama, after referring to the tendency of the American decisions, to hold that no devise of after acquired real estate is specific unless the land is described with sufficient particularity to identify it: "conceiving the modifications [of the common-law rule] to be sound in principle, we adopt it, and hold in so far as wills pass real estate acquired after execution, the devises are general and not specific, unless so described as to admit of its identification by the devisee": *Kelly v. Richardson*, 100 Ala. 584, 597.

³ 1 Jarm. * 650. But see *post*, p. * 1094.

⁴ *Farnum v. Bascom*, 122 Mass. 282, 286; *Blaney v. Blaney*, 1 Cush. 107, 116;

Thayer v. Wellington, 9 Allen, 283, 296; *In re Woodworth's Estate*, 31 Cal. 595, 613; *Kelly v. Richardson*, 100 Ala. 584, 599, 613; *Shreve v. Shreve*, 10 N.J. Eq. 385, 390; see also *ante*, § 438, p. * 946, note 7, and authorities.

⁵ "A devise of a rent-charge out of a term is as much a specific devise as if it had been of the term itself": and "the devise of a term for years is as much a specific devise as a devise of lands in fee": *per* Lord Cowper, Ch., in *Long v. Short*, 1 P. Wms. 403.

⁶ *Mann v. Copeland*, 2 Madd. 457 (1st Am. ed.); *Vickers v. Pound*, 6 H. L. Cas. 885; *Willson v. Tyson*, 61 Md. 575.

⁷ *Page v. Leapingwell*, 18 Ves. 463; *Walpole v. Apthorp*, L. R. 4 Eq. 37; *infra*, note 2.

⁸ *Thompson v. Thompson*, 3 Dem. 409; *Burke v. Stiles*, 65 N. H. 163. "Nothing is given by a residuary clause except upon the condition that something remains after all paramount claims upon the testator's estate are satisfied": *Tomlinson v. Bury*, 145 Mass. 346, *per* Devens, J., p. 347.

because it is in the same clause or sentence with real estate, which is usually specific.¹ But a bequest of all the testator's property coming under a description which distinguishes it from other property of the testator, *e. g.* all his personal property at a given place, when he has property at another place also, is specific;² but a general residuary

Residue designated by a description distinguishing it from other assets may be specific.

clause is not the less general because some of the particulars [*969] of which it may consist are therein * enumerated,³ unless it is deducible from the context that the testator meant the words in a different sense.⁴ Where the testator gives particular specific portions of a tract of land to different devisees, and the "balance" to another, the latter devise is specific.⁵ What is included under a residuary devise or legacy is also discussed in connection with the subject of the payment of the residue.⁶

§ 445. **Cumulative, Repeated, and Substituted Legacies.** — A legacy bequeathed twice to the same person may be either *cumulative*, if the testator intended the legatee to have *the two* legacies given him in the same will, or in a will and a codicil; or the second may be only a repetition of the bequest of the first, in which case the legatee will take *but one* legacy. It seems preferable, on the score of convenience, to consider this subject in connection with the discharge of legacies, rather than as a part of the construction of wills, to which in strictness it belongs, since it turns exclusively upon the discovery of the intention of the testator.⁷ Mr. Williams classes the questions arising

¹ Warley v. Warley, Baily Eq. 397; Healey v. Toppan, 45 N. H. 243, 265; England v. Vestry, 53 Md. 466, 469.

² Sayer v. Sayer, 2 Vern. 688; Nisbett v. Murray, 5 Ves. 149, 156; Moore v. Moore, 1 Bro. C. C. 127; Tomlinson v. Bury, 145 Mass. 346, 348. So where a testator directed his executor to pay, out of a fund of \$1,300, the sum of \$500 to A., and the balance amongst his other nephews, it was held, on a deficiency in the fund, that the legacy to A. was on the same footing with the others, and not entitled to payment in full before the legacies out of the "balance": Van Nest v. Van Nest, 43 N. J. Eq. 126, relying on Page v. Leapingwell, 18 Ves. 463; see also Belcher v. Belcher, 16 R. I. 72.

³ England v. Vestry, 53 Md. 466, 471; Le Rougetel v. Mann, 63 N. H. 472; Taubenhan v. Dunz, 125 Ill. 524; Parker, J., in Matter of Reynolds, 124 N. Y. 388 and cases cited, limiting this rule to residuary clauses, or where there is no such clause in the will.

⁴ Thus, where a testator disposed of real

and personal property specifically, and then proceeded, "I bequeath to my friend, Dr. J. D., all my books, medicines, and shop furniture, and all the estate not before devised, including my gig and saddle-horses," it was held that this was not a general residuary clause carrying slaves on two several plantations, but must be construed to include only property of the same *kind* as the articles enumerated: Minor v. Dabney, 3 Rand. 191, 198, *et seq.*; see also Godard v. Wagner, 2 Strobh. Eq. 1, 9. Where certain things are enumerated in a legacy, and a more general description is coupled with it, that description generally covers only things of a like kind with those specially named: Andrews v. Schoppe, 84 Me. 170.

⁵ Pittman's Estate, 182 Pa. St. 355.

⁶ Post, § 462, p. * 1018.

⁷ "It is in all cases a question of intention: and that intention is to be sought for and collected from the language of the testator, the form and character of the bequests, the object of his bounty, and the whole scope, structure, and arrangement

on this point under two heads: *first*, where there is no evidence of the testator's intention apparent on the face of the will; *second*, where there is such evidence;¹ and in respect of those cases where

In the absence of internal evidence as to the testator's intention, the repetition of a specific legacy is not a new bequest,

no internal evidence of intention is discernible, he suggests the following propositions to aid courts of construction: I. If *the same specific thing* is bequeathed *twice* to the same legatee in the same will, or in a will and again in a codicil, but one legacy is given; for when once given, the testator has exhausted his power of disposition over the thing given.² II. Where two legacies of quantity are given *in the same instrument* of *equal amount*, to the same legatee, there also the same bequest is considered a repetition, and the legatee takes but one legacy.³ III. Where two * legacies of quantity [* 970] of *unequal amount* are bequeathed to the same legatee in one

nor the repetition of a legacy of quantity in the same will;

and the same instrument, the one is not merged in the other, but the latter is regarded as cumulative, and the legatee takes both.⁴ IV. And where two legacies are given *simpliciter* to the same legatee by *different instruments*, the presumption is, also, that the latter is cumulative, whether they be equal or unequal in amount.⁵ In a recent case the Supreme Court of California announce it to be "well settled, except where the two legacies are for the same sum, and both testamentary instruments express the same motive for the gift, that where a testator gives a legacy of quantity *simpliciter*, and also a second legacy of quantity to the same legatee, the second legacy is regarded as cumulative, and not as substitutionary, unless the language of the second will or codicil shows an intent to the contrary."⁶ It should be observed, that in determining whether a will consists of one or more instruments, the judgment of the court of probate is conclusive upon the court of construction. Thus, a will and codicil, though written on the same paper, must be considered as distinct instruments, if they have been admitted to probate as such;⁷

but two legacies of unequal amount do not merge.

and the same instrument, the one is not merged in the other, but the latter is regarded as cumulative, and the legatee takes both.⁴ IV. And where two legacies are given *simpliciter* to the same legatee by *different instruments*, the presumption is, also, that the latter is cumulative, whether they be equal or unequal in amount.⁵ In a recent case the Supreme Court of California announce it to be "well settled, except where the two legacies are for the same sum, and both testamentary instruments express the same motive for the gift, that where a testator gives a legacy of quantity *simpliciter*, and also a second legacy of quantity to the same legatee, the second legacy is regarded as cumulative, and not as substitutionary, unless the language of the second will or codicil shows an intent to the contrary."⁶ It should be observed, that in determining whether a will consists of one or more instruments, the judgment of the court of probate is conclusive upon the court of construction. Thus, a will and codicil, though written on the same paper, must be considered as distinct instruments, if they have been admitted to probate as such;⁷

and two legacies in two different instruments are cumulative.

and the same instrument, the one is not merged in the other, but the latter is regarded as cumulative, and the legatee takes both.⁴ IV. And where two legacies are given *simpliciter* to the same legatee by *different instruments*, the presumption is, also, that the latter is cumulative, whether they be equal or unequal in amount.⁵ In a recent case the Supreme Court of California announce it to be "well settled, except where the two legacies are for the same sum, and both testamentary instruments express the same motive for the gift, that where a testator gives a legacy of quantity *simpliciter*, and also a second legacy of quantity to the same legatee, the second legacy is regarded as cumulative, and not as substitutionary, unless the language of the second will or codicil shows an intent to the contrary."⁶ It should be observed, that in determining whether a will consists of one or more instruments, the judgment of the court of probate is conclusive upon the court of construction. Thus, a will and codicil, though written on the same paper, must be considered as distinct instruments, if they have been admitted to probate as such;⁷

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of his will: or as Chief Justice Kent expressed it, from internal evidence and the circumstances of the case" *per* Hornblower, C. J., in *Jones v. Creveling*, 19 N. J. L. 127, quoting from Kent in *Dewitt v. Yates*, 10 John. 156.

¹ Wms. Ex. [1289].

² This proposition is self-evident; Williams cites as authority *Toller*, 335, and *Suisse v. Lowther*, 2 Hare, 424, 432, in which earlier cases are mentioned.

³ On this point *Swinb.* pt. 7, § 21, pl. 13, and *Godolph.* pt. 3, c. 26, § 46, as well as English cases, are cited. Chancellor Kent in *Dewitt v. Yates*, 10 John. 156,

158 (nearly twenty years before the great work of Williams had appeared) announces this and Proposition IV., *infra*, as deduced from numerous authorities mentioned by him. See also *Jones v. Creveling*, 19 N. J. L. 127; *In re Zeile*, 74 Cal. 125, 131.

⁴ *Swinb.*, *supra*, and several English cases, are cited for authority.

⁵ Numerous English cases are cited as authority for and in illustration of this proposition. See also *Manifold's Appeal*, 126 Pa. St. 508.

⁶ *In re Zeile*, 74 Cal. 125, 131.

⁷ Wms. Ex. [1289], and authorities. But evidence by one of the subscribing

and, conversely, two instruments admitted to probate as one will are regarded as such by the court of construction.

The above rules apply only when there is no possibility of ascertaining the testator's intention from his words, construed with reference to any circumstances which the court may lawfully consider. They constitute presumptions which a slight preponderance of probability is sufficient to overthrow.¹ Where, *e. g.*, a *second [* 971] codicil appears to be a mere copy of the first, with the addition or exception of a single legacy; or where it is manifest that an instrument was made for the purpose of explaining or making more certain the provisions of a former one, — this is evidence that but one legacy was intended.² So, if in connection with the legacy the motive inducing it is expressed in two instruments, and in both the same sum is given and the same motive expressed, the court considers the two coincidences as raising a presumption that the testator did not mean to repeat the gift, but meant in the second instrument only to repeat without adding to the former gift.³ And so where the testator, in the same instrument, gives two legacies of quantity of unequal amount, the first to a legatee by name, the second to the same person as one of a class of legatees, the intention of the testator is to be sought from his language; if it appear that the bequest to the class is to be governed by the conditions annexed to the first gift to the legatee by name, it may be inferred therefrom that this gift is referred to as an example of the mode in which the class is to enjoy the legacy, and the rule that the one gift is not merged in the other does not apply.⁴ *A fortiori*, the inference to be drawn from the repetition in a codicil of a bequest of quantity in the will, according to the rule (IV.), may be strengthened by the language of the testator, as where he gives the second bequest "in addition to" the first,⁵ or

witnesses was admitted to show, in such case, that two codicils were not two instruments, but one: *Hubbard v. Alexander*, L. R. 3 Ch. D. 738.

¹ The contrary view expressed in an English case of recent date (*Wilson v. O'Leary*, L. R. 12 Eq. 525, affirmed in L. R. 7 Ch. App. 448) is commented on in *Rice v. Boston Post*, 56 N. H. 191, 198; in which two judges (a third judge dissenting, agreeing with the view expressed in *Wilson v. O'Leary*) announce the law as stated in the text, one of them stating that in his opinion the cases are all opposed to the doctrine that the rule is binding in all cases. Where the two instruments are not both testamentary, the presumption is still more easily overcome: see *Graves v. Mitchell*, 90 Wis. 306, 315.

² *Rice v. Boston Post*, 56 N. H. 191, 197; *Osborne v. Leeds*, 5 Ves. 369; *Hemming v. Gurrey*, 2 Sim. & Stu. 311, 320; *Lee v. Pain*, 4 Hare, 201, 218, 243.

³ *Hurst v. Beach*, 5 Madd. 351, 358: "The court raises this presumption only where the double coincidence occurs, — of the same motive and the same sum in both instruments. It will not raise it, if in either instrument there be no motive, or a different motive, expressed, although the sums be the same; nor will it raise it if the same motive be expressed in both instruments, and the sums be different": *per* Sir John Leach, V. C., p. 359; and see *In re Zeile*, 74 Cal. 125.

⁴ *Orrick v. Boehm*, 49 Md. 72, 98.

⁵ *Sponsler's Appeal*, 107 Pa. St. 95, 101; *Barnes v. Hanks*, 55 Vt. 317.

"I further order,"¹ or by any word from which it may appear that he intended to add to the bequest already made.²

The admissibility of parol evidence to show the testator's intention in cases of several legacies to the same person, or to control

Parol evidence admissible on general principles to show intention, but not otherwise.

* the legal intendment or construction of the [* 972]

words of the will in this respect, rests, it seems, upon the same grounds with all other questions touching the testator's intention.³ In 1820 this question arose in England, and Sir John Leach, V. C., came to the con-

clusion that, while evidence would be received in courts of equity to repel a presumption raised against the apparent intention of a testamentary instrument, it cannot be allowed to contradict the expressed effect of a written instrument;⁴ but the more logical doctrine allows no deviation from the ordinary rules of construction, allowing evidence referring to the testator's property and family, showing the number of his children, the terms on which he lived with them, and the nature and amount of his investments, but excluding his declarations of his intentions or meaning.⁵

Legacies substituted for or added to former legacies are, according to a general rule, subject to the same conditions as those for which

Substituted legacies are liable to same conditions as the original ones.

they are substituted or to which they are added, although it is not so expressed in the testamentary instrument.⁶

But this rule, like the other rules of construction above mentioned,⁷ is never applied to thwart, but only to carry into effect, the testator's intention; the rule must always

yield to the discernible intention of the testator.⁸

§ 446. **Ademption and Satisfaction of Legacies by Act of the Testator.**—The revocation of devises of real estate by subsequent acts of the testator inconsistent therewith has been considered in connection with the subject of the revocation of wills.⁹ It remains to notice, in this connection, a similar effect produced by acts of the

¹ Jones v. Creveling, 19 N. J. L. 127, 131.

² Wms. Ex. [1292], and numerous illustrations; Cushing v. Burrell, 137 Mass. 21, 24; Utlely v. Titcomb, 63 N. H. 129. A legacy to the "R. T. Seminary and the H. T. Seminary, \$10,000," is a legacy of that amount to each: Taylor v. Tolen, 38 N. J. Eq. 91, 95.

³ 2 Redf. on Wills, 183, pl. 14.

⁴ Hurst v. Beach, 5 Madd. 351, 361. Williams incorporates this opinion with his text without comment, although its doctrine seems to militate against his statement that the presumptions mentioned by him are only applicable "where there is no internal evidence of intention."

⁵ Guy v. Sharp, 1 Myl. & K. 589, 600, 1060

608; see also Utlely v. Titcomb, 63 N. H. 129; Chapman v. Allen, 56 Conn. 162, 167.

⁶ Barnes v. Hanks, 55 Vt. 317; Condict v. King, 13 N. J. Eq. 375, 381; Tilden v. Tilden, 13 Gray, 103, 108; Pike v. Walley, 15 Gray, 345; Snow v. Foley, 119 Mass. 102; Thompson v. Churchill, 60 Vt. 371, 377; Mason v. Smith, 49 Ala. 71, 75; Buehler v. Fairlamb, 100 Pa. St. 384, distinguished in Fry's Estate, 163 Pa. St. 30.

⁷ Supra, pp. *969, *970.

⁸ Cases supra; Brown v. Brown, 137 Mass. 539; Van Houten v. Post, 39 N. J. Eq. 51; Buchanan v. Lloyd, 64 Md. 306, 312.

⁹ Ante, § 53.

testator inconsistent with legacies given in a will, resulting in either their *ademption* or *satisfaction*. A legacy is, strictly speaking, *adeemed* (from *adimere*, to take away) when

the thing given has, by some act of the testator, [* 973] ceased * to exist in the form in which it is described in the will, so that on his death there

A legacy is adeemed when the thing given does not exist at the time of testator's death,

is nothing answering the description of the legacy to be given to the legatee. This, of course, can only happen in cases of specific legacies, since general or demonstrative legacies are not dependent upon the existence of specific things, and cannot therefore be *adeemed*, or taken away, by the destruction or alteration of the subject of the gift.¹

A similar result follows where the testator performs the function of an executor, by giving during his lifetime what he intended the legatee to have by his will, thereby *satisfying* the legacy himself, leaving nothing for the executor to do in respect of such legacy. The distinction between the *ademption* and *satisfaction* of legacies seems clear enough,² but it is not generally observed, the term "ademption" being applied indiscriminately to cases where the legacy is cut off by the destruction or alteration of the subject, and where it is satisfied by the delivery of the subject to the legatee during the testator's lifetime.

or satisfied when the testator has himself delivered it to the legatee.

Specific legacies, as already observed, are destroyed, if the subjects given do not exist, at the time of the testator's death, as they are described in the will, because there is nothing on which the will can operate.³ Hence the specific bequest of a debt or fund owing to the testator is adeemed by the payment of the fund or debt to the testator during his lifetime,⁴ and the receipt by the testator of part of such

Payment to or collection by the testator of a debt bequeathed to the debtor is ademption,

debt, or the alienation or change of part of stock specifically [* 974] bequeathed, will be an ademption *pro tanto*.⁵ * But where

¹ Smith's Appeal, 103 Pa. St. 559; Walton v. Walton, 7 John. Ch. 258, 262; Gilbreath v. Winter, 10 Ohio, 64, 68. See ante, § 444.

² Beck v. McGillis, 9 Barb. 35, 56; Langdon v. Astor, 3 Duer, 477, 541; Follett, J., in Burnham v. Comfort, 37 Hun, 216, 220.

³ Ante, § 444; Blackstone v. Blackstone, 3 Watts, 335, 337; Hood v. Haden, 82 Va. 588, 599.

⁴ A distinction formerly drawn between voluntary payment by the debtor, in which case the testator was said not to have changed his mind, and consequently not to have adeemed the legacy, and payment made compulsory upon the testator's demand, in which case he was held to show an intent to revoke it, is no longer

recognized; the legacy is now held to be adeemed in all cases where it does not exist *in specie* after the testator's death, irrespective of the question of intention: Wyckoff v. Perrine, 37 N. J. Eq. 118, 122, disapproving Stout v. Hart, 7 N. J. L. 414, 424; Hoke v. Herman, 21 Pa. St. 301, holding a debt bequeathed by a testator who subsequently became insane adeemed by its payment to his committee; Richards v. Humphreys, 15 Pick. 133, 135; Stanley v. Potter, 2 Cox Ch. 180; Ludlam's Estate, 13 Pa. St. 188; Georgia Infirmary v. Jones, 37 Fed. Rep. 750; Succession of Bachelor, 48 La. An. 278. A devise of ground rents is adeemed by the payment of the same to testator in a lump sum: Harshaw v. Harshaw, 184 Pa. St. 407.

⁵ Ashburner v. Macguire, 2 Bro. Ch.

but alteration of testator's interest in property bequeathed without his consent is not ademption.

the testator's interest in property bequeathed is altered, or a fund converted into property of a different description, by the operation of law,¹ or without the testator's consent,² there will be no ademption; nor is the identity of a debt lost, so as to cause it to be

adeemed by the renewal from time to time of notes given to secure it,³ but otherwise if a mortgage has been foreclosed, although a new security be taken on the same property.⁴ Where the proceeds of property, or of a debt, and not the property or debt itself, are bequeathed, an alteration or payment thereof works no ademption;⁵ nor, of course, will a mere intention to convert, not

Removal of goods no ademption, so long as they can be identified.

executed, have such effect.⁶ If goods in a particular locality are bequeathed, which are subsequently removed, the legacy will be adeemed by such removal, if the goods cannot be identified; but not if their identification is independent of their locality.⁷

§ 447. **Legacies in Satisfaction of Debts.**—If a testator, having given a legacy in discharge of a debt or with a view to accomplish

A legacy given in discharge of a debt is cancelled by the prior discharge of the debt.

some particular purpose, himself pays the debt or carries out the purpose in his lifetime, the legacy, being thus satisfied,⁸ is thereby cancelled.⁹ A legacy expressly given to pay a debt is satisfied by its payment by the testator in his lifetime, although larger than the debt.¹⁰

So, where a woman bequeathed certain legacies and afterwards made a marriage settlement disposing of her property substantially to the legatee, the legacies were held adeemed, or satisfied, as far as the provisions in the settlement extended.¹¹ But if the language of the will be inconsistent with this view, the legacy will not be adeemed; hence where a legacy was given solely for the erection of a certain church, in contemplation at the date of the will, which

C. 108, 114; *White v. Winchester*, 6 Pick. 48, 57; *Godard v. Wagner*, 2 Strobb. Eq. 1, 10, 13.

¹ *Walton v. Walton*, 7 John. Ch. 258, 265; *Wms. Ex.* [1325]; but see *Ludlam's Estate*, *supra*.

² *Wms. Ex.* [1325]; *Patton v. Patton*, 2 Jones Eq. 494.

³ *Ford v. Ford*, 23 N. H. 212, 219, 220; *Gardner v. Printup*, 2 Barb. 83, 88; *Havens v. Havens*, 1 Sandf. Ch. 324, 331; *Succession of Irwin*, 33 La. An. 63, 72.

⁴ *Beck v. McGillis*, 9 Barb. 35, 58; see *Matthews v. Foulsham*, L. R. 2 Eq. 669.

⁵ *Nooe v. Vannoy*, 6 Jones Eq. 185, 188; *Clark v. Browne*, 2 Sm. & G. 524, 530; *Littig v. Hance*, 81 Md. 416, 432.

Says Wallace, J., in the case of *Georgia Infirmary v. Jones*, 37 Fed. Rep. 750, on p. 754: "When the bequests are of this character the fund received by the testator in his lifetime may be followed through its transmutations and reached, if capable of identification."

⁶ *Basan v. Brandon*, 8 Sim. 171.

⁷ 2 Redf. on Wills, *435, and authorities there cited.

⁸ *Ante*, § 446.

⁹ And is not revived by republication of the will: *Tanton v. Keller*, 167 Ill. 129, 140; *Langdon v. Astor*, 16 N. Y. 9, 36; *Hine v. Hine*, 39 Barb. 507, 510.

¹⁰ *Taylor v. Tolen*, 38 N. J. Eq. 91, 97.

¹¹ *Webb v. Jones*, 36 N. J. Eq. 163, 168.

legacy was not to be paid while said church was in debt, the legacy was held not to be adeemed by the erection of the church in the lifetime of the testator, though the property was still indebted, and the testator had before his death paid large sums to defray the expenses of erection.¹ In connection with this principle, a rule was established in the English equity courts, that, where a debtor bequeaths to his creditor a legacy equal [* 975] to or greater *than the amount of his debt, it shall be presumed, in the absence of a contrary intent inferable from the will, that the legacy was intended to be in satisfaction of the debt.² But this rule has been freely censured in England,³ and although well settled, yet courts dislike it so much as to lay hold of any minute circumstance to take a case out of its operation;⁴ and it is said that equity leans against legacies being taken in satisfaction of debts, though in favor of a provision by will being in satisfaction of a portion by contract.⁵ So also in this country.⁶ The American courts recognize the rule, but regret its existence, and lean to a contrary presumption whenever the testator's language, or even circumstances proved *aliunde*, enable them to disregard the ancient rule.⁷ It is held, accordingly, that the presumption that a legacy was intended as the payment of a debt does not arise, if there be, independent of the legacy, an express direction to pay debts;⁸ nor if there be a difference in the nature of the debt and legacy,⁹ or a difference in the times when they are respec-

English rule that bequest of the amount of a debt by the debtor to his creditor is intended as payment of the debt, is unwillingly observed by courts.

Its existence is regretted in America.

It does not apply, if in addition to the legacy there is a direction to pay debts;

¹ Keiper's Appeal, 124 Pa. St. 193, holding that the will negatived the idea of the legacy being adeemed either in whole or *pro tanto*.

² Wms. Ex. [1296]; Strong v. Williams, 12 Mass. 391, 394, citing English cases.

³ "Where a debtor by his will gives a larger or equal benefit, it is extraordinary to say, that, if the estate is sufficient for both debt and bounty, the testator upon the rule of constructive satisfaction should not intend both": *per* Sir T. Clarke, M. R., in Mathews v. Mathews, 2 Ves. Sen. 635, 636; Hinchcliffe v. Hinchcliffe, 3 Ves. 516, 529.

⁴ Sir T. Clarke, M. R., in Mathews v. Mathews, 2 Ves. Sen. 636.

⁵ Thynne v. Glengall, 2 H. L. Cas. 131, 153.

⁶ Byrne v. Byrne, 3 S. & R. 54, 61.

⁷ "If nothing were said on the subject, the modern rule of construction would be, that a bequest is to be regarded as a

bounty, and not as the payment of a debt, unless a contrary intention is expressed": Smith v. Smith, 1 Allen, 129, 130; Perry v. Maxwell, 2 Dev. Eq. 488, 498; Caldwell v. Kinkead, 1 B. Mon. 228, 230; Crouch v. Davis, 23 Gratt. 62; Heisler v. Sharp, 44 N. J. Eq. 167, 170; Glover v. Patten, 165 U. S. 394, 410. In Sheldon v. Sheldon, 133 N. Y. 1, 4, the court seems to hold that an intention to extinguish the debt must appear from the will.

⁸ Edelen v. Dent, 2 Gill & J. 185, 191; Boughton v. Flint, 74 N. Y. 476, 482. And see Lisle v. Tribble, 92 Ky. 304, 308.

⁹ Edelen v. Dent, *supra*; Perry v. Maxwell, 2 Dev. Eq. 488, 499; Cloud v. Clinkebeard, 8 B. Mon. 397, 399; Phillips v. McCombs, 53 N. Y. 494; Partridge v. Partridge, 2 Harr. & J. 63; Deichmann v. Arndt, 49 N. J. Eq. 106 (holding a devise of land not in discharge of testator's bond debt, though secured by mortgage on the lands devised).

or if there is other ground from which a different intention may be inferred.

tively payable,¹ nor where the one is certain and absolute, and the other contingent and uncertain;² nor where the debt was contracted after the will was executed;³ nor where the legacy is in some particulars less beneficial,⁴ though in others more so, than the debt;⁵ nor where the debt is of an unliquidated amount,⁶ nor where the * legatee is one of several to whom equal amounts are be- [*976] queathed.⁷ In Delaware, it is held that a legacy is not to be deemed payment, either in full or in part, of the testator's debt to the legatee.⁸

The rule is not applicable where the debt is owing to one person and the legacy is given to another.⁹

On the other hand, the bequest of a legacy to a debtor does not Bequest to a debtor by his creditor does not *per se* release the debt. *per se* release or extinguish the debt.¹⁰ The testator's intention to add to the legacy the release or discharge of the legatee's debt to him must appear by clear expression or necessary implication.¹¹ But if the will is silent, or expresses no clear intention on the subject, such intention may be proved by extrinsic evidence.¹²

Since the release of a debt by a testator is but a bequest, such debt is, like any other bequest, liable to be taken as assets to pay the testator's debts;¹³ and the executor may, where the legatee is indebted to the testator, retain the legacy, either in partial or full satisfaction of the debt, by way of set-off.¹⁴ This, in some States, is provided for by statute,¹⁵ and it is held that the statutory provision does not extend to debts barred by limitation at the time of the testator's death,¹⁶ although it

Release of a debt may be avoided by the testator's creditors.

¹ Day v. Williams, 2 Dev. & B. Eq. 66, 67.

² Day v. Williams, *supra*; Eaton v. Benton, 2 Hill (N. Y.) 576, 581.

³ Crouch v. Davis, 23 Gratt. 62, 93; Heisler v. Sharp, 44 N. J. Eq. 167; Adams v. Olin, 61 Hun, 318, 324; Glover v. Patten, 165 U. S. 394, 410.

⁴ Stone v. Pennock, 31 Mo. App. 544, 555.

⁵ Gilliam v. Brown, 43 Miss. 641, 654.

⁶ Gilliam v. Brown, *supra*. See Glover v. Patten, *supra*.

⁷ Crouch v. Davis, 23 Gratt. 62, 93.

⁸ Morris v. Morris, 3 Houst. 568, 574.

⁹ Thus a legacy given to the wife for services rendered by her to the testator is not a discharge of the debt due the husband for the services of his wife: Reynolds v. Robinson, 82 N. Y. 103, 108. So a legacy by a creditor to the wife of the debtor is not a satisfaction of the debt due the testator: Clarke v. Bogardus, 12 Wend. 67.

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¹⁰ Wms. Ex. [1303]; Peter's Appeal, 2 Cent. R. 528; Charlick's Estate, 11 Abb. N. C. 56.

¹¹ Sorrell v. Sorrell, 5 Ala. 245, 248; Bailey's Estate, 153 Pa. St. 402; Baldwin v. Sheldon, 48 Mich. 580; Woodruff v. Migeon, 46 Conn. 236; Spoth v. Ziegler, 48 La. An. 1168.

¹² Zeigler v. Eckert, 6 Pa. St. 13, 19. In England this doctrine was announced in Eden v. Smyth, 5 Ves. 341, 355, and doubted, but not overruled, in Pole v. Somers, 6 Ves. 309, 322. See also Chester v. Urwick, 23 Beav. 404.

¹³ Rider v. Wager, 2 Peere Wms. 328, 331; Cheshire v. Cheshire, 2 Dev. & B. 254.

¹⁴ For a discussion of this subject see *post*, § 564, and authorities there cited; Clarke v. Bogardus, 12 Wend. 67.

¹⁵ For instance, in Massachusetts: Allen v. Edwards, 136 Mass. 138.

¹⁶ Allen v. Edwards, *supra*.

seems to be the law in England that the right to retain exists even in such case;¹ nor is it uniformly held whether a devisee can be kept out of his devise to satisfy a debt due by him.² It may be mentioned here, as resulting from the doctrine of election, that a legatee is bound by the recital in the will of a debt due by him, except in a clear case of mistake in figures,³ and it is held that so far as the heirs are concerned a testator may in his will declare himself a debtor to another and direct that any part of his estate that may be claimed by the creditor shall be considered as due him without further proof, and be conclusive on the heirs.⁴

[*977] * § 448. **Ademption of Legacies given as Portions.**—According to an arbitrary doctrine prevailing in courts of equity, a legacy given by a father, or person *in loco parentis*, to a child or grandchild, is completely adeemed if he afterwards, during his lifetime, advances a portion for that child, on the occasion of its marriage or otherwise; and the ademption is complete whether the advancements are larger than, or equal to, or smaller than the testamentary portions.⁵ This rule, says Williams, has excited the regret and censure of more than one eminent modern judge, although it has also met with approbation from other high authorities.⁶ Story condemns it, and insists that the natural presumption would be, at least where the assets are sufficient to satisfy the portion as well as the legacy, that the testator intended the latter as a bounty, in addition to the duty already assumed (referring to portions secured by marriage settlement);⁷ “but,” he says, “we must be content to declare *ita lex scripta est*; it is established, though it may not be entirely approved.” The doctrine seems to have originated in the reluctance of equity courts to sanction a rule which might allow double portions to children. To avoid such possibility, they created the presumptions according to which every legacy from a father to his child is *prima facie* intended as a portion, and that every advancement to such child by the testator during life is intended as a satisfaction of such portion.⁸ “Whatever may be thought of the doctrine, it is thoroughly established in English and American jurisprudence.”⁹

Original rule that legacy given by a father is adeemed if he afterward advances a portion to the child

¹ See cases cited *post*, § 564. *Courtenay v. Williams*, 3 Hare, 539, 553; *Coates v. Coates*, 33 Beav. 249, 252; *Cordwell's Estate*, L. R. 20 Eq. 644.

² *Covin's Estate*, 20 S. C. 471, 476; *post*, § 564, and authorities there cited.

³ *Wms. Ex.* [1303]. But see *Vandervoort, in re*, 62 Hun, 612.

⁴ *Maurer v. Bowman*, 65 Ill. App. 261; s. c. affirmed 169 Ill. 586.

⁵ *Shaw, J.*, in *Richards v. Humphreys*, 15 Pick. 133, 136, *et seq.*; *Langdon v. Astor*, 16 N. Y. 9, 34.

⁶ *Wms. Ex.* [1332].

⁷ 2 Sto. Eq. Jur. § 1110; see also, as to cases other than marriage settlements, §§ 1112 *et seq.*

⁸ Story calls this “extremely artificial reasoning, and such as an ingenuous mind may find it extremely difficult to follow”; *Sto. Eq. Jur.* § 1113. The extraordinary conclusions to which the doctrine leads are strongly emphasized by him in § 1118. See also *Evans v. Beaumont*, 4 Lea, 599, 603.

⁹ *Per Worden, J.*, in *Weston v. Johnson*, 48 Ind. 1, 5.

The original severity of the rule raising the presumption of intention to adeem a legacy by the advancement of a portion less in amount,¹ has been relaxed, however, so that now such advancement operates as an ademption *pro tanto* only.² And it has been held that, where there is * great disparity between the gift *inter vivos* and the legacy, [* 978] the latter being greatly in excess of the former, the gift is not regarded as either a portion or an advancement, so as to operate as an ademption or satisfaction *pro tanto*, if not so expressed by the testator, or clearly indicated by the circumstances.³ So Gifts of small the gift of small sums, from time to time, is not regarded as a satisfaction or ademption of a legacy by a father, or one *in loco parentis*, to a child, even *pro tanto* ;⁴ nor a provision not *ejusdem generis* with the legacy,⁵ unless an intention to such effect be clearly apparent or expressed ;⁶ nor where the advancement or the legacy is contingent,⁷ or a loan.⁸ Whether the doctrine is applicable in cases of the bequest of the residue, is not well settled ; it is held in some cases that such a bequest is,⁹ in others that it is not, adeemed by advancement during the testator's life.¹⁰ Specific legacies are said not to be affected by the subsequent advancement of a portion, because the gift of specific articles of personal property by a father to his child is not presumed to be intended as a portion.¹¹ And for the same reason real estate devised is held not to come within the rule ;¹² but this

¹ *Supra* ; *Richards v. Humphreys*, 15 Pick. 133, 136, *et seq.* ; *Wms. Ex.* [1333].

² *Pym v. Lockyer*, 5 Myl. & Cr. 29, 45, reviewing the authorities fully and reaching the conclusion (p. 55) that the rule adeeming a legacy upon payment of a portion less in amount is not supported by authority, and cannot be supported on principle, being, "in its operation, generally destructive of the interests which parents have intended for their children." *Carmichael v. Lathrop*, 108 Mich. 473, 478 ; *Paine v. Parsons*, 14 Pick. 318, 320 ; *Benjamin v. Dimmick*, 4 Redf. 7, 9 ; *Wallace v. Du Bois*, 65 Md. 153, 159.

³ *State v. Crossley*, 69 Ind. 203, 209, citing earlier Indiana cases.

⁴ *Watson v. Watson*, 33 Beav. 574 ; *Schofield v. Heap*, 27 Beav. 93, 98.

⁵ *Swoope's Appeal*, 27 Pa. St. 58, 61 ; *Dugan v. Hollins*, 4 Md. Ch. 139 ; *Evans v. Beaumont*, 4 Lea, 599, 601.

⁶ *Jones v. Mason*, 5 Rand. 577, 582.

⁷ *Clark v. Jetton*, 5 Sneed, 229, 235 ;

De Groff v. Terpenning, 14 Hun, 301, 304 ; *Sto. Eq. Jur.* § 1111.

⁸ *Wallace v. Du Bois*, 65 Md. 153, 160.

⁹ *Van Houten v. Post*, 32 N. J. Eq. 709, 712 ; *Wms. Ex.* [1334], citing *Montefiore v. Guedalla*, 1 DeG. F. & J. 93, *Schofield v. Heap*, 27 Beav. 93, and *Beckton v. Barton*, 27 Beav. 99. See *Carmichael v. Lathrop*, 108 Mich. 473 (holding that the tendency is in that direction) ; *Allen v. Allen*, 13 S. C. 512, 527. In *Vickers v. Vickers*, L. R. 37 Ch. Div. 525, 532, it is held that a gift of a share of residue contained in a will is adeemed by the gift of a business, part of such residue, by a deed in the father's lifetime.

¹⁰ *Davis v. Whittaker*, 38 Ark. 435, 439 ; *Clark v. Jetton*, 5 Sneed, 229, 235 ; *Clendenen v. Clymer*, 17 Ind. 155, 159 ; *Hays v. Hibbard*, 3 Redf. 28, 30.

¹¹ *Weston v. Johnson*, 48 Ind. 1, 7.

¹² *Fisher v. Riethley*, 43 S. W. R. (Mo.) 650, 651 ; *Swails v. Swails*, 98 Ind.

exception is repudiated in Virginia,¹ and unfavorably commented on elsewhere.² A written release by a son, *executed in consideration of a sum of money received from the father, expressed to be the son's full share, and more, in his father's estate, releasing and discharging him and his representatives from paying "the legacy named in said will, or from paying to me any sum of money or property under any other will of my said father," etc., is an ademption of all the legacies in the will to the son, not because there is a technical release, but because, having received his full share, he is estopped by his covenant from claiming anything more under the will.³ But where a father, having conveyed land to a son in consideration of the relinquishment by the latter of all claims of inheritance, made a will in which the son was directed to share in the estate, "*with the rest of my heirs*," the prior arrangement excluding the son was held to be revoked by this clause.⁴

By the terms of the rule, it is not applicable unless the testator stands to the legatee as father, or *in loco parentis*.⁵ But uncles, great-uncles, grandfathers, grandmothers or putative fathers, are not to be considered *in loco parentis* unless they intended to assume the office and duty of parent.⁶

Rule inapplicable except to father or one *in loco parentis*.

The republication of a will or codicil does not rebut the presumption of ademption or satisfaction of the legacy given by the will, or in any wise change the general rule.⁷ But where a testator satisfies a legacy given in his will, taking the legatee's receipt as a full or part payment thereof, and subsequently executes a new will containing the same bequest, the legatee is entitled to such legacy given in the last will, in the absence of an understanding that what he had received should apply to legacies in future wills.⁸

Effect of republications, and of making subsequent will.

511, 515, citing earlier Indiana cases; *Davys v. Boucher*, 3 Y. & Coll. 397, 411; *Burnham v. Comfort*, 37 Hun, 216, 219, affirmed 108 N. Y. 535; *Allen v. Allen*, 13 S. C. 512, 527; *Thomas v. Capps*, 5 Bush, 273, 276. See also *Clark v. Jetton*, 5 Sneed, 229, 236; *Marshall v. Rench*, 3 Del. Ch. 239, 256.

¹ *Hansbrough v. Hooe*, 12 Leigh, 316, 322, Tucker, J., dissenting, p. 325.

² *Per Follett, J.*, in *Burnham v. Comfort*, 37 Hun, 216, 220, *et seq.*; *McIver, J.*, in *Allen v. Allen*, 13 S. C. 512, 527. See language of *Mitchell, J.*, in *Roquet v. Eldridge*, 118 Ind. 147, 149; and *Carmichael v. Lathrop*, 108 Mich. 473, where the subject is fully discussed and the authorities reviewed.

³ *Low v. Low*, 77 Me. 37, 40.

⁴ *Turner's Appeal*, 52 Mich. 398, 401.

⁵ *Gilchrist v. Stevenson*, 9 Barb. 9, 16; *Swails v. Swails*, 98 Ind. 511, 515; *Sprengle's Appeal*, 15 Atl. R. 773. Extended to all persons by statute in some States: *post*, § 450.

⁶ *Weston v. Johnson*, 48 Ind. 1, 5; *Wms. Ex.* [1338]. This intention may be proved by extrinsic evidence: *post*, § 449.

⁷ *Ware v. People*, 19 Ill. App. 196, 200; *Paine v. Parsons*, 14 Pickering, 318, 321; *Langdon v. Astor*, 16 N. Y. 9, 57; *Wms. Ex.* [1331].

⁸ *Jacques v. Swasey*, 153 Mass. 596; *Chapman v. Allen*, 56 Conn. 152; *Dunham v. Averill*, 45 Conn. 61, 86.

§ 449. **Admissibility of Parol Evidence on Questions of Ademption.** — We have seen that specific legacies are necessarily adeemed by the testator's disposing of the specific thing bequeathed in a manner inconsistent with the bequest;¹ ademption is the consequence of the testator's act, which makes the execution of the bequest impossible, and therefore excludes any question of intention. Hence parol evidence of intention is inapplicable in such * case.² The decisive, and usually the most difficult, question [* 980] in such case is whether the legacy is specific;³ if found to be such, and the subject of the gift is not in existence, the bequest is at an end.⁴ It is difficult to conceive how the question of ademption of strictly specific legacies can be made to turn upon the testator's intention, as is sometimes asserted;⁵ for to the precise extent to which it may be found that the testator intended the legatee to take an equivalent for the thing given, the legacy ceases to be specific.

Parol evidence is admissible on questions of the effect of testator's acts after execution of will and before death.

But upon the question of ademption of general legacies, — more accurately of their satisfaction by the testator,⁶ — intention is of the very essence;⁷ and as this question is determined by the effect of an act of the testator intervening between the execution of the will and his death, it is obvious that parol evidence must be resorted

to, — not to ascertain the testator's intention in giving the legacy, which is not permissible, — but to establish or disprove the act alleged to work the ademption or satisfaction of the legacy,⁸ as well as the circumstances which may explain the motives and object of such act, to show whether the testator intended it to affect his will or not;⁹ for unless it was his *intention* that such act should constitute a satisfaction of the legacy, it cannot have that effect.¹⁰

Parol evidence is also admissible upon the principle that a presumption of intention, raised by a rule of construction, may be rebutted or confirmed by the application of parol evidence of a different intention on the part of the testator.¹¹

And to rebut presumptions

¹ *Ante*, § 446.

² *Shaw, J.*, in *Richards v. Humphreys*, 15 Pick. 133, 135; *Wyckoff v. Perrine*, 37 N. J. Eq. 118, 122; *Gilbreath v. Winter*, 10 Ohio, 64, 68; *Hoke v. Herman*, 21 Pa. St. 301; *Ford v. Ford*, 23 N. H. 212, 216.

³ *Stanley v. Potter*, 2 Cox, 180, 182.

⁴ *Humphreys v. Humphreys*, 2 Cox, 184, 185.

⁵ 2 Redf. on Wills, 438, pl. 21, citing two Georgia cases, *Beall v. Blake*, 16 Ga. 119, and *Smith v. Smith*, 23 Ga. 21. The former holds that "whether a specific legacy, not illegal, has been adeemed or not depends on whether the testator's intention has been to adeem it": the latter

is not in point, as the legacy under consideration was held not specific.

⁶ See *ante*, § 446.

⁷ *Van Houten v. Post*, 32 N. J. Eq. 709, 712.

⁸ *May v. May*, 28 Ala. 141, 152; *Allen v. Allen*, 13 S. C. 512, 526.

⁹ *Rogers v. French*, 19 Ga. 316, 321; *Thomas v. Capps*, 5 Bush, 273, 276; *Wallace v. Du Bois*, 65 Md. 153, 160; *Cowles v. Cowles*, 56 Conn. 240.

¹⁰ *Sims v. Sims*, 10 N. J. Eq. 158, 163.

¹¹ *Wms. Ex.* [1335]; *ante*, § 445; *May v. May*, 28 Ala. 141, 153; *Taylor v. Lanier*, 3 Murph. 98, 102; *Langdon v. Astor*, 16 N. Y. 9, 34; *Miner v. Atherton*, 35 Pa. St.

and any doubt raised by parol testimony may be resolved by the same kind of evidence.¹ raised by a rule of construction.

Under either theory, the declarations of the testator accompanying the act are admissible;² and it is asserted by some writers, that declarations made by the testator to any person, at any time, whether as part of the transaction of the advancement or not, are admissible upon the question of ademption;³ but this seems doubtful.⁴ The presumptions that a legacy is intended as a portion, and that the advancement of a portion is intended as a satisfaction of the portion by legacy, can, as heretofore stated,⁵ arise only between a parent and child, or where one stands *in loco parentis* to the legatee; hence parol evidence is admissible to prove that a testator did in fact sustain such relation; and this may be shown by his acts and declarations.⁶ And that testator stood *in loco parentis*.

Where the testator is a stranger to the legatee (*i. e.* where the relation of parent and child does not exist) there can be no presumption as to portions or their discharge. In such case a legacy implies a bounty, and a presumption arises that the legacy is intended to be a clear gratuity; which may be repelled by parol proof, and like evidence may be resorted to, to restore the presumption.⁷ So it is a presumption in equity, that, where a debtor bequeaths a legacy to his creditor, it is intended as a discharge of the debt;⁸ this presumption may likewise be rebutted by parol evidence in support of the apparent intention of the testator;⁹ but such evidence is not admissible to

528, 536; *Jones v. Mason*, 5 Rand. 577, 580.

¹ *Tillotson v. Race*, 22 N. Y. 122, 126.

² *Kirk v. Eddowes*, 3 Hare, 509, 518; *Gilliam v. Chancellor*, 43 Miss. 437, 449.

³ 2 Redf. on Wills, 443, pl. 7, quoting as authority *Roper*, 364-409, and the case of *Wallace v. Pomfret*, 11 Ves. 542, which, however, he repeatedly condemns. (See 2 Redf. on Wills, 188, pl. 7.) In *Zeigler v. Eckert*, 6 Pa. St. 13, 18, it is held that to rebut equities, and to repel the rebutting evidence, parol evidence of the testator's declarations before, at, and after the publication of the will is competent. Says *Shope, J.*, in *Richardson v. Eveland*, 126 Ill. 37, on page 44: "Where, as here, the gift is unaccompanied by any written instrument, the declarations and conduct of the testator in respect of the subject-matter being considered, and in breaking in upon the portions as fixed by his will, from which an inference of his intention in making the gift can be logically and legitimately drawn, are competent to be con-

sidered, whether contemporaneous with or prior or subsequent to the gift."

⁴ *De Groff v. Terpenning*, 14 Hun, 301, 303, holding that such declaration is admissible only when made at the time of the advancement.

⁵ *Ante*, § 448.

⁶ *Powys v. Mansfield*, 3 Myl. & Cr. 359, 377; *Monick v. Monck*, 1 Ball & Beat. 298, 304.

⁷ *Zeigler v. Eckert*, 6 Pa. St. 13, 20. "In case the legacy is to a stranger," says *Shopé, J.*, in *Richardson v. Eveland*, 126 Ill. 37, on p. 43, "the intention of the testator to satisfy the legacy by a subsequent gift — unless the legacy and gift be given for the same specific purpose — must be expressed."

⁸ See *ante*, § 447.

⁹ On the principle, that the effect of such testimony is not to show that the testator did not mean what he has said, but, on the contrary, that he did mean what he has expressed: *per Sir John Leach*, in *Hurst v. Beach*, 5 Madd. 351, 360; *Trimmer v. Bayne*, 7 Ves. 508, 514.

prove the testator's intention where such presumption is not raised.¹ It is held in many cases, however, that if it appear from the face of the will, or by evidence * *aliunde*, that the testator [* 982] intended the legacy as a satisfaction, it will so have effect.²

§ 450. **Statutory Provisions affecting Ademption or Satisfaction of Legacies.** — By the English Wills Act it is provided that "No conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked, . . . shall prevent the operation with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death."³ Similar statutes exist in Georgia,⁴ Indiana,⁵ Kentucky,⁶ North Carolina,⁷ Virginia,⁸ and West Virginia.⁹ A number of States have adopted the statute of New York on this subject, which provides, — 1st, that a bond or covenant to convey real or personal property previously devised or bequeathed shall not be deemed a revocation of such devise or bequest, but pass under the will, subject to the same remedies as would have existed against the heirs or next of kin, had it descended to them; 2d, that no charge or encumbrance upon any property shall be deemed a revocation of previous disposition by will; 3d, nor shall any act by which the testator's estate is altered revoke a devise or bequest when it does not wholly divest the testator's interest, but the actual estate of the testator shall pass under the will, unless a contrary intent is expressed in the instrument by which the alteration is made; 4th, but if such provision by which the alteration is made is wholly inconsistent with the nature of the devise or bequest, it works a revocation, unless dependent on a contingency which does not take effect.¹⁰ The same provisions exist in California,¹¹ Kansas,¹² and Ohio,¹³ and, so far as property is affected by the first two or three of the clauses, also in Alabama,¹⁴ Arkansas,¹⁵ Indiana,¹⁶ Missouri,¹⁷ Montana,¹⁸ Nevada,¹⁹ and * Oregon.²⁰ In Louisiana a gift or sale of the [* 983]

¹ *Cloud v. Clinkinbeard*, 8 B. Mon. 397, 399; *Reynolds v. Robinson*, 82 N. Y. 103, 107; *Phillips v. McCombs*, 53 N. Y. 494, 496.

² *Gilliam v. Brown*, 43 Miss. 641, 654; *Williams v. Crary*, 8 Cow. 246; *Clark v. Bogardus*, 2 Edw. Ch. 387.

³ 1 Vict. c. 26, § 23.

⁴ Code, 1895, § 3332. It is provided by this statute, moreover, that an exchange of property shall be deemed a substitution instead of revocation of the property willed: *Ib.*, § 3333; *Reed v. Reed*, 68 Ga. 589.

⁵ Ann. Ind. St. 1894, § 2735.

⁶ Ky. St. 1894, § 4835; *Haselwood v. Webster*, 82 Ky. 409.

⁷ Code, 1883, § 2179.

⁸ Code, 1887, § 2520.

⁹ Code, 1891, ch. 77, § 9.

¹⁰ *Banks & Bro.*, 7th ed., p. 2286, §§ 45 *et seq.*

¹¹ Civ. Code, §§ 1301-1304.

¹² Gen. St. Kans. 1897, ch. 110, § 33.

¹³ *Bates' Ann. Oh. St.* 1897, §§ 5954-5957.

¹⁴ Code, 1896, §§ 4254-4256.

¹⁵ Dig. of St. Ark. 1894, § 9397.

¹⁶ Ann. Ind. St. 1894, *supra*.

¹⁷ Rev. St. 1889, §§ 8874, 8875.

¹⁸ *Chadwick v. Tatem*, 9 Mont. 354.

¹⁹ Rev. St. 1885, §§ 3011 *et seq.*

²⁰ Code, 1887, §§ 3072, 3073.

whole or part of a thing bequeathed is declared a revocation *in toto* or *pro tanto*, as the case may be, although the gift or sale be null and the thing have returned to the possession of the testator.¹ In California advancements of gifts are not to be taken as adempments of general legacies, unless such intention is expressed in writing by the testator.² In Kentucky, Virginia,³ and West Virginia,⁴ the doctrine of ademption or satisfaction by advancement is extended to all persons, whether the testator stand to them *in loco parentis* or not; and parol evidence is admissible to show the testator's intention. An exception is made in Kentucky in favor of heirs as legatees, in respect to whom a conversion of the thing given works no ademption, but the legatee is entitled to the value of the thing converted, unless the testator otherwise intended,⁵ the burden of proof resting on those who assert the ademption.⁶

¹ Succession of Irwin, 33 La. An. 63, 72.

⁵ Lilly v. Curry, 6 Bush, 590, 593.

² Civ. Code, § 1351.

⁶ Hocker v. Gentry, 3 Met. (Ky.) 463,

³ Strother v. Mitchell, 80 Va. 149, 153. 473; Haselwood v. Webster, 82 Ky. 409.

⁴ Code, 1887.

* CHAPTER XLIX.

[* 984]

OF THE SATISFACTION OF LEGACIES BY THE EXECUTOR.

§ 451. **Preference of Creditors over Legatees.**—It has already been mentioned, in connection with the subject of the payment of debts,¹ that the claims of all creditors must first be discharged before the legacies can be paid. The consequences of satisfying legacies 'while any debts remain unpaid have also been pointed out. At common law the subject of paying legacies was fraught with hazard and danger, not always avoidable by the most prudent executor;² but in America, as indicated in an earlier chapter,³ executors and administrators may fully protect themselves from any liability to creditors by a simple compliance with the plain provisions of the statutes.

When all the debts proved against an estate have been fully satisfied, or a sufficient amount of assets reserved for the payment of such claims as may be in litigation or payable at a future time, legatees are entitled to satisfaction of their bequests, if there be assets for that purpose in the hands of the executor. If the assets remaining are insufficient to carry out the provisions of the will in every particular, they must be applied as far as they go in the manner and priority directed by the testator; for in this as well as every other respect in regard to the execution of wills, the testator's intention, so far as the same may be gathered from the whole will, is to be sought

Legatees are entitled to their bequests out of assets not needed for payment of debts.

If assets are not sufficient to pay all legacies, they must be paid *pro rata*.

¹ *Ante*, § 379; *State v. Roth*, 47 Ark. 222; *Blake's Estate*, 134 Pa. St. 240. That the alienee of an heir or devisee takes subject to the right of creditors to sell for the payment of debts is mentioned later: § 471, p. * 1044. Even a legacy or devise for a valuable consideration is postponed to the discharge of debts: *Commonwealth v. Cochran*, 146 Pa. St. 223, 226; see next section on the priority of legacies and devises given for a consideration. An order of distribution before the time to prove debts has expired is void as to creditors proving their claims within that time: *Browne v. Doolittle*, 151 Mass. 595. See

on this and similar points as to distribution of the estate, *post*, § 562.

² "The mere circumstance of want of notice of a debt or claim against the estate of the deceased will not excuse an executor or administrator from the payment or satisfaction of it, if the assets were originally sufficient for the purpose, notwithstanding that, in ignorance of the existence of the debt or claim, he has *bona fide* handed over the assets to legatees or parties entitled in distribution": *Wms. Ex.* [1351].

³ *Ante*, §§ 384 *et seq.*

out and carried into effect.¹ If, however, it cannot be ascertained from * the testator's words upon which of the legatees he intended the loss to fall in case their legacies could not all be satisfied, the law directs a certain order in which they abate; and it will be necessary to consider briefly the rules according to which this order of payment is determined.

§ 452. **Order in which Legacies abate.**—In the absence of a contrary intention inferable from the words of the will, it is to be presumed that the testator meant to discharge his liabilities and obligations before giving his estate in bounty; hence legacies given for a valuable consideration, or for the relinquishment of a right or interest, are entitled to priority of payment over voluntary general legacies.² Thus, a provision for a widow in lieu of her dower right entitles her to take as a purchaser for a valuable consideration, not subject to that abatement to which general legacies are subject,³ even though the value of the legacy be in excess of the value of the dower right,⁴ and though the will was made before marriage, if in contemplation of marriage,⁵ and although the gift be an annuity payable out of the income.⁶ The provision in lieu of dower is held to be superior to specific, as well as general legacies; these must abate if necessary to satisfy the same.⁷ But whether specific devises of real estate abate in favor of such provision is not so unanimously held.⁸ Of course the testator's intention in this respect also is decisive; hence the legacy in lieu of dower can have no priority over the express direction of the testator.⁹ The question of the relative priority between a legacy in lieu of dower and the claim of a creditor has been discussed in an earlier chapter.¹⁰ The liability of devises and legacies in lieu

Legacies in discharge of an obligation of the testator have priority.

Legacy in lieu of dower superior to specific and general legacies.

¹ *Towle v. Swasey*, 106 Mass. 100, 105; *Wallace v. Wallace*, 23 N. H. 149, 155; *Emery v. Batchelder*, 78 Me. 233, 236; *University's Appeal*, 97 Pa. St. 187, 200; *Moore v. Moore*, 50 N. J. Eq. 554.

² *University's Appeal*, 97 Pa. St. 187, 200; *Wood v. Vandenburg*, 6 Pa. 277, 286; *Duncan v. Franklin Township*, 43 N. J. Eq. 143, 145.

³ *Security Co. v. Bryant*, 52 Conn. 311; *Pollard v. Pollard*, 1 Allen, 490; *Lord v. Lord*, 23 Conn. 327, 330; *Williamson v. Williamson*, 6 Pa. 298, 305; *In re Gotzian*, 34 Minn. 159, 167. See *Barnett's Appeal*, 104 Pa. St. 342, in which the widow's legacy was held to abate.

⁴ *Warren v. Morris*, 4 Del. Ch. 289; *Brown v. Brown*, 79 Va. 648, citing English authorities; *Howard v. Francis*, 30 N. J. Eq. 444, 448.

⁵ *Towle v. Swasey*, 106 Mass. 100, 106; *Farnum v. Bascom*, 122 Mass. 282, 289.

⁶ *Moore v. Alden*, 80 Me. 301; *Rowe v. Lansing*, 53 Hun, 210.

⁷ *Borden v. Jenks*, 140 Mass. 562; *Clayton v. Aiken*, 38 Ga. 320, 332; *Loomcock v. Clarkson*, 1 Desaus. 471, 475.

⁸ Affirmatively in the case of *Borden v. Jenks*, *supra*; negatively in *Boykin v. Boykin*, 21 S. C. 513, 534, and *Morse v. Hayden*, 82 Me. 223, 231.

⁹ *Tickle v. Quinn*, 1 Dem. 425, 428; *Orton v. Orton*, 3 Abb. App. Dec. 411, 415; *Kline's Appeal*, 117 Pa. St. 139, 148. The burden is on him who attacks the legacy to show that a preference is forbidden: *Moore v. Alden*, 80 Me. 301, 306.

¹⁰ *Ante*, § 119.

of dower to contribute to the making up of portions for children omitted in the will, or born after the making of a will, is mostly * regulated by statutes,¹ and arises from the paramount right of such children over any disposition made by the will.² A provision made for the support of the testator's widow has been held to be preferable to general legacies, and where the income from the estate was insufficient for such purpose, the payment of the latter was postponed until the widow's death.³

The consideration for a legacy entitling it to priority over others must be a valid subsisting right against the testator at the time of his death, or a legal claim, such as the widow's dower, or a debt due from the testator,⁴ or a consideration arising after the testator's death by reason of services to be performed, which if performed in the testator's lifetime would have entitled the legatee to compensation.⁵ Such expressions as that the legacy is given to an executor "for his care and pains,"⁶ or for his "trouble in management of the estate,"⁷ or "over and above any commissions,"⁸ or "for his services in assisting me at various times,"⁹ are not sufficient to show an intended preference. Nor is a legacy in lieu of dower to be preferred, unless the testator possessed real estate and the widow was entitled to dower therein.¹⁰

It is also presumed that, by singling out a specific article by way of a specific bequest, the testator intends that the legatee shall take in preference to those legatees whose bequests are not specifically pointed out; hence the rule is, that specific legacies do not abate,¹¹ except in favor of such legacies as were given for a valuable consideration,¹² or among themselves.¹³ It has been mentioned, that all devises

Specific legatees take in preference to general legatees.

¹ See *post*, § 565, p. * 1240; *Ward v. Ward*, 120 Ill. 111.

² *Warren v. Morris*, 4 Del. Ch. 289, 306; *Coates v. Hughes*, 3 Binn. 498, 508; *Mitchell v. Blain*, 5 Pa. 588.

³ *Bonham v. Bonham*, 33 N. J. Eq. 476; s. c. 38 N. J. Eq. 419.

⁴ *Clayton v. Aiken*, 38 Ga. 320, 330; *Davies v. Bush*, 1 Younge, 341; *Turner v. Martin*, 7 DeG. M. & G. 429. In *McLean v. Robertson*, 126 Mass. 537, 539, a legacy in repayment of a sum loaned to the testatrix's husband was held not to abate with other legacies.

⁵ *Harper's Appeal*, 111 Pa. St. 243, 246; *Gassman's Estate*, 10 W. N. Cas. 275; *Wilson's Estate*, 15 Phila. 528.

⁶ *Heron v. Heron*, 2 Atk. 171.

⁷ *Duncan v. Watts*, 16 Beav. 204.

⁸ *Waters v. Collins*, 3 Dem. 374.

⁹ *Duncan v. Franklin Township*, 43 N. J. Eq. 143.

¹⁰ *Borden v. Jenks*, 140 Mass. 562, 564; *Blower v. Morret*, 2 Ves. Sen. 420; *Roper v. Roper*, L. R. 3 Ch. Div. 714. "The rule does not, however, apply, if the wife has no right of dower. Her right must be subsisting at the death of the testator": *Moore v. Allen*, 80 Me. 301, *per Peters*, Ch. J., p. 305.

¹¹ *Humes v. Wood*, 8 Pickering, 478; *Corya v. Corya*, 119 Ind. 593, 596; *Estate of Wilson*, 15 Phila. 528; *Davenport v. Sargent*, 4 Atl. 569; *Estate of Neistrath*, 66 Cal. 330; *Perkins v. Mathes*, 49 N. H. 107, 114; *Bonham v. Bonham*, 33 N. J. Eq. 476.

¹² See cases *supra*, p. * 985.

¹³ *Wms. Ex.* [1371]; see cases *infra*, p. * 987, note 2; *Tomlinson v. Bury*, 145

[* 987] * of real estate are in their nature specific;¹ and the question is therefore of frequent occurrence, whether devisees have preference over specific legacies. It is now generally held, that, other assets failing so that it becomes necessary to resort to specific legacies for the payment of debts, these abate ratably with specific devisees.² General legacies do not become specific by reason of being given for any particular purpose or object, to accomplish which the testator directs them to be applied;³ hence such legacies are not exempt from abatement, although they be to a wife or child, or for a charitable purpose,⁴ unless they be for the maintenance and support of such as stand in near relation to the testator, dependent upon his bounty, and otherwise unprovided for.⁵ A legacy for the erection of suitable headstones at the graves of the testator's parents, brothers, and sisters, however, has been held not to abate in favor of general legatees, being considered as part of the funeral expenses, in a case where the rights of creditors cannot be defeated thereby.⁶

Specific devisees and specific legatees abate ratably.

Demonstrative legacies, as already pointed out,⁷ are classed with specific legacies in this respect. If the fund pointed out for their payment fail, they are payable out of the general assets not specifically bequeathed, or out of funds covered by residuary bequests, and do not abate with legacies general in their nature.⁸ If, however, the fund out of which a demonstrative legacy is made payable fails, or is inadequate to satisfy it in full, the legatee has no preference [* 988] as to the unsatisfied remainder of the * demonstrative legacy over general legatees, but takes as a general legatee, and his legacy abates with other general legacies.⁹

Demonstrative legacies do not abate; but if the fund fail, they rank with general legacies.

Mass. 346; *Page v. Leapingwell*, 18 Ves. 463, 466, approved in *Van Nest v. Van Nest*, 43 N. J. Eq. 126.

¹ *Ante*, § 444, p. * 967.

² *Brant's Will*, 40 Mo. 266, 280; *Maybury v. Grady*, 67 Ala. 147, 161; *Kelly v. Richardson*, 100 Ala. 584; *Grim's Appeal*, 89 Pa. St. 333; *Estate of Woodworth*, 31 Cal. 595, 615; *Langstroth v. Golding*, 41 N. J. Eq. 49, 55; *Armstrong's Appeal*, 63 Pa. St. 312, 315. Otherwise in Virginia: *Edmunds v. Scott*, 78 Va. 720, 729; and South Carolina: *McFadden v. Hefley*, 28 S. C. 317.

³ *Harvard College v. Quinn*, 3 Redf. 514, 524; *Wetmore v. St. Luke's Hospital*, 56 Hun. 313, 321; *Wms. Ex.* [1366]; *Beeston v. Brooth*, 4 Madd. 161.

⁴ *University's Appeal*, 97 Pa. St. 187, 200; *Waters v. Collins*, 3 Dem. 374; *Swasey v. American Bible Society*, 57

Me. 523, 528; *Titus v. Titus*, 26 N. J. Eq. 111.

⁵ *Bliven v. Seymour*, 88 N. Y. 469, 475, *per* Finch, J.; *Scofield v. Adams*, 12 Hun. 366, 370; and see cases *infra*, p. * 988, note 5.

⁶ *Wood v. Vandenburg*, 6 Pa. 277, 285. Chancellor Walworth cites as authority for this view the case of *Masters v. Masters*, 1 P. Wms. 421, 423, and *Ward's Law of Leg.* 375.

⁷ *Ante*, § 444.

⁸ *Armstrong's Appeal*, 63 Pa. St. 312; *Bowen v. Dorrance*, 12 R. I. 269.

⁹ *Florence v. Sands*, 4 Redf. 206, 210. "Such a legacy will not be liable to abate with general legacies, except to the extent that it is to be treated as a general legacy, after the application of the fund designated for its payment": *Alvey, C. J.*, in *Gelbach v. Shively*, 67 Md. 498, 501.

General legacies abate proportionately if the assets are not sufficient to pay them all, unless an unequivocal preference is given to some one or more of them by the words of the will,¹ except as to such of them as are given for a valuable consideration, which have the same preference over other general legacies as above indicated in respect to specific legacies.²

General legacies abate proportionately on insufficiency of assets.

Annuities stand on same ground with other general legacies.

What is not a sufficient indication of a preference between general legacies.

Annuities stand on the same ground with other general legacies,³ unless a different intention appear from the will itself; as, for instance, where the annuity is made a charge upon the whole estate,⁴ or where it is for the support of wife or children otherwise unprovided for,⁵ or given for a valuable consideration, such as a widow's dower.⁶ Whether deficiencies in the amount of the annuity can be made good out of the capital fund, or out of the subsequent surplus, is referred to elsewhere.⁷ No preference is indicated between general legacies by such expressions in the will, as "in the first place," "first of all," etc., followed by other legacies, beginning with "next," or "secondly."⁸ The order in which the legatees are named is immaterial, as well as the fact that one is named in the body of the will and the other in the codicil;⁹ nor is the merit or near relationship of the legatee sufficient, of itself, to give preference to his legacy,¹⁰ although such may be taken into consideration in ascertaining the testator's intention.¹¹ Legacies resulting from an ineffectual testamentary disposition to the heir or distributee abate as though the original disposition had been effectual.¹²

Residuary legacies can hardly be said to abate, since the residuum

A specific legacy cannot be called on to abate with a demonstrative legacy if the general assets are insufficient to pay the latter: *Dunn v. Renick*, 40 W. Va. 349.

¹ *Pennsylvania Company's Appeal*, 109 Pa. St. 479; *University's Appeal*, 97 Pa. St. 187, 200; *Titus v. Titus*, 26 N. J. Eq. 111; *Swasey v. Bible Society*, 57 Me. 523, 528; *Boston Deposit Co. v. Plummer*, 142 Mass. 257, 264.

² *Supra*, § 452.

³ *Emery v. Batchelder*, 78 Me. 233, 237; *Additon v. Smith*, 83 Me. 551; *University's Appeal*, *supra*.

⁴ *Smith v. Fellows*, 131 Mass. 20; *Creed v. Creed*, 11 Cl. & Fin. 491, 507. Where the testator directs the investment of a sum sufficient to give an annuity of a certain amount, which is done, but which fund subsequently fails to produce the annuity bequeathed, by fluctuations of interest, the annuitant is entitled to have the loss made good from the residue:

Merritt v. Merritt, 43 N. J. Eq. 11; and see *Merritt v. Merritt*, 48 N. J. Eq. 1; and also *post*, § 456, p. *1002.

⁵ *Stewart v. Chambers*, 2 Sandf. Ch. 382, 395; *Willson v. Tyson*, 61 Md. 575, 580; *Lewin v. Lewin*, 2 Ves. Sen. 415.

⁶ *Supra*, p. *985.

⁷ *Post*, § 456, p. *1002.

⁸ *Everett v. Carr*, 59 Me. 325, 330; *Wms. Ex.* [1370].

⁹ *Sumner v. Society*, 64 N. H. 321, 322, *per Smith, J.*

¹⁰ *Emery v. Batchelder*, 78 Me. 233, 238; *Richardson v. Hall*, 124 Mass. 228, 233; *Babbidge v. Vittum*, 156 Mass. 38; *Titus v. Titus*, *supra*; *Hinson v. Ennis*, 81 Ky. 363; *Jett v. Bernard*, 3 Call, 11.

¹¹ *Chester Co. v. Hayden*, 83 Md. 104; *Hoyt v. Hoyt*, 85 N. Y. 142, 148; *Moore v. Beckwith*, 14 Oh. St. 129; *Scofield v. Adams*, 12 Hun, 366.

¹² *Harker v. Reilly*, 4 Del. Ch. 72, 95.

is that only which is *left* after all express or prior dispositions of the testator have been satisfied; hence residuary legatees [* 989] * can in no case call upon general or specific legatees to abate.¹ Residuary devises, however, are effected by the general rule, that unless it appears from the will that the legacies were meant to be paid at all events, or unless the intent of the testator to charge the legacies upon the real estate² is fairly deducible from the will, they do not abate in favor of general legacies.³ But if the testator, in the residuary clause, treats the real and personal property as forming one whole, without distinguishing the one from the other, he is presumed thereby to manifest an intention to charge the general legacies upon the land,⁴ because "residue" in such case can only mean what remains after satisfying the former gifts.⁵ There are some cases in which this rule has been disregarded, based upon and following the ruling of Chancellor Kent in *Lupton v. Lupton*;⁶ but it is said to be well settled both in England and America,⁷ and the New York cases now hold that, while the blending of the two kinds of property in the residuary clause is not sufficient of itself to charge the real estate, yet it is of great weight in ascertaining the testator's intention,⁸ which, of course, is always decisive.⁹ It must be remembered that a

Residuary devises do not abate in favor of general legacies, unless such intention appear.

¹ *Ante*, § 444; *Warren v. Morris*, 4 Del. Ch. 289, 304; *Langstroth v. Golding*, 41 N. J. Eq. 49, 53; *Thompson v. Thompson*, 3 Dem. 409. Where a will provided, "should my estate diminish in value, then my legacies shall decrease in proportion," this was held to mean that, if the estate diminish in value between the making of the will and the payment of the legacies, the resulting loss should fall equally upon all legacies, and not wholly upon the residuary legatees: *Spencer, Petitioner*, 16 R. I. 25. Hence the specific bequest of the proceeds of a note cannot be used to pay administration expenses so long as there are assets disposed of generally: *Corya v. Corya*, 119 Ind. 593, 596.

² As to which see *post*, § 491.

³ *Lupton v. Lupton*, 2 John. Ch. 614, 623; but see *ante*, § 444, pp. *967, *968, and references, showing the common-law doctrine to be modified in America.

⁴ *Knotts v. Bailey*, 54 Miss. 235, 238, affirmed in *Heatherington v. Lewenberg*, 61 Miss. 372, 376; *Allegheny Bank v. Hays*, 12 Fed. Rep. 663; *Hutchinson v. Gilbert*, 86 Tenn. 464, 469; *Jaudou v. Ducker*, 27 S. C. 295.

⁵ *Lewis v. Darling*, 16 How. (U. S.) 1, 10; *Bennett's Estate*, 148 Pa. St. 139;

Crone's Appeal, 103 Pa. St. 571, 575; *Mathewson's Petition*, 12 R. I. 145; *Corwine v. Corwine*, 24 N. J. Eq. 579, approved in *Cook v. Lanning*, 40 N. J. Eq. 369, 372; *Wilcox v. Wilcox*, 13 Allen, 252, 256; *Moore v. Beckwith*, 14 Oh. St. 129, 135; *Thomas v. Rector*, 23 W. Va. 26; *Bird v. Stout*, 40 W. Va. 43; *Rambo v. Rumor*, 4 Del. Ch. 9, 13.

⁶ 2 Johns. Ch. 614, 623; *Pearson v. Wartman*, 80 Md. 528 (citing prior Maryland cases); *Gridley v. Andrews*, 8 Conn. 1, 5; *Laurens v. Read*, 14 Rich. Eq. 245, 265.

⁷ *Per Wayne, J.*, in *Lewis v. Darling*, *supra*; *Durfee, C. J.*, in *Mathewson's Petition*, *supra*.

⁸ *Hoyt v. Hoyt*, 85 N. Y. 142, 149; *Scott v. Stebbins*, 91 N. Y. 605.

⁹ *McCorn v. McCorn*, 100 N. Y. 511, 513; *Anderson v. Davison*, 42 Hun. 431. In *Brill v. Wright*, 112 N. Y. 129, 133, it is said such a gift "is not inconsistent with an intention on the part of the testator to charge the legacies on the land. The courts have therefore permitted extrinsic circumstances to be considered for the purpose of ascertaining the actual intention of the testator;" but unaided by extrinsic circumstances legacies will not

devise or bequest may be specific although contained in a residuary clause;¹ hence general legacies are not chargeable upon real estate simply because it is devised in the residuary clause.²

The order in which the funds of the estate are applied to the payment of debts is discussed hereafter,³ as well under what circumstances the personalty is exonerated as against the real estate,⁴ in connection with the subject of the marshalling of assets.

* Statutory provisions upon the order of abatement of [* 990] legacies are more usually found with reference to their abatement for the payment of debts.⁵ In California,⁶ property for the payment of legacies must be resorted to in the following order: (1) property expressly appropriated by the will for the payment of legacies; (2) property not disposed of by the will; (3) property devised or bequeathed to a residuary legatee; (4) property not specifically devised or bequeathed. Legacies to husband, widow, or kindred of any class, are chargeable only after legacies to persons not related to the testator;⁷ and it is further provided that abatement takes place in any class only as among legacies of that class, in the absence of anything to the contrary in the will. The statute of Delaware⁸ provides that, where there are sufficient assets to pay debts but not all the legacies, the latter shall abate in proportion to their respective amounts, unless otherwise provided in the will. In Indiana,⁹ if there are not enough assets to discharge specific and general legacies, the latter abate in proportion to the amount; and in Pennsylvania,¹⁰ where, after paying the debts, the residue is insufficient to discharge all pecuniary legacies, there must be an abatement in proportion to the legacies given, unless the will provides otherwise.

§ 453. **Executor's Assent to Devises and Legacies.**—It follows from the principle vesting the entire personal estate of a deceased testator in his executor, that, before a legatee, whether specific, general, or residuary, can obtain a complete title to his legacy, he must obtain the executor's assent thereto;¹¹ so that, if the legatee take possession of his

be charged upon lands included in the residuary devise. See also *post*, § 491.

¹ *Ante*, § 444.

² *Robinson v. McIver*, 63 N. C. 645, 650; *Warley v. Warley*, Bai. Eq. 397, 407; *Newson v. Thornton*, 82 Ala. 402, 406; *Belcher v. Belcher*, 16 R. I. 72.

³ *Post*, §§ 489 *et seq.*

⁴ *Post*, § 493.

⁵ As to which see *post*, §§ 489 *et seq.*, under marshalling assets.

⁶ Civ. Code, §§ 1360 *et seq.*

⁷ But in *Estate of Apple*, 66 Cal. 432, 440, this section was held to give a pref-

erence to such legatees only when their legacies are sought to be charged for the payment of debts, and not otherwise.

⁸ Code, 1874, p. 705, § 3.

⁹ Ann. Ind. St. 1094, § 2537.

¹⁰ *Pep. & L. Dig.* 1896, p. 1508, § 174.

¹¹ *Mead v. Orrery*, 3 Atk. 235, 240; *Elliott v. Elliott*, 9 M. & W. 23; *Refeld v. Bellette*, 14 Ark. 148, 158; *Suggs v. Sapp*, 20 Ga. 100; *Cannon v. Ulmer*, Bai. Eq. 204, 206; *Wheeler v. Hatheway*, 54 Mich. 547, 549. In Georgia this is extended to devises of realty: Code, 1895, § 3319.

legacy without such assent, the executor may maintain trespass or trover against him,¹ although the will expressly directs that [* 991] such consent shall not be necessary to the * legatee's right.²

Until the executor has assented, the right of the legatee, although vested in him and transmissible to his representatives, is inchoate and liable to be defeated;³ hence no action at law will lie for the recovery of a legacy before assent.⁴ The executor's own legacy forms no exception to the rule;⁵ he must assent to it before it can be treated as his property, but his assent may be inferred from circumstances, as in other cases,⁶ except that no assent will be inferred from acts referable to his character as executor.⁷ Where real estate constitutes assets in the hands of the executor, as, for instance, in Georgia, the doctrine, in its substantial effect, is equally applicable to the realty.⁸ Nor is a debt forgiven by the terms of the will excepted from the general rule; it requires the executor's assent, which will not be given if payment of the debt be necessary to discharge the debts of the testator.⁹

Assent may be inferred from circumstances.

If the executor unreasonably refuse his assent, relief may be obtained in equity, where he will be compelled to give it;¹⁰ or it will sometimes be presumed upon the theory that the executor has done what he ought to have done.¹¹

Executor may be compelled to assent in equity.

¹ *Crist v. Crist*, 1 Ind. 570; *King v. Cooper*, Walk. (Miss.) 359; *Lott v. Meacham*, 4 Fla. 144, 149; *Wilson v. Rine*, 1 Harr. and J. 138.

² Because, if this were permitted, the testator might appoint his effects to be thus taken in fraud of creditors: *Wms. Ex.* [1372]; *McClanahan v. Davis*, 8 How. (U. S.) 170, 178. This rule does not apply where the testator has himself placed the bequest in the possession of the legatee: *Lowry v. Mountjoy*, 6 Call, 55, 59; *Finch v. Rogers*, 11 Humph. 559. Simple possession of real estate devised is not, however, evidence that the testator gave possession, so as to avoid the necessity of the executor's consent: *Bothwell v. Dobbs*, 59 Ga. 787.

³ *Lillard v. Reynolds*, 3 Ired. L. 366, 371. It cannot be seized for the legatee's debts until assented to: *Suggs v. Sapp*, 20 Ga. 100; *Wilkinson v. Chew*, 54 Ga. 602.

⁴ See note of reporter to *Hedges v. Norris*, 32 N. J. Eq. 193, with an extensive collection of authorities on this subject.

⁵ *Young v. Holmes*, 1 Stra. 70.

⁶ *Chester v. Greer*, 5 Humph. 26, 31; *Murphree v. Singleton*, 37 Ala. 412, 415; *Vanzant v. Bigham*, 76 Ga. 759.

⁷ *Wms. Ex.* [1380]; *Doe v. Sturgis*, 7 Taunt. 217, 223; *Richards v. Browne*, 3 Bing. N. C. 493, 500; *Hearne v. Kevan*, 2 Ired. Eq. 34, 37.

⁸ "An executor, having notice of an outstanding debt against his testator, cannot administer to himself, as devisee or heir at law, any portion of the realty in kind, so as to hold it free from the ordinary legal lien of a judgment *de bonis testatoris* subsequently rendered against him in favor of the creditor": *McMillan v. Toombs*, 79 Ga. 143, 145.

⁹ *Wms. Ex.* [1373]; *Cheshire v. Cheshire*, 2 Dev. & B. 254; the legatee cannot set off his legacy on a suit brought by the executor for money due the testator: *ante*, § 398.

¹⁰ *Sto. Eq. Jur.* § 540; *Cray v. Willis*, 2 P. Wms. 529, 531; *Nancy v. Snell*, 6 Dana, 148, 152; *Lark v. Linstead*, 2 Md. Ch. 162; *Cranch, J.*, in *Chapman v. Fenwick*, 4 Cr. C. C. 431, 435; *Nelson v. Cornwell*, 11 Gratt. 724, 738. By statute in Georgia: *Code*, 1895, § 3600.

¹¹ *Wms. Ex.* [1377]; *Schoul. Ex.* § 488, note (6); *Thursby v. Myers*, 57 Ga. 155, 158.

Whether the assent has been given or not is generally a question of fact;¹ no particular form is necessary, but it may be expressed in words² accompanied by a delivery of the thing bequeathed, or * implied from the indirect expressions and acts of the [* 992] executor.³ So the executor's assent may be implied from his continued acquiescence in the possession by the legatee of a specific legacy,⁴ there being assets enough to pay debts;⁵ or from permitting a slave emancipated by the will to go at large for several years;⁶ or permitting a life tenant under the will to remain in possession for many years;⁷ or any acts from which it is reasonable to suppose that the executor has given his assent to the legacy. But as the consequences of an assent may be highly injurious to the representative, there should be no ambiguity in the act or expression by which it is manifested.⁸

Since a legacy limited to several persons in succession, as, for instance, a term of years, or other chattel, with remainder over, constitutes but one entire legacy, it follows that the executor's assent to the interest of one is an assent to that of all,⁹ even where the executrix herself is the first legatee in possession, and she assents to her own legacy;¹⁰ but if the specific thing be bequeathed for life with a remainder which in terms requires the restoration of the property to the executor to enable him to execute the trusts attached to the ulterior disposition, the executor may sue and recover, the assent in such case being limited to the vesting of the life estate only.¹¹ *A fortiori*, where the property goes to several heirs, the assent of the administrator to the title of one of them is sufficient, nothing else appearing, to change the entire title;¹² but not so of the legacy of a number of articles, as stock in trade, etc., in which case the execu-

Assent to legacy of one of several successive legatees good for all.

¹ *Mason v. Farnell*, 12 M. & W. 674, 682; *Edney v. Bryson*, 2 Jones L. 365; *Thompson v. Schmidt*, 3 Hill (S. C.) 156.

² *Barnard v. Pumfrett*, 5 Myl. & Cr. 63, 70; *Buffaloe v. Bangh*, 12 Ired. 201.

³ *McClanahan v. Davis*, 8 How. (U. S.) 170, 178; *Rea v. Rhodes*, 5 Ired. Eq. 148, 158; *Proctor v. Robinson*, 35 Mich. 284, 293; *Perkins v. Brown*, 29 Ga. 412, 415.

⁴ *Whorton v. Moragne*, 62 Ala. 202, 206; *White v. White*, 4 Dev. & B. 401; *Hall v. Hall*, 27 Miss. 458; *Parker v. Chambers*, 24 Ga. 518, 527; *Schley v. Collis*, 47 Fed. R. 250; *Eberstein v. Camp*, 37 Mich. 176.

⁵ *Andrews v. Hunneman*, 6 Pick. 126.

⁶ *Nancy v. Snell*, 6 Dana, 148, 155.

⁷ *Coleman v. Lane*, 26 Ga. 515, 518.

⁸ *George v. Goldsby*, 23 Ala. 326, 333;

Rea v. Rhodes, 5 Ired. Eq. 148; *Burkland v. Colson*, 2 Dev. & B. Eq. 77, 81; *Chidgoy v. Harris*, 16 M. & W. 517, 524.

⁹ *Whorton v. Moragne*, 62 Ala. 202, 206; *Thrasher v. Ingram*, 32 Ala. 645, 667; *McGlaw v. Lowe*, 74 Ga. 34; *Frazer v. Beville*, 11 Gratt. 9, 16; *Adams v. Peirce*, 3 P. Wms. 11, and cases *ubi supra*. But this rule does not apply where lands are devised to the testator's widow for life, and are directed to be sold on her death: in such case the interest of the remainderman is personalty, and unaffected by the possession of the life tenant: *Hemphill v. Moody*, 64 Ala. 468.

¹⁰ *Kopp v. Herman*, 82 Md. 339, 348.

¹¹ *McKoy v. Guirkin*, 102 N. C. 21, 23.

¹² *Pirtle v. Cowan*, 4 Dana, 302.

tor may assent to part, and withhold assent as to the rest;¹ although the assent may, it seems, be qualified by a condition precedent, until the performance of which it does not operate as such.² The assent of one of several executors is sufficient,³ even to his own legacy.⁴

Assent may be conditional.

The executor's assent to a specific legacy divests him of [*993] the legal * title and perfects the inchoate title of the legatee,⁵ so that the latter may bring trespass, trover, replevin,⁶ or ejectment therefor,⁷ even against the executor;⁸ and when once given is in general irrevocable,⁹ although the assets prove insufficient to pay the debts.¹⁰ In such case the remedy of the creditors is to follow the property in equity,¹¹ or to charge the executor with the value of the legacy and interest, as assets in his hands, since a premature assent is at his own risk.¹² But since the executor's trust is executory as long as the legacy is not paid or delivered, he may, until such payment or delivery, retract his assent, if given upon a reasonable ground to consider the assets sufficient, and which proved insufficient in consequence of unknown debts unexpectedly claimed.¹³

Executor's assent divests him of title,

and is irrevocable.

Assent when legacy is required to pay debts.

The effect of an executor's assent to a general legacy seems not to have engaged the attention of courts to any considerable extent. It was held in South Carolina, that the effect of the executor's assent to a pecuniary legacy was a contract on his part to pay it, enforceable in equity;¹⁴ but it seems that a verbal promise by an executor, either with or without assets, to a legatee to pay a legacy, imposes no

¹ *Elliott v. Elliott*, 9 M. & W. 22, 27.

² *Per Parke, B.*, in *Elliott v. Elliott*, 9 M. & W. 22, 28; *Lillard v. Reynolds*, 3 Ired. L. 366, 372.

³ *Adie v. Cornwell*, 3 T. B. Mon. 276, 282; *Murphree v. Singleton*, 37 Ala. 412, 416.

⁴ *Adie v. Cornwell*, *supra*; *Townson v. Tickell*, 3 B. & Ald. 31, 40.

⁵ *Whorton v. Moragne*, 62 Ala. 202, 206; *Lillard v. Reynolds*, 3 Ired. L. 366, 371.

⁶ *Andrews v. Hunneman*, 6 Pick. 126, 129, citing English authorities.

⁷ *Matthews v. Turner*, 64 Md. 109, 121.

⁸ *Eberstein v. Camp*, 37 Mich. 176, and English authorities there cited.

⁹ *Eberstein v. Camp*, *supra*; *Chapman v. Fenwick*, 4 Cr. C. C. 431; *Lott v. Meacham*, 4 Fla. 144, 149.

¹⁰ *Nancy v. Snell*, 6 Dana, 148, 155.

¹¹ *Sampson v. Bryce*, 5 Munf. 175; *Rea v. Rhodes*, 5 Ired. Eq. 148, 157; *McMullin*

v. Brown, 2 Hill Ch. 457, 459; *Randolph v. Randolph*, 6 Rand. 194; *Lyon v. Vick*, 6 Yer. 42. The legacy is only ratable liable on a subsequent judgment against the executor: *Schley v. Collis*, 47 Fed. R. 250.

¹² *Matter of Van Houten*, 18 N. Y. App. D. 301, 304; *Spode v. Smith*, 3 Russ. Ch. 511; *Handley v. Heflin*, 84 Ala. 600; *Matter of Pye*, 18 N. Y. App. D. 306 (in this case a specific legacy to the executor himself. He was held liable for interest, but not for profit in the use of the legacy, which was a livery business).

¹³ *Finch v. Rogers*, 11 Humph. 559, 564; *Nelson v. Cornwell*, 11 Gratt. 724, 738.

¹⁴ *Dunham v. Elford*, 13 Rich. Eq. 190, 194, citing *Atkins v. Hill*, Cowp. 284, and *Sto. Eq.* § 592, to the effect that it might be enforced at law, but relying on *Deeks v. Strutt*, 5 Term R. 690, that an action at law would not lie.

personal liability upon him, as it comes under the Statute of Frauds, and hence no right of action arises therefrom.¹ Speaking to the question whether an executrix who was sole legatee held a legacy individually or officially, it is said in the dissenting opinion in a New York case:² "The bequest to her of all the personal estate was not a specific one. It was a general bequest. And therefore the defendant individually could only through the execution of the will take title."

It is provided by statute in Delaware,³ that assets in the hands of an executor to pay a legacy shall create a legal liability, and raise a consequent promise to pay it.

It is to be observed, that the subject of the executor's assent is of little or no importance in those States whose statutes determine

the time and manner of paying and delivering legacies, and point out the conditions under which the executor may fully protect himself against liability, which subject is treated elsewhere.⁴ The same is true of the question of assent before or without probate of the will, which is within the * executor's power [* 994] at common law,⁵ but not in any of those States in which the executor's authority is derived from the grant by the probate court.⁶

§ 454. Time for Paying or Delivering Legacies.—Since the creditors of a testator must all be satisfied before any legacy is payable,⁷ the executor must be allowed a reasonable time to inform himself of the state of the property and the demands upon the same, before the legatees can compel him to satisfy their legacies. The period fixed by the civil law, and acquiesced in by common-law courts, is a year from the testator's death,⁸ within which the executor cannot be compelled to pay a legacy, although directed by the testator to be paid sooner.⁹ But the time is given simply for the convenience and protection of the executor; hence he may discharge the

¹ *Smith v. Carroll*, 112 Pa. St. 390, and authorities.

² *Bradley, J.*, in *Blood v. Kane*, 130 N. Y. 514, on pp. 520, 521.

³ Code, 1874, p. 704, § 1.

⁴ See as to the American system of enforcing distribution, *post*, § 569.

⁵ *Gums v. Capehart*, 5 Jones Eq. 242.

⁶ *Ante*, § 186; *White v. White*, 4 Dev. & B. 401; *Gardner v. Gantt*, 19 Ala. 666; *Wood v. Cosby*, 76 Ala. 557; *Cecil v. Rose*, 17 Md. 92, 102.

⁷ *Ante*, §§ 379, 451.

⁸ *Perry v. Hale*, 44 N. H. 363, 368; *Bitzer v. Hahn*, 14 Serg. & R. 232, 238;

Lawrence v. Embree, 3 Bradf. 364; *Cooke v. Meeker*, 36 N. Y. 15, 18; *Hammond v. Hammond*, 2 Bland Ch. 306, 315; *Hoagland v. Schenck*, 16 N. J. L. 370, 375; *Hallett v. Allen* (showing the common-law rule, though changed by statute), 13 Ala. 554, 557; *Sullivan v. Winthrop*, 1 Sumn. 1, 12; *Brooks v. Lynde*, 7 Allen, 64, 67.

⁹ *Brooke v. Lewis*, Madd. & Geld. 358. Where the testator gave his executor five years to settle the estate, it was held the legatees could not sue sooner: *Spencer, Petitioner*, 16 R. I. 25, 31.

legacies at any earlier period if the estate be such as to enable him to do so;¹ and where a legacy is given upon a contingency or future event, occurring more than a year after the testator's death, it is payable immediately upon the occurrence of such event.² A legacy given generally, subject to a limitation over on a future event, is payable to the immediate legatee, without security to repay the money in case the event should happen,³ unless it be shown that there is danger that the property will be wasted, secreted, or removed,⁴ when the court may require security to be given by the first taker.⁵

sooner at their peril.

Legacies on a contingency more than one year after testator's death, payable to the immediate legatee, without bond, unless danger of loss be shown.

Annuities given by will shall commence on the testator's death; the first payment is therefore to be made at the expiration [* 995] of one * year thereafter,⁶ or if payable quarterly, at the end of the first quarter;⁷ but a legacy for life with remainder over is distinguished from an annuity, and it was once held that on such legacy no interest is payable until the end of two years.⁸ From such legacies the bequest of a life estate in a residuary fund was again distinguished, in which, if no time is specified for the commencement of the interest or income, the legatee for life is entitled to the income of the clear residue, as afterward ascertained, computed from the testator's death.⁹ And it is held in Massachusetts that the rights of the tenant for life certainly can be no less in a special fund set apart by the testator than in a residuary bequest.¹⁰ This point will be again considered together with the question of interest on legacies, and life estates with remainder over.¹¹

Annuities run from testator's death, payable one year after.

Where a legacy is payable at twenty-one, and the legatee dies before reaching that age, it will, if the interest is given during the minority, be payable to the representatives immediately after the legatee's death; but if interest is

Legatee dying before twenty-one, his representatives take

¹ *Evans v. Iglehart*, 6 Gill & J. 171, 191; *Sullivan v. Winthrop*, 1 Sumn. 1, 19. Such payment is good as against the legatee paid, but not against creditors: *post*, § 519, p. * 1153.

² *Miller v. Philip*, 5 Pai. 573.

³ *Condict v. King*, 13 N. J. Eq. 375, 383; *Lapham v. Martin*, 33 Oh. St. 99; *Martin v. Lapham*, 38 Oh. St. 538. See *post*, § 456.

⁴ *Fiske v. Cobb*, 6 Gray, 144, 146.

⁵ *Rowe v. White*, 16 N. J. Eq. 411, 417. This subject will be further considered in connection with the rights of successive legatees, *post*, §§ 456 *et seq.*

⁶ *Crew v. Pratt*, 119 Cal. 131; *Law-*

rence v. Embree, 3 Bradf. 364, citing English authorities; *Stephenson v. Axson*, Bai. Eq. 274.

⁷ *Wiggin v. Swett*, 6 Met. (Mass.) 194, 202.

⁸ *Per Lord Eldon in Gibson v. Bott*, 7 Ves. 89, 96; *Eyre v. Golding*, 5 Binn. 472, 475. See as to interest on legacies, *post*, § 458.

⁹ *Pollock v. Learned*, 102 Mass. 49, 54; *Cooke v. Meeker*, 36 N. Y. 15, 21; *Wms. Ex.* [1390], with numerous authorities; see *post*, § 458, p. * 1006, and authorities.

¹⁰ *Sargent v. Sargent*, 103 Mass. 297, 299.

¹¹ *Post*, §§ 456-458.

at once, if interest is also given.

Legatee having a valid interest in a fund payable after twenty-one, may recover at twenty-one.

not given, they must wait for the money until the legatee, if living, would have attained twenty-one.¹ So, also, a legatee who has a vested interest in a certain fund which would be payable to him at twenty-one, but the payment of which is deferred by the terms of the will to a later period, may nevertheless obtain an order for the payment of such legacy on attaining twenty-one.²

Where legacies are made payable at a future time, the legatees may demand that a sufficient sum be set apart therefor;³

Appropriation for legacies payable in the future,

or to pay annuities.

or the * residue may be ordered to be paid to the [* 996] residuary legatee on his giving security to pay the legacy when due.⁴ So the executor should retain and invest a sufficient sum to produce the amount of an annuity charged upon a residue, before delivering the property to the residuary legatee, or take sufficient security from him for the payment of the annuity.⁵

In such cases of appropriation it may become a question upon whom the loss shall fall in case of depreciation or failure of the fund set apart, or who shall benefit by its appreciation. The authorities are not entirely harmonious in this respect; but it seems clear, on principle, that, where an annuity is charged upon the whole personal estate, the executor cannot, by any appropriation, affect the legatee's right to the full annuity;⁶ and that where the testator intended the retention or appropriation of a sufficient sum to pay annu-

¹ On the principle that in the latter case the interest belongs to other parties, whose rights extend to the time when the first legatee would be of age. See remarks of Gray, J., in *Merritt v. Richardson*, 14 Allen, 239, 241; and see also *Felton v. Sawyer*, 41 N. H. 202; *post*, § 459, p. * 1008.

² The reason given by Williams is that at the age of twenty-one the legatee has the power of charging, or selling, or assigning the legacy, and the court will not subject him to the disadvantage of raising money by these means when the thing is absolutely his own: *Wms. Ex.* [1398]; *Rocke v. Rocke*, 9 Beav. 66; *Curtis v. Lukin*, 5 Beav. 147, 155; *Young's Settlement*, 18 Beav. 199, 201. The point was squarely decided in *Dado v. Maguire*, 71 Mo. App. 641, 645; and see *Succession of Stephens*, 45 La. An. 962. So in New Hampshire, where a legacy and interest was payable at thirty-five, the legatee dying before that age, her representative was held entitled to the fund immediately:

Felton v. Sawyer, 41 N. H. 202. But in Massachusetts this rule is not followed to its full extent, and it is held that where it is the testator's intention that the legacy shall not be paid before a certain age that his intention should be carried into effect; says Field, J., in deciding the case of *Clafin v. Clafin*, 149 Mass. 19: "It is true that the plaintiff's interest is alienable by him, and can be taken to pay his debts, but it does not follow that because the testator has not imposed all possible restrictions the restrictions which he has imposed should not be carried into effect."

³ *Phipps v. Annesley*, 2 Atk. 57; *Merritt v. Richardson*, 14 Allen, 239, 242.

⁴ *Webber v. Webber*, 1 Sim. & St. 311, 313.

⁵ *Nutter v. Vickery*, 64 Me. 490, 494; *Stephenson v. Axson*, Bai. Eq. 274.

⁶ *May v. Bennett*, 1 Russ. Ch. Cas. 370, 373; *Nutter v. Vickery*, 64 Me. 490, 497; *Davies v. Wattier*, 1 Sim. & Stu. 463; *Boyd v. Buckle*, 10 Sim. 595.

ities, and payment of the residue meanwhile, all parties will be bound by the appropriation so made.¹

A legacy payable "on the settlement of the estate," the amount of which is to be determined by the shares of the residuary legatees, can only be ascertained on final settlement of the estate.²

It has been heretofore mentioned, in speaking of the extent of jurisdiction of probate courts to construe wills, that where a legacy is given to successive legatees, the power of the probate court is limited to determine whom the executor must pay in the first instance, and does not extend to determining questions between the legatees, with which the executor has no concern.³

§ 455. **Time for Paying Legacies fixed by Statutes.**—Most of the States regulate the time of paying or delivering legacies by statute, requiring this to be done whenever the time has expired within which creditors may prove their claims, and sufficient assets remain in the executor's hands to pay all debts and legacies. By far the greater number of the States, however, allow legacies to be paid before the expiration of the time for proving debts, if there be assets for the purpose, on bond being given by the legatees, conditioned that they shall refund their due proportion for the payment of all debts and costs subsequently established against the estate.⁴ Thus, such bond may be given upon proof, made at any time, that the assets are sufficient to pay the debts proved and legacies, in Arkansas,⁵ Delaware,⁶ Illinois,⁷ Indiana,⁸ [*997] Iowa,⁹ Kansas,¹⁰ Massachusetts,¹¹ Michigan,¹² * Nebraska,¹³ New York,¹⁴ Ohio,¹⁵ Rhode Island,¹⁶ and Texas;¹⁷ after four months of administration in California¹⁸ and

Legacies payable when time for presenting claims has expired,

or on legatees giving bond to pay debts.

¹ *Orr v. Moses*, 52 Me. 287, 291; *Kendall v. Russell*, 3 Sim. 424, 431. And see in connection herewith, § 452, p. * 988, and § 456, p. * 1002, as to the effect on annuities when the assets are insufficient to pay all legacies.

² And the legatee cannot complain that the residue was reduced by the undue delay of the executor in making settlement, since he could have been compelled to do so at the proper time: *American Mortgage Co. v. Boyd*, 92 Ala. 139.

³ *Ante*, § 155.

⁴ The subject of refunding bonds is more fully treated in connection with distribution: *post*, § 560.

⁵ *Ross v. Davis*, 17 Ark. 113, 117; *Dig. of St.* 1894, § 161.

⁶ *Rev. Code*, 1874, p. 549, § 37.

⁷ *St. & Curt. St.* 1896, p. 342, ¶ 117.

⁸ *Ann. St. Ind.* 1894, § 2536.

⁹ *Code*, 1897, §§ 3355, 3356.

¹⁰ *Gen. St. Kans.* 1897, ch. 107, § 164.

¹¹ *Pub. St.* 1882, p. 774, § 20.

¹² *How. St.* § 5966.

¹³ *Cons. St.* 1893, § 1350.

¹⁴ *Code Civ. Pr.* 1897, §§ 2771, 2723.

¹⁵ *Bates' Ann. Oh. St.* 1897, § 6075.

¹⁶ *Gen. L.* 1896, p. 473, § 16.

¹⁷ A legatee or devisee may obtain an order for the delivery of a legacy, whenever it is made to appear that the executor will retain, after such delivery, sufficient funds to pay all debts of the estate: *Sayles' Tex. Civ. St.* 1897, art. 2010; *Hudgins v. Leggett*, 84 Tex. 207.

¹⁸ *Code Civ. Pr.* § 1661. If the remaining assets are sufficient to satisfy all demands, the court may order any amount in the hands of the executor to be paid to a legatee, although the sum is no greater than the commissions which will become

Nevada;¹ after six months in Florida;² after one year in Alabama,³ Mississippi,⁴ Missouri,⁵ New Jersey,⁶ Pennsylvania,⁷ and Virginia;⁸ after eighteen months, formerly, in Alabama;⁹ after two years in Tennessee;¹⁰ and, generally, on the expiration of the time allowed for the presentation of claims against the estate, whereupon the court will order and enforce payment against the executor. In North Carolina, two years are fixed as the time for paying out and dividing the estate to those entitled;¹¹ but it is in the power of the judge or court, on petition or action, to adjudge full or partial payment of legacies within that time, on such terms as the court may deem proper, if there is no necessity to retain the fund.¹² Specific legacies are mentioned as payable by preference in

Specific legacies preferred.

Perishable legacies may be delivered to legatee at any time.

by the statutes of Arkansas * and Missouri.²² A distinction [* 998]

Legacies to persons in want.

is made by the statutes of Indiana²³ and Maryland²⁴ in favor of legacies to persons in want of subsistence, or in straitened circumstances, to whom legacies may be ordered to be paid under the circumstances and in the manner pointed out, on their giving refunding bond.

The time for the payment of legacies without refunding bond varies according to the time allowed creditors to prove their claims. If there are assets sufficient, they are payable on final settlement, or whenever it appears that no further claims of creditors can be established; if the assets are insufficient to pay all legacies in full, they are, on such showing, payable in the order heretofore

due upon final settlement: Estate of Dunne, 65 Cal. 378.

¹ Rev. St. 1885, § 2919.

² Rev. St. Fla. 1892, § 1908, pl. 2.

³ Code Ala. 1896, § 260.

⁴ Miss. Ann. Code, 1892, § 1961.

⁵ Rev. St. 1889, § 238.

⁶ Gen. St. N. J. 1895, p. 1938, pl. 1.

⁷ Pep. & L. Dig. 1896, p. 1508, § 173.

⁸ Code, 1887, § 2706.

⁹ Walker v. Johnson, 82 Ala. 347, 349.

Changed to twelve months by Code of 1896, §§ 260, 267.

¹⁰ Code, 1884, § 3152, 3158.

¹¹ Code, 1883, § 1488.

¹² *Ib.*, § 1512; Clements v. Rogers, 91 N. C. 63, 65, and North Carolina cases there cited.

¹³ 2 Mills' Ann. St. 1891, § 4797.

¹⁴ On bond being given to refund, spe-

cific legacies may be demanded immediately after appointment: Rev. Code,

1874, p. 549, § 37, p. 550, § 40.

¹⁵ St. & Curt. St. 1896, p. 341, ¶ 116.

¹⁶ Ann. Ind. St. 1894, § 2539.

¹⁷ Code, 1897, § 3355.

¹⁸ Gen. St. Kans. 1897, ch. 107, § 165.

¹⁹ "Specific pecuniary legacies": Ky. St. 1894, § 2065.

²⁰ Code Civ. Pr. 1897, § 2721.

²¹ Bates' Ann. St. Oh. 1897, § 6075.

²² Statutes cited *supra*.

²³ Rev. St. 1881, § 2379. By an amendment adopted in 1883, the mention of persons in want of subsistence or in needy circumstances is omitted, so that any legatee has now the same right: 1 Ann. Ind. 1894.

²⁴ 2 Publ. Gen. L. Md. 1888, p. 1360, art. 93, § 140.

indicated, abating *pro rata* as to any class that cannot be paid in full.

The manner in which payment of legacies is enforced is discussed in connection with the subject of distribution.¹

§ 456. **Payment of Bequests for Life with Remainder over.**—

The difference between a *general gift* of the estate, or the gift of a residue, to or in trust for any person for life, with remainder over, and the bequest of *specific articles* for life, with remainder over, has already been adverted to.²

It is to be observed, that the bequest for life, with remainder over, of a residue consisting in part or wholly of property in its nature perishable and daily wearing out, does not entitle the legatee for life to the annual produce which such property is actually making, but to the interest on the estimated value computed from the death of the testator.³ Hence, where a testator bequeaths a residue consisting of money, or property whose use is the conversion into money, with remainder to another, it is the duty of the executor either to take security from the life tenant protecting the interest of the remainderman, or to convert the fund into cash and invest it for the benefit of all who are entitled under the will.⁴ So where the executor is himself the

General bequest, or bequest of the residue with remainder over, entitles the life tenant to interest only;

and he must give security if he takes possession, although he be executor himself and excused from bond as such.

[* 999] * devisee for life, he may be compelled, after completing his duties as executor, to give security for the benefit of the remainderman,⁵ although relieved from bond as executor.⁶ If the executor neglect to invest, in some safe manner, under direction of the probate court or a court of equity, the probate court may revoke his letters and appoint an administrator *de bonis non cum testamento annexo*, whose duty it will be to bring suit on the bond

Remainderman may cause executor to be removed for endangering the remainder.

¹ *Post*, §§ 568, 569.

² *Ante*, § 454.

³ The leading case establishing the distinction between specific and general or residuary bequests in this respect is *Howe v. Dartmouth*, 7 Ves. 137, in which Lord Eldon directed such property to be converted into government securities, and the interest to be paid to the successive owners. It was fully recognized in England: *Healey v. Toppan*, 45 N. H. 243 (see collection of English cases by Sargent, J., p. 261), and is followed in most American States (*Ib.* p. 262). See also *Buckingham v. Morrison*, 136 Ill. 437, 447; on p. 448 the court says: "Gradually the meaning of 'perishable property' has been enlarged, so as to include securities of a wasting nature, or any form of

investment of an uncertain kind, or attended with risk."

⁴ *Healey v. Toppan*, 45 N. H. 263; *Evans v. Iglehart*, 6 Gill & J. 171, 200; *Smith v. Van Ostrand*, 64 N. Y. 278, 281; *Matter of McDougall*, 141 N. Y. 21, distinguishing New York cases; *Field v. Hitchcock*, 17 Pick. 182; *State v. Robinson*, 57 Md. 486, 495; *Security Company v. Hardenburgh*, 53 Conn. 169, 171, *et seq.*; *Welsch v. Belleville Bank*, 94 Ill. 191, 206; *Ritch v. Morris*, 78 N. C. 377, 379.

⁵ *Van Dusen's Appeal*, 102 Pa. St. 224.

⁶ *Amiss v. Williamson*, 17 W. Va. 673, 678; *Hetfield v. Fowler*, 60 Ill. 45, 47, requiring bond from a legatee excused by the testator.

of the recusant executor, collect the money, and properly invest it; or the remainderman may proceed in equity against the defaulting executor, and compel him to bring the money into court for investment; but he cannot, while the life tenant is living, sue on the executor's bond for waste or conversion of the money bequeathed.¹

But things specifically bequeathed for life to one, and remainder to another, are subject to a different rule. The tenant for life is

Life tenant is entitled to the possession of specific bequest for life.

Specific bequest of things consumed by their use for life constitutes an absolute gift;

of such things as deteriorate by use, entitles life tenant to possession without giving security,

unless remainderman show that there is danger of waste.

entitled to the possession and use of property so bequeathed as long as he lives, and if such possession or use wear out, damage, or wholly destroy the same, the remainderman is without remedy.² Hence the specific

bequest for life of such articles as *ipso usu consumuntur* (corn, hay, wine, provisions, etc.) constitutes an absolute gift to the tenant for life, although there be a limitation over, unless the first taker die before the property has been consumed or has perished.³ And where the

specific gift is of articles which are not consumed by use, but only deteriorated or worn out (furniture, plate, farming utensils, etc.), the remainder is good, but the life tenant is entitled to the use and possession of the articles without giving security.⁴ But in such case,

the remainderman is entitled to have an inventory filed of * the goods,⁵ and if he show that there is real [* 1000] danger of wanton waste, or fraudulent secretion or removal of the property, a court of chancery will compel the life tenant to give security for the protection of the remainderman.⁶ It follows from this, that, if an executor deliver property so bequeathed to the first legatee, he cannot be made liable to the remainderman after the life tenant's death, although he took no security.⁷ This matter, however, is regulated by statute in some of the States, providing for the manner in which the interests of remaindermen are to be secured. Thus the life

¹ State v. Brown, 64 Md. 97, 100.

² Jones v. Stites, 19 N. J. Eq. 324, 327.

³ Healey v. Toppan, 45 N. H. 243, 260; Evans v. Iglehart, *supra*; Major v. Herndon, 78 Ky. 123, 126; Walker v. Pritchard, 121 Ill. 221, 228 (quoting the appellate court); Whittemore v. Russell, 80 Me. 297.

⁴ Campbell v. Beaumont, 91 N. Y. 464, 469; Major v. Herndon *supra*; Homer v. Shelton, 2 Met. (Mass.) 194, 205; Brooks v. Brooks, 12 S. C. 422, 462; Taggard v. Piper, 118 Mass. 315; Parks v. Asso. 62 Vt. 19, 23.

⁵ Healey v. Toppan, *supra*; per Daniel, J., in Sutton v. Craddock, 1 Ired. Eq.

134, 135; Sampson v. Randall, 72 Me. 109, 112; Mortimer v. Moffatt, 4 Hen. & M. 503; Clarke v. Terry, 34 Conn. 176; In re Oertle, 34 Minn. 173, 181.

⁶ Langworthy v. Chadwick, 13 Conn. 42; Homer v. Shelton, 2 Met. (Mass.) 194, 206; In re Oertle, *supra*; In re Garrity, 108 Cal. 463. Although the will direct that the legacy be paid to the legatees "on their own responsibility": Sherman v. Sherman, 36 N. J. Eq. 125.

⁷ Posegate v. South, 46 Oh. St. 391; Hodge v. Hodge, 72 N. C. 616, 619; Starr v. McEwan, 69 Me. 334; In re Ryerson, 26 N. J. Eq. 43.

tenant must give security for the safe and proper keeping of the estate and its delivery to the remainderman, in Connecticut,¹ New Jersey,² and Pennsylvania.³ In the last-named State it is held that the effect of such a bond to secure a money legacy was to make the legacy part of the life tenant's individual estate, the remaindermen becoming his creditors, and entitled to interest from his death, without deducting any portion of the expenses of settling the life tenant's estate.⁴ A statute providing for the payment, to the first legatee upon his giving security, of legacies given for a limited period or upon a condition or contingency, was held not to be intended to destroy active trusts.⁵ In California the first legatee must deliver to the second, or, if none, to the personal representative, an inventory, indicating the right of the subsequent legatee to the property therein scheduled upon cessation of the term of the first;⁶ and the life tenant cannot be required to give security unless the remainderman show there is some danger of loss if the property be delivered to the life tenant.⁷

It is again to be remembered, that in this respect also the intention of the testator, if discernible, is to be carried into effect without regard to rules of construction. If, therefore, it is fairly inferable from the will, construed under the ordinary rules, that, in bequeathing the residue of his personal estate to one for life with remainder to another, he did not mean to deprive the life tenant of the specific possession and use of the property bequeathed, such life tenant is entitled to all such property *in specie*.⁸ In Maine, it is held that the donee for life is entitled to the possession of the property bequeathed, unless [*1001] the will otherwise provides.⁹ So, although under the *gen-

But the intention of the testator must govern.

¹ Gen. St. 1888, § 559; *Security Co. v. Pratt*, 65 Conn. 161; *Terry v. Allen*, 60 Conn. 530. But this statute has no application if inconsistent with the directions given by the testator: *Stone v. McEckton*, 57 Conn. 194, 201.

² Gen. St. N. J. 1896, p. 1939, ¶ 12, § 1.

³ *Pep. & L. Dig.* 1896, p. 1509, § 175.

⁴ *Reiff's Appeal*, 124 Pa. St. 145, 149.

⁵ *Watson's Appeal*, 125 Pa. St. 340, 346, in which Paxson, Ch. J., severely criticises the statute.

⁶ *Civ. Code*, § 1365.

⁷ *In re Garrity*, 108 Cal. 463.

⁸ *Evans v. Iglehart*, 6 Gill & J. 171, 195 *et seq.*; *Matter of James*, 146 N. Y. 78; *Buckingham v. Morrison*, 136 Ill. 437, 449, and cases cited (a case of a partnership continued after the death of one of the partners); *Martin v. Martin*, 69 Miss. 315; *Watkins v. Suadon*, 90 Ky.

501; *Starr v. McEwan*, 69 Me. 334; *Brooks v. Brooks*, 12 S. C. 422, 462; *Warren v. Webb*, 68 Me. 133, 135; *Pierce v. Stidworthy*, 81 Me. 50; *Harris v. Knapp*, 21 Pickering, 412, 416; *In re Weppeler*, 2 Dem. 626; *Smith v. Van Ostrand*, 64 N. Y. 278, 282; *Swain v. Spruill*, 4 Jones, Eq. 364, 368; *Chambers v. Bumpass*, 72 N. C. 429, 432; *Fernbacher v. Fernbacher*, 4 Dem. 227, 244; *In re Denton*, 102 N. Y. 200, 202; *Corle v. Monkhouse*, 47 N. J. Eq. 72, 77; "and very slight indications in the will will be construed as showing that the testator intended the life tenant, rather than the executor, to be the trustee" for the remainderman, of the property bequeathed: *In re Garrity*, 108 Cal. 463, 471, referring to a number of cases in which the will was held to show such intent.

⁹ *Sampson v. Randall*, 72 Me. 109, 1089

eral rule a specific legacy of consumable articles vests the absolute property in the legatee for life; still, if it be the apparent intention of the testator that the thing shall not be consumed, but shall go to the party in remainder, courts will interfere in case of danger, and compel the life tenant to give security.¹

It has already been stated,² that where the remainder is contingent, the immediate legatee is entitled to the legacy without security unless cause to the contrary be shown; and in such case he is entitled to all the income prior to the happening of the contingency.³

Since a gift for life of a chattel is a gift of the use only, the bequest over is good, as an executory devise, as to every species of chattel of a durable nature,⁴ although, if specifically given, it is void as to articles necessarily consumed in their use.⁵ It follows

from this, that the life tenant is bound to keep up a stock of goods,⁶ farming stock,⁷ implements of husbandry,⁸ household furniture,⁹ etc.; but he is not bound to increase it, the rule being that the tenant for life is entitled to the increment of personal property made during his tenancy, as compensation for the trouble and expense of taking care of the property. Hence the remainderman is entitled only to what remains of the original stock;¹⁰ from which rule slaves were excepted in the Southern States, the increase of which was held to go to the remainderman.¹¹ The property is to be maintained and

preserved as a whole, in as good condition as to productive capacity as when received; and while the life tenant is not responsible for deterioration occurring without his fault,¹² he and his personal representatives are liable to the remainderman for any property converted to his own use;¹³

as to such property as is not consumed by *its [* 1002] use, the life tenant is regarded in equity as a trustee for the remainderman.¹⁴ Hence the sale by the

112; *Copeland v. Baron*, 72 Me. 206, 211; *Whittier v. Waterman*, 75 Me. 409, 411.

¹ *Miller v. Williamson*, 5 Md. 219, 233.

² *Ante*, § 454.

³ *Devecmon v. Shaw*, 70 Md. 219, 226.

⁴ 2 Kent, 352; *Westcott v. Cady*, 5 John. Ch. 334, 346.

⁵ *Supra*, p. * 999.

⁶ Thus where a wine merchant bequeathed all his property to his wife for life, with remainder to his daughter, she was held to take absolutely the wine which he had for private use, but a life interest only in the wine kept for the purpose of trade: *Phillips v. Beal*, 32 Beav. 25; *Cockayne v. Harrison*, L. R. 13 Eq. Cas. 432.

⁷ *Horry v. Glover*, 2 Hill (S. C.) Ch. 515, 520; *Patterson v. High*, 8 Ired. Eq. 52.

⁸ *Saunders v. Haughton*, 8 Ired. Eq. 217.

⁹ *Marston v. Carter*, 12 N. H. 159, 163.

¹⁰ *Saunders v. Haughton*, 8 Ired. Eq. 217, 221.

¹¹ See cases *supra* from North and South Carolina.

¹² *Brooks v. Brooks*, 12 S. C. 422, 445, *et seq.*, reviewing numerous South Carolina cases.

¹³ *Pettyjohn v. Woodroof*, 77 Va. 507, 515; an action of account will lie: *Griggs v. Dodge*, 2 Day, 28, 49.

¹⁴ *Swan v. Ligan*, 1 McC. Ch. 227, 231; *Tabb v. Cabell*, 17 Gratt. 160, 172.

life tenant of slaves renders him liable to the remainderman for their value at the time of the conversion, although the value of slaves was destroyed by emancipation before the life tenant died.¹

It is well settled, according to the maxim, *Qui sentit commodum sentire debet et onus*, that the life tenant must pay all ordinary taxes, assessments, interest on encumbrances, and charges for ordinary repairs, out of the income;² but this rule does not apply to an annuitant, who takes a fixed amount, directed to be paid absolutely and without contingency.³ In such case, if the testator directs the appropriation of a fund sufficient to yield an annuity of a certain sum, and subsequently such annuity falls below the sum named by reason of depreciated interest on the investment, the annuitant is entitled to have the deficiency made up from the residuary estate.⁴ When the estate for a number of years is insufficient to pay the annuity, but subsequently there is a surplus, if the language of the will will warrant it, the deficiency of the previous years may first be made up out of the surplus.⁵ But whether the principal of a fund, the income of which is set apart to pay an annuity, can be broken into to make good arrearages in such annuity, depends upon the intention of the testator as gathered from the whole will.⁶ But annuitants cannot create a charge upon the trust fund so as to impair the principal thereof.⁷ And it is usually held that the gift of the interest on a fund, though made payable annually, is not equivalent to the bequest of an annuity, but only of the income.⁸

Life tenant must pay taxes, interest on encumbrances, and repairs, out of the income.

Annuitant takes the amount absolutely.

¹ *Moorman v. Smoot*, 28 Gratt. 80; *Brown v. Lambert*, 33 Gratt. 256, 265; *Pettyjohn v. Woodroof*, 77 Va. 507, 515.

² *Hepburn v. Hepburn*, 2 Bradf. 74; *Webb v. Burlington*, 28 Vt. 188; *Spangler v. York Co.*, 13 Pa. St. 322, 327; *Holcombe v. Holcombe*, 29 N. J. Eq. 597; *St. Paul Trust Co. v. Mintzer*, 65 Minn. 124; *Whitson v. Whitson*, 53 N. Y. 479. Of course, if the will disclose an intention that the taxes and repairs be borne by the corpus, the life-tenant will take without any deduction: *Wilson v. White*, 133 Ind. 614 (referring to several cases, and criticising *Whitson v. Whitson*, *supra*), the court holding also that, in Indiana, by statute, before the estate is closed, the taxes on personal funds must be paid by the executor out of the general assets, and are not chargeable to the life tenant; the court also says that the reason of the rule requiring a tenant of real estate for life to bear all taxes, repairs, etc., does not always exist as to a life interest in a bequest of personalty.

³ *Ex parte McComb*, 4 Bradf. 151; *Whitson v. Whitson*, 53 N. Y. 479, and cases cited. See in connection herewith, as to the effect of a gift of an annuity upon the rents and profits, &c., *post*, p. * 1102, § 492.

⁴ *Merritt v. Merritt*, 43 N. J. Eq. 11; *Merritt v. Merritt*, 48 N. J. Eq. 1, and cases cited; see also *Boomer v. Babbitt*, 67 Vt. 327; and cases *ante*, § 452, p. * 988.

⁵ *In re Chauncy*, 119 N. Y. 77; *Crew v. Pratt*, 119 Cal. 131, 135.

⁶ *Einbecker v. Einbecker*, 162 Ill. 267, reviewing the English and American cases as to what is sufficient to indicate such intention.

⁷ *Post v. Cavender*, 12 Mo. App. 20.

⁸ *Matter of Dewey*, 153 N. Y. 63. The court says that it may be difficult to harmonize the decisions of some of the States, especially Massachusetts, with the New York cases on that point.

Increase in value of securities purchased to yield an income to one for life, belongs to the residuary estate.

The direction to pay the interest of a fund to a legatee during his natural life, then to divide the principal sum among others, is not a direction to invest the fund for the benefit of the remaindermen, so as to entitle them to the increase in the value of the securities purchased;

but such increase goes to the residuary estate.¹ The appreciation in value of unproductive property is part of the *corpus* of the estate, and not of the income;² but rents and royalties from coal leases are income, although the mines were not opened during the testator's lifetime,³ and payable, as such, to the legatee for life,⁴ as well as profits realized from the foreclosure of a mortgage and the resale of the property bought in by the trustee.⁵ So also the proceeds of the sale of building stone taken by [* 1003] the executors from quarries opened before the testator's death, and never abandoned, are part of such income.⁶ Where a loss occurs in a trust for the benefit of one for life and another in remainder, because of insecurity of the particular investment, it is to be apportioned between them in the proportion which the principal sum lost bears to the interest due upon it at the time when the loss is determined;⁷ and if such time of ascertainment be after the death of the life tenant, the interest from his death to the ascertainment of the loss should be added to the principal sum involved.⁸

§ 457. **Relative Rights of Life Tenants and Remaindermen to Dividends of Stock.**—It is self-evident that ordinary periodical

Ordinary periodical dividends go to the owners of the stocks at the time.

dividends declared by a corporation as profits or earnings on its stock go to the shareholders of the stock at the time, and therefore to those legatees to whom the testator may have bequeathed the shares or the income, profit, or dividends thereof, for life.⁹ But great difficulty is experienced, in some cases, in determining whether a dividend declared represents earnings in the proper sense, distributable among the shareholders without diminution of the capital stock, or whether it is but a new shape into which the capital stock is transformed, whereby no profits are distributed. There is much difference of opinion as to the relative rights of life tenants and remaindermen to extraordinary dividends, bonuses, or additional stock distributed among the stockholders. On the one hand, it is held that nothing is income from the stock of a corporation until the corporation itself

¹ Middleton's Appeal, 103 Pa. St. 92. Unless the remaindermen are also residuary legatees: *In re Gerry*, 103 N. Y. 445.

² Outcalt v. Appleby, 36 N. J. Eq. 73, 78.

³ Wentz's Appeal, 106 Pa. St. 301, 307.

⁴ McClintock v. Dana, 106 Pa. St. 386, 391; Shoemaker's Appeal, 106 Pa. St. 392.

⁵ Park's Estate, 173 Pa. St. 190.

⁶ Mulford v. Mulford, 42 N. J. Eq. 68, with a collection by the reporter of cognate decisions. See also Woodburn's Estate, 138 Pa. St. 606, 615.

⁷ Hagan v. Platt, 48 N. J. Eq. 206, and English cases cited.

⁸ Tuttle's Case, 49 N. J. Eq. 259.

⁹ Perry on Trusts, § 543.

has set it apart as income, and declared it to be payable in money as a dividend; hence all appropriations of earnings to increase the capital, to enlarge or improve the works, or for any purpose to which capital is usually employed, whether declared under the name of stocks, dividends, or however appointed or apportioned by the corporation or its directors, are capital, and belong to the remainderman.¹ This doctrine is consistent with the distribution to the life tenant of stocks purchased with the earnings of the corporation, and voted to be divided among the stockholders, which thus constitute a cash dividend in reality, though a stock dividend in form.²

Appropriations of earnings to increase capital, or enlarge business, held to go to remainderman,

but distribution of stock purchased with earnings to the life tenant.

On the other hand, it is claimed that, since nothing but profits can be divided,³ all dividends, whether in stock or cash, [*1004] belong to the tenant for life, because it is the produce, proceeds, or result of the capital.

All dividends, whether stock or cash, held to go to life tenant.

Hence it is held, in what seems to be the decided preponderance of cases,⁴ that all accumulations in stock after the death of the testator constitute income, and belong to the life tenant.⁵ In Maine, the qualification limiting the right of the life tenant to earnings *after* the testator's death is rejected as leading to difficulty and uncertainty, and the true rule announced to be, that, when a dividend is declared upon its stock by a corporation, it belongs to the person holding the stock at the time of the declaration, whether life tenant or remainderman, without regard to the source from which or the time during which the earnings divided

¹ *Gibbons v. Mahon*, 136 U. St. 549; *Hooper v. Rossiter*, McClel. 527, 535; *Barton's Trust*, L. R. 5 Eq. Cas. 238, 243; *Minot v. Paine*, 99 Mass. 101, 105; *Rand v. Hubbell*, 115 Mass. 461, 474; *Mills v. Britton*, 64 Conn. 4.

² *Leland v. Hayden*, 102 Mass. 542, 546. Says the court in *Thomas v. Gregg*, 78 Md. 545, 556, in discussing the decisions of those courts inclining to hold stock dividends to be capital: "There are but few cases, if any, that can properly be construed to mean that, although the stock dividends only included net earnings, and they were intended to be distributed as income, yet the life tenant must be deprived of them simply because they were stock dividends."

³ The division consequent upon the dissolution of a corporation is not, of course, subject to this doctrine; in such case a cash dividend arising from all its assets, consisting in part of undivided earnings, is held to be capital, and not income: *Gif-*

ford v. Thompson, 115 Mass. 478; *Richardson v. Richardson*, 75 Me. 570, 575.

⁴ "We are well convinced that the general rule, deducible from the latest and wisest decisions, declares," etc., says Peters, C. J., in stating the rule mentioned in the text: *Richardson v. Richardson*, 75 Me. 574. See also *Cook on Stocks and Stockholders*, § 554; *Smith's Estate*, 140 Pa. St. 344, 355; *Waterman v. Alden*, 42 Ill. App. 294, 318, *et seq.*

⁵ *Pritchett v. Nashville Co.*, 96 Tenn. 472; *Earp's Appeal*, 28 Pa. St. 368, 374; *Simpson v. Moore*, 30 Barb. 637; *Clarkson v. Clarkson*, 18 Barb. 646, 651; *Bushee v. Freeborn*, 11 R. I. 149; *Van Doren v. Olden*, 19 N. J. Eq. 176; *Lord v. Brooks*, 52 N. H. 72, 75, 77; *Millen v. Guerrard*, 67 Ga. 284; *Thompson's Estate*, 153 Pa. St. 332 (applying the rule to profits made by an unincorporated joint stock company, dealing in the sale of lands); *Hite v. Hite*, 93 Ky. 257.

were acquired by the company.¹ A similar doctrine is announced in New York² and other States.³ Where, however, a dividend is declared in *stock*, under circumstances showing that no profits had accumulated, but that the new stock distributed is really an increase of capital, or proceeds of sale of property owned by the company, such new stock is held to belong to the remainderman even in the States holding that all earnings go to the tenant for life.⁴ In Rhode Island, an inquiry is directed, if necessary, by a master, to determine how much of any stock dividend grew out of earnings or accumulated profits, and the life tenant is entitled to a proportionate share of the dividend;⁵ the application of surplus capital to * the issue of new shares of stock is not a dividend of the [* 1005] earnings, and such stock goes to the remainderman.⁶ In Maryland it is held to be the duty of the court to dispose of stock dividends in an equitable way between tenants and remaindermen, whenever it is possible to ascertain to any certainty whether the distribution in the stock dividend includes net earnings, and if so, what proportion; and also whether such earnings were intended to be made a part of the capital, or merely to be used temporarily, with the intention of refunding them to the share-holders as income.⁷

§ 458. **Interest on Legacies.**—Interest, in the sense in which the word is used in connection with the payment of legacies, is the compensation allowed by law for the deprivation of a legacy or distributive share beyond the period when it is payable according to the terms of a will or statute.⁸ As a general rule, therefore, interest is payable from the time when a legacy ought to be paid until the time when payment

Interest, as a general rule, is payable on legacies from the time they ought to be

¹ Richardson v. Richardson, 75 Me. 570, 575.

² *In re Kernochan*, 104 N. Y. 618, 628; *Jernain v. Lake Shore Railway*, 91 N. Y. 483. A case (*Cragg v. Riggs*, 5 Redf. 82) decided by Surrogate Calvin, about three years before, holds the doctrine that in respect to *stock* dividends the relative rights of tenant for life and remainderman are determined by the amount of capital and of earning represented by the dividend, and also by the time when earned. It is held in the case of *Kernochan*, 104 N. Y. 618, 624, that the person entitled when the profits are declared takes the fund, no matter when payable. "The dividend to which the life tenant may be entitled as income can only be that which the company declares after that relation is acquired."

³ *Hite v. Hite*, 93 Ky. 257.

⁴ *Moss's Appeal*, 83 Pa. St. 264, distinguishing in this respect from *Earp's* 1094

Appeal, supra, and *Wiltbank's Appeal*, 64 Pa. St. 256; *Riggs v. Cragg*, 26 Hun, 89, 102; *Brinley v. Gron*, 50 Conn. 66, 75; *Biddle's Appeal*, 99 Pa. St. 278; *In re Kernochan*, 104 N. Y. 618, 625; *Hite v. Hite*, 93 Ky. 257, 267.

⁵ *Bushee v. Freeborn*, 11 R. I. 149.

⁶ *Brown's Petition*, 14 R. I. 371; *Gibbons v. Mahon*, 136 U. S. 549.

⁷ *Thomas v. Gregg*, 78 Md. 545, 556.

⁸ "In the Roman law, when a person brought an action against his debtor for non-payment of a sum of money, he claimed, in addition to the debt, *id quod interest creditoris salutem esse*;" Rap. & L. Law. Dict. tit. "Interest." "Interest is given after the end of one year from the testator's death, not as incident to a right of action, but as incident to the legacy itself": *Davison v. Rake*, 44 N. J. Eq. 506, 510; *Powell v. Drake*, 19 D. C. 334, 338.

is made.¹ This time is, as heretofore indicated, one year after the testator's death,² unless a different time is fixed by the will, or by provision of the statute. Hence, general legacies bear interest from the expiration of one year after the testator's death.³ The testator may, of course, annex interest to the principal bequeathed, to be payable from any period he may point out;⁴ but the direction in the will to pay the legacy "as soon as possible,"⁵ "as soon as the executors shall think proper,"⁶ or that the executors "shall have five years in which to settle my estate,"⁷ or similar expressions, are not sufficient to take a legacy out of the operation of the general rule.⁸

until they are paid,

unless testator indicate differently.

The reason of the rule according to which interest begins to run from the time at which the legacy is payable seems to demand that, in those States in which the legacies are payable, not at the end of one year after the testator's death, but one year after the date of the executor's letters, the interest should be payable from that time.⁹ In some [*1006] instances it has been so held;¹⁰ but * in others, the statutes changing the time of payment to one year after grant of letters are held to have no effect upon the rule as to the payment of interest.¹¹

The year commences to run from date of letters,

or from death of testator.

Specific legacies do not come within the general rule, because, it is said,¹² they are considered as separated from the general estate, and appropriated at the time of the testator's death. Hence, whatever produce accrues upon them from that time on belongs to the legatee,¹³ and, if there be succe-

Increase of specific legacies goes to legatee from

¹ *Smith v. Field*, 6 Dana, 361, 364; *Rotch v. Emerson*, 105 Mass. 431, 434; *Stephenson v. Axson*, Bai. Eq. 274, 278; *Hamilton v. McQuillan*, 82 Me. 204, 209; *Matter of McGowan*, 124 N. Y. 526, 531.

² *Ante*, § 454.

³ *Hamilton v. McQuillan*, 82 Me. 204; *Powell v. Drake*, 19 D. C. 334; *Hitch v. Davis*, 3 Md. Ch. 266, 277; *Derby v. Derby*, 4 R. I. 414, 425; *Koon's Appeal*, 113 Pa. St. 621, 627; *Welsh v. Brown*, 43 N. J. L. 37.

⁴ *Phillips's Estate*, 133 Pa. St. 426, 437. Thus the words "in case she becomes a widow" were held to entitle the legatee to interest from the date of her widowhood: *Booth v. Ammermann*, 4 Bradf. 129.

⁵ *Webster v. Hale*, 8 Ves. 410, 415; *Vernet v. Williams*, 3 Dem. 349.

⁶ *Benson v. Maude*, 6 Madd. 15.

⁷ *Spencer*, Petitioner, 16 R. I. 25, 32.

⁸ *In re Williams*, 112 Cal. 521; *Bartlett v. Slater*, 53 Conn. 102, 106; *Kent v.*

Dunham, 106 Mass. 586, 590. In fact, a legacy otherwise carrying interest from testator's death was held to be brought within the general rule by a provision that it "be paid as soon as convenient" after testator's death: *Welch v. Adams*, 152 Mass. 74, 80. See in connection herewith the next section.

⁹ *Wheeler v. Hathaway*, 54 Mich. 547, 550; *Matter of McGowan*, 124 N. Y. 526.

¹⁰ *Bradner v. Faulkner*, 12 N. Y. 472; *Thorn v. Garner*, 113 N. Y. 198, *per Peckham, J.*, p. 203; *Matter of McGowan*, *supra*, 124 N. Y. 526; *Wheeler v. Hathaway*, *supra*; *Way v. Priest*, 13 Mo. App. 555, 560.

¹¹ *Lawrence v. Embree*, 3 Bradf. 364, 366; *Cooke v. Meeker*, 36 N. Y. 15, 18; *Davison v. Rake*, 45 N. J. Eq. 767.

¹² *Wms. Ex.* [1423].

¹³ *Graybill v. Warren*, 4 Ga. 528, 533; *Smith v. McKitterick*, 51 Iowa, 548; *Custis v. Potter*, 1 Houst. 382, 395; *Harrell v. Davenport*, 5 Jones Eq. 4, 9; *Welsh v. Brown*, 43 N. J. L. 37.

date of testator's death. sive legatees, each is entitled to the income during the time he is entitled to the corpus. Thus, where there is a specific legacy of shares of stock, the dividends go to the legatee from the death of the testator;¹ and where livestock, cows, mares, or ewes, etc., are bequeathed, the legatee is entitled to any increase between the death of the testator and the assent of the executor.²

So annuities commence at testator's death; So the bequest of an income or annuity carries interest, or rather such income or annuity is payable from the testator's death, because his intention to provide a support for the legatee is otherwise not complied with.³ Specific legacies are not entitled to interest *eo nomine*.⁴ But where the residuum, also, interest on residuum for life, with remainder over. or the interest thereon, is given for life to one, remainder to another, and no time is mentioned for the beginning of the interest or enjoyment, the legatee for life is entitled to interest from the testator's death, although not ascertainable until a subsequent time.⁵ Where, however, the testator has directed the residuary fund to be invested in a particular manner, and has given a life estate in the fund as thus invested, the life interest is deemed to *commence when the [*1007] investment is made, which must be done, in the absence of a specific time fixed by will, within a reasonable time.⁶ Of course, a residuary legacy cannot carry interest, since there is no fund out of which the interest could be paid; but because a legacy is made

¹ Loring v. Woodward, 41 N. H. 391, 394; Cogswell v. Cogswell, 2 Edw. Ch. 231, 237.

² Wms. Ex. [1423]; McConn, V. C., in Isenhardt v. Brown, 2 Edw. Ch. 341, 347.

³ Ante, § 454; Townsend's Appeal, 106 Pa. St. 268; Hilyard's Estate, 5 Watts & S. 30; Flickwir's Estate, 136 Pa. St. 374; Pell v. Mercer, 14 R. I. 412, 432; Lovering v. Minot, 9 Cush. 151; Pittman v. Johnson, 35 Hun, 38; Green v. Blackwell, 32 N. J. Eq. 768, 773; Van Blarcom v. Dager, 31 N. J. Eq. 783, 795; Ayer v. Ayer, 128 Mass. 575. So it was held that where the income is given to a legatee for life he is entitled to the same from the testator's death, though the legacy is not payable until a year thereafter: Matter of Stanfield, 135 N. Y. 292, placing a gift of the income, with respect to the time when it accrues, on the same plane with an annuity and expressly affirming Cook v. Meeker, 36 N. Y. 15, in holding that when a sum in trust is given, with the income to the use of a person, such person is entitled to the income from testator's death.

⁴ Bliss v. Olmstead, 3 Dem. 273, 277; Murphy v. Marcellus, 1 Dem. 288, citing numerous authorities.

⁵ Chancellor Walworth held such to be the result of the English cases: Williamson v. Williamson, 6 Pai. 298, 304. See Green v. Green, 30 N. J. Eq. 451, 457, with a collection of cases by the reporter, p. 452; Marsh v. Taylor, 43 N. J. Eq. 1, 6; Lovering v. Minot, 9 Cush. 151, 157; Wethered v. Safe D. Co., 79 Md. 153; Lawrence v. Security Co., 56 Conn. 423; ante, § 454, p.* 995.

⁶ Clifford v. Davis, 22 Ill. App. 316, 320, stating one year to be the usual limit, but allowing two years in analogy with the statute for the settlement of estates. So where the testator directs the payment, annually, of the interest of a certain sum, which sum is to be invested by the executor for the purpose of raising the annual interest, such legacy does not begin to carry interest until the end of a year from the testator's death, and is not payable until the end of the second year: Flummerfelt v. Flummerfelt, 51 N. J. Eq. 432.

payable out of the residuum does not necessarily make it a residuary legacy.¹

Upon a similar ground, the general rule is held not to extend to legacies to a child by a parent, or one *in loco parentis*. Such legacies are held to carry interest from the testator's death, so as to constitute a provision for maintenance, whether so expressed by the testator or not, if no other provision is made by him for the support of the legatee.² This exception is confined to infants, and does not affect the operation of the general rule upon adults,³ nor in favor of a god-daughter,⁴ or grandchild,⁵ or nephew or niece,⁶ unless the testator put himself *in loco parentis*, as where the legacy to the grandchildren is one of which the income had been given to their parent.⁷

Legacies to a child by a parent carry interest from testator's death.

A legacy given to a widow in lieu of dower has likewise been held to carry interest from the testator's death, if he has made no other provision for her support during the first year,⁸ although such legacy exceeds in value her dower interest;⁹ but the contrary has been held in New Jersey,¹⁰ and intimated in Pennsylvania.¹¹ In England, it is

Legacy in lieu of dower carries interest from testator's death.

held that the exception from the rule that a legacy does not [* 1008] * bear interest until it is payable, made in favor of children, does not exist in favor of the wife.¹² And that a legacy in lieu of dower carries interest only from a year after testator's death.¹³

¹ *In re Williams*, 112 Cal. 521.

² *King v. Talbot*, 40 N. Y. 76, 92; *Flinn v. Flinn*, 4 Del. Ch. 44, 47; *Brown v. Knapp*, 79 N. Y. 136; *Hart v. Williams*, 77 N. C. 426; *Welsh v. Brown*, 43 N. J. L. 37; *Anderson v. Piercy*, 20 W. Va. 282 (although also residuary legatee, p. 328); *Marsh v. Taylor*, 43 N. J. Eq. 1. It is held in *Lyon v. Industrial School*, 127 N. Y. 402, that such a legacy will not carry interest from the decedent's death, unless the legatee will have no means of support without it.

³ "The principal ground upon which interest is allowed to children and other persons to whom the testator stands *in loco parentis*, is that they are *infants*, and require a maintenance. No case can be produced (as I believe) where interest has been given in favor of a female married legatee having a competent maintenance; or in favor of an adult child; for the law supposes an adult capable of maintaining himself": *Story, J.*, in *Sullivan v. Winthrop*, 1 Sumn. 1, 15; *Thorn v. Garner*, 113 N. Y. 198, 203; *Howard v. Francis*, 30 N. J. Eq. 444.

⁴ *Page's Appeal*, 71 Pa. St. 402.

⁵ *Lupton v. Lupton*, 2 John. Ch. 614, 628; *Van Bramer v. Hoffman*, 2 John. Cas. 200; *Huston's Appeal*, 9 Watts, 472, 476; *Walker v. Walker*, 17 Ala. 396, 400; *Leech's Appeal*, 44 Pa. St. 140; *Smith v. Moore*, 25 Vt. 127, 137; *Marsh v. Taylor*, 43 N. J. Eq. 1.

⁶ *Crickett v. Dolby*, 3 Ves. 10, 12.

⁷ *Seibert's Appeal*, 19 Pa. St. 49, 56; *Stout v. Stout*, 44 N. J. Eq. 479; *Chisolm v. Chisolm*, 4 Rich. Eq. 266, 270.

⁸ *Bullard v. Benson*, 1 Dem. 486, 493; *Pollard v. Pollard*, 1 Allen, 490; *Williamson v. Williamson*, 6 Pai. 298, 305; *Towle v. Swasey*, 106 Mass. 100, 106; of course, where a different intention of the testator is inferred from the will, this rule will not apply: *Welch v. Adams*, 152 Mass. 74, 80.

⁹ *In re Combs*, 3 Dem. 341.

¹⁰ *Dutch Church v. Ackerman*, 1 N. J. Eq. 40, 43. See *Stout v. Stout*, *supra*, allowing such interest on stocks which she was permitted to select by the will.

¹¹ *Spangler's Estate*, 9 W. & S. 135, 141.

¹² *Stent v. Robison*, 12 Ves. 461.

¹³ *In re Bignold*, L. R. 45 Ch. Div. 496.

Lex domicilii
governs rate of
interest and
currency.

It was held in South Carolina, that the rate of interest on a pecuniary legacy is governed by the law of the testator's domicile; and that such a legacy is payable in a currency equivalent to the currency of that country.¹

§ 459. Interest when Time of Payment is fixed by the Will.—

The rule that general legacies bear interest from the time at which they are payable,² applies equally to those legacies which the testator has directed to be paid at a given time; and it is immaterial, in

Interest on a
legacy payable
at a particular
time runs from
that time.

this respect, whether the legacy is or is not a vested one.³ For although a legacy to one payable when he attains a certain age vests in the legatee upon the testator's death, yet he is not entitled to interest thereon until he has reached the appointed age;⁴ nor does his dying before that time entitle his personal representatives to claim the legacy, or interest on it, sooner than if the legatee had lived.⁵ A legacy payable when it shall be convenient to the executors, without regard to the time fixed by law, out of moneys realized from the sale of a certain farm, or otherwise as may seem best to the executors, carries interest from the time when sufficient proceeds of the farm sales are realized to pay the legacy, and no inconvenience to the estate prevents such application.⁶ So if a legacy is directed to be paid, or invested, within a time named by the testator, it will not carry interest until the expiration of the period named.⁷ On the same principle, a contingent legacy taking effect after a prior legacy upon the happening of the contingency is not entitled to interest for the period prior to the happening of the divesting contingency, but such interest will go to the first legatee or his personal representatives;⁸

¹ *Graveley v. Graveley*, 25 S. C. 1, 22, *et seq.*

² *Ante*, § 458.

³ *Custis v. Potter*, 1 *Houst.* 382, 396; *Bell, C. J.*, in *Loring v. Woodward*, 41 N. H. 391.

⁴ *Kerr v. Bosler*, 62 Pa. St. 183, 187; *Smith v. Moore*, 25 Vt. 127, 136; *Page's Appeal*, 71 Pa. St. 402; *Weatherly v. Kier*, 38 N. J. Eq. 87. But in *Yost's Estate*, 134 Pa. St. 426, 435, where a legacy was to be paid to several or the survivors, at twenty-one, the intermediate interest was held to be due to the legatees, the reasoning of the court seems inconsistent with the prior decisions. The rule announced in the text does not apply where the testator severs the amount to be paid from the residuary estate and directs it to be put out at interest until the time of payment arrives; in such case the investment is deemed to be for the benefit of

the legatee, and the interest will follow the legacy: *Male v. Williams*, 48 N. J. Eq. 33, 36.

⁵ *Holt v. Hogan*, 5 Jones Eq. 82, 88; *ante*, § 454, p. * 995.

⁶ *Van Rensselaer v. Van Rensselaer*, 113 N. Y. 207, 215. See *Phillips's Estate*, 133 Pa. St. 426, 437; *Matter of Hodgman*, 140 N. Y. 421.

⁷ *Kent v. Dunham*, 106 Mass. 586, 591; *Thomas v. Attorney-General*, 2 Y. & Coll. 525, 527; *Valentine v. Ruste*, 93 Ill. 585; *Estate of James*, 65 Cal. 25; *Davis v. Davis*, 39 N. J. Eq. 13. But where the time of payment is extended solely for the convenience and benefit of the estate, and is not extended to affect the time from which interest is to be paid, the general rule that interest is calculated from one year after the death of testator governs: *Bartlett, Petitioner*, 163 Mass. 509, 521.

⁸ *Taylor v. Johnson*, 2 P. Wms. 504;

and so with respect to a residue vesting immediately, but payable later, with a bequest over divesting the legacy on death before that time.¹ But a legacy payable on the marriage or majority of the legatee, with interest after, at her option, carries interest from the time when the first of these events may happen.² So [*1009] where there is a * general residuary bequest, contingent in its terms, no other disposition thereof being made in the mean time, it will carry the intermediate income or interest, which will be required to accumulate and form part of the residue.³

As to the exceptions, also, there is little or no distinction between the rule applicable to the payment of interest on legacies when the time of payment is determined by the testator and when not. Thus, an infant legatee, for whose maintenance no other provision is made, is entitled to interest on his legacy from a parent, or one standing *in loco parentis*, from the testator's death, although the legacy itself is not payable until he reaches a certain age.⁴ And this although the will contain an express direction that the interest shall accumulate.⁵ In such case, the interest on the legacy to a child in *ventre sa mère* is computed from the time of the birth.⁶ If the testator has made provision for the maintenance of his child, the allowance will not be increased by the court, although such allowance be less than the interest on the legacy;⁷ but if the allowance is insufficient for a reasonable maintenance, the court may grant additional allowance.⁸

Except where testator stood in relation of parent, and legacy is necessary for the infant's support,

Although the testator fix a given time for the legacy, his intention that interest thereon shall be payable from any other time must be carried into effect, if such intention is made apparent in the will.⁹ So, where the testator directs payment of a legacy when the legatee attains a certain age, *with interest*, such legacy will bear interest from the end of the year after the testator's death.¹⁰

or where testator directs payment of interest.

Webb v. Kelly, 9 Sim. 469; Barber v. Barber, 3 Myl. & Cr. 688, 693; Keehn v. Fries, 5 Jones Eq. 273; English's Estate, 167 Pa. St. 463; Cannon v. Apperson, 14 Lea, 553, 564 (no prior legacy). A legacy payable on the happening of a contingency carries interest when the contingency happens, after a year from the testator's death: Ashton v. Wilkinson, 53 N. J. Eq. 227 and cases.

¹ See Laporte v. Bishop, 23 Pa. St. 152, holding that in such case the interest accruing after the happening of the contingency goes to the second legatee. See *infra*.

² Bradford Academy v. Grover, 55 Vt. 462.

³ Hurford v. Haines, 67 Md. 240, 244.

⁴ Per Story, J., in Sullivan v. Winthrop, 1 Sumn. 1, 13; see cases *ante*, § 458, p. *1007. Magoffin v. Patton, 4 Rawle, 113, 119; Allen v. Crosland, 2 Rich. Eq. 68, 74; Jordan v. Clark, 16 N. J. Eq. 243; Brown v. Knapp, 79 N. Y. 136, 141.

⁵ Miles v. Wister, 5 Binn. 477, 479; Mole v. Mole, 1 Dick. 310; Brown v. Temperley, 3 Russ. Ch. 263.

⁶ Rawlins v. Rawlins, 2 Cox, 425.

⁷ Hearle v. Greenbank, 3 Atk. 695, 716; Long v. Long, 3 Ves. 286, note.

⁸ Aynsworth v. Pratchett, 13 Ves. 321.

⁹ Budd v. Garrison, 45 Md. 418.

¹⁰ Knight v. Knight, 2 Sim. & Stu. 490.

The rule according to which interest is payable on general legacies is not affected by the condition of the estate, so that the executor have assets to meet it. Thus, where no time for payment is specified in the will, legacies bear interest from the end of the first year after the testator's death, although assets may not have come to the hands of the executor until long afterwards.¹ But

* where the legacy is made payable out of the first money [* 1010] realized by the executor, after the payment of debts and funeral expenses, it does not bear interest until all the debts of the estate have been paid.²

The rate of interest payable on legacies is fixed in England at four per cent;³ in the United States it is generally governed by

<p>Rate of interest fixed by general law.</p> <p>May be increased by <i>devastavit</i> of executor.</p> <p>No demand necessary by legatee.</p> <p>Interest where legatee refuses to accept legacy.</p>	<p>the legal rate of interest allowed by statute on ordinary contracts where no special rate is fixed by the parties.⁴</p> <p>But this rate may be increased where the executor employs the funds in his own business or for his own purposes, or neglects to perform his duties in respect of the property, as will be more fully discussed hereafter.⁵</p> <p>No demand is necessary, generally, to entitle the legatee to interest on his legacy from the time when it is payable,⁶ unless the payment of the legacy is rendered impossible by some act of the legatee; as where, for instance, the fund is brought into court and he refuses to accept it, in which case he will be entitled to such interest only as the fund may earn if invested under order of the court.⁷ Nor is the general rule altered because the legatee is not in a situation to receive the money.⁸</p>
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Annuities, as already stated,⁹ begin, in the absence of a contrary disposition by the will, from the death of the testator, and bear interest where interest is payable thereon from the time when the first payment is due and is not made. But since the executor cannot be compelled to pay a general legacy within a year of the testator's death, so, it seems, no interest can be charged from any period within that time. It is said in England, that, generally

¹ *Marsh v. Hague*, 1 Edw. Ch. 174, 187; *Baptist Convention v. Ladd*, 58 Vt. 95; *Bonham v. Bonham*, 38 N. J. Eq. 419; *Martin v. Martin*, 6 Watts, 67; *Kent v. Dunham*, 106 Mass. 586, 590; *Koon's Appeal*, 113 Pa. St. 621. And the rule is not changed because payment is long delayed by pending litigation, during which the executors could obtain interest only at less than the rate allowed on the legacies: *Sloan's Appeal*, 168 Pa. St. 422 and cases *supra*. But see *Trustees v. Morris*, 99 Ky. 317.

² *Estate of James*, 65 Cal. 25.

³ *Wms. Ex.* [1431] *et seq.*

⁴ *Wheeler v. Brem*, 33 Miss. 126.

⁵ *Post*, § 511.

⁶ *Glen v. Fisher*, 6 John. Ch. 33; *Kent v. Dunham*, 106 Mass. 586, 590; *Marsh v. Hague*, 1 Edw. Ch. 174; *Lyon v. Magagnos*, 7 Gratt. 377, 379; *Stephens v. Van Buren*, 1 Pal. 479.

⁷ 2 Redf. on W. 471, pl. 8 and authorities cited.

⁸ *Esmond v. Brown*, 18 R. I. 48, and cases cited.

⁹ *Ante*, §§ 454, 458.

speaking, courts of equity refuse interest on arrears of annuities given by will,¹ unless the person charged with the annuity is obliged to seek relief in equity, when the court will require him to pay the arrears due with interest;² but American courts incline to allow such interest;³ particularly *where the annuity is charged upon land, or another legacy, and there is default in the payment.⁴ As to the question of apportionment of annuities, it is the common law, followed in chancery, that sums of money, payable periodically, are not apportionable during the periods intervening between the days on which payment is due. Annuities are within this rule, except where they are clearly intended for the daily support of a wife or child; in such case they are apportionable on the ground of necessity. This subject has been heretofore discussed, and reference is made to the authorities there cited.⁵

Interest on arrears of annuities discouraged in England;

such interest

otherwise in America.

Apportionment of annuities not allowed during time intervening between days of payment,

except when for support of a wife or child.

Some of the States have enacted the rules above discussed in statutes regulating interest on legacies. So in California,⁶ Georgia,⁷ Kentucky,⁸ Louisiana,⁹ and Massachusetts.¹⁰

Statutes regulating interest.

§ 460. Persons competent to receive Payment of Legacies.—

Literal compliance with the directions of a will is not in all cases sufficient to protect an executor from liability to pay the legacy a second time, since it is a general rule that executors must see, at their peril, that they pay legacies to persons legally authorized to receive them.¹¹ In England, for instance, the executor could not, before the passage of the statute¹² authorizing the payment of legacies and distributive shares into the Bank of England, if the persons entitled thereto were infants or beyond sea, safely pay a legacy to an infant, or to any other person on his account,¹³ during his minority. In the United States, however, payment may

Executors must at their peril pay legacies to those who are authorized to receive them.

In America, legacy to an

¹ Wms. Ex. [1427], and English authorities there cited.

² *Ib.*, citing *Ferrers v. Ferrers*, Cas. Temp. Talb. 2.

³ *Waples v. Waples*, 1 Harr. 392; *Beeson v. Beeson*, 1 Harr. 106; *Stephenson v. Axson*, Bai. Eq. 274, 278.

⁴ *Addams v. Heffernan*, 9 Watts, 529, 543.

⁵ *Ante*, § 301. It is there also mentioned that the apportionment of annuities has been regulated by statutes in several States.

⁶ Civ. Code, §§ 1366–1370. Legacies for maintenance and to the widow carry

interest from the testator's death; and this though given to trustees: *In re Mackay*, 107 Cal. 303; *Crew v. Pratt*, 119 Cal. 131.

⁷ Code Ga. 1895, § 3328.

⁸ St. Ky. 1894, § 2065.

⁹ It is held in this State that particular legatees are only entitled to interest from the date of demand of delivery: *Succession of Ames*, 33 La. An. 1317, 1328.

¹⁰ Pub. St. 1882, p. 774, § 23; p. 775, § 25.

¹¹ *Shaw, C. J.*, in *Newcomb v. Williams*, 9 Met. (Mass.) 525, 535.

¹² 36 Geo. III. c. 52, § 32.

¹³ Wms. Ex. [1397].

infant may be paid to his legal guardian, but not to the infant, or parent, or other relative or person.

be made of an infant's legacy to his lawfully constituted guardian,¹ or to one or more of his several *guardians.² Payment to the infant himself,³ [* 1012] or his parent, or other relative or person, is no protection against the claim of the legatee on his attaining majority,⁴ or of a legally constituted guardian before the majority of the legatee;⁵ but while the payment should regularly be made to the guardian, yet in the absence of bad faith such disbursements as would have been approved had they been made by a guardian of the infant will be allowed to the administrator.⁶ The same is true of the payment to a husband of a legacy given to the separate use of his infant wife.⁷ If an infant legatee have no guardian, it is usual for the court having jurisdiction to appoint one; or the legacy may, in some States, be paid into court for his use;⁸ if the testator has named a trustee for the infant, payment may, of course, be made to him, and will be a valid discharge to the executor,⁹ if the trustee is legally qualified to act.¹⁰ Payment even to the guardian does not discharge the executor, if made in a manner contrary to the direction of the testator.¹¹

Interest on legacies to infants will be appropriated for their support, and in extreme cases the legacy itself.

The interest on bequests by parents, or those *in loco parentis*, to infant legatees, is allowed to them from the death of the testator,¹² and courts will, if they have no other means of support, decree its application for their maintenance.¹³ In cases of extreme urgency the court will allow maintenance for the infant out of the capital fund,¹⁴ even *when inconsistent with the disposition made [* 1013] by the testator;¹⁵ but this is done only in ex-

¹ Sparhawk v. Buell, 9 Vt. 41, 76. But the guardian appointed in one State is not entitled to receive a legacy from an executor in another: Morrell v. Dickey, 1 John. Ch. 153; McLoskey v. Reid, 4 Bradf. 334.

² Alston v. Munford, 1 Breckenb. 266, 278.

³ Davis v. Crandall, 101 N. Y. 311, 320; Quinn v. Moss, 12 Sm. & M. 365.

⁴ Davis v. Crandall, *supra*; Miles v. Boyden, 3 Pick. 213, 217; Lang v. Pettus, 11 Ala. 37; Genet v. Tallmadge, 1 John. Ch. 3; McKnight v. Walsh, 23 N. J. Eq. 136; Waterman v. Hawkins, 63 Me. 156, 160; Decrow v. Moody, 73 Me. 100, 102.

⁵ Williams v. Cushing, 34 Me. 370, 374.

⁶ Rogers v. Traphagen, 42 N. J. Eq. 421.

⁷ Windsor v. Bell, 61 Ga. 671, 675. The executor was also guardian of the legatee, and settled with her husband, not as guardian but as executor, before her

majority. The court held that the proper time for him to pay her legacy was on her arrival at twenty-one years of age.

⁸ Kent v. Dunham, 106 Mass. 586, 591; Thurston v. Sinclair, 79 Va. 101, 111; or, where the amount is small, to a relative: Rogers v. Traphagen, 42 N. J. Eq. 421, 427, and authorities.

⁹ *In re Denton*, 33 Hun, 317; affirmed, 102 N. Y. 200.

¹⁰ Shaw, C. J., in Newcomb v. Williams, 9 Met. (Mass.) 525, 535. See Silvers v. Canary, 16 N. East. R. (Ind.) 166.

¹¹ Hinckley v. Probate Judge, 45 Mich. 343.

¹² *Ante*, § 459.

¹³ Flinn v. Flinn, 4 Del. Ch. 44, reviewing authorities.

¹⁴ Matter of Bostwick, 4 John. Ch. 100; *Ex parte Green*, 1 Jac. & W. 253; Swift v. Swift, 1 Russ. & Myl. 575.

¹⁵ Matter of Muller, 29 Hun, 418.

trema cases.¹ Nor will an order be made for the maintenance of minor legatees other than the testator's children, unless the estate is solvent, and able to pay all its debts and leave a sufficient fund applicable to their legacies.² But where a bequest is given to an infant by one not a parent or *in loco parentis*, vested and immediate, so that the legatee, if of age, would be entitled to it at the end of one year after the testator's death, maintenance will be ordered out of the interest on such legacy, although no express provision be made for the maintenance, or though the income be expressly directed to accumulate,³ if the parents of the infant legatee are unable to support him.⁴ The general rules applicable between guardian and ward and distinguishing between capital and income in defraying the expenses of education and maintenance of infant or insane wards, more strictly pertain to the subject of Guardian and Ward, and are discussed in the author's treatise on guardianship.⁵

It has already been mentioned, that a vested legacy, otherwise payable to the legatee at majority, the payment of which is postponed to a later period by the testator, is nevertheless payable when the legatee attains the age of twenty-one.⁶ This rule does not, however, apply where the interest on the fund during the intervening period is given to another legatee, although such legatee die before the infant reaches majority.⁷

The statutes of the several States determine the authority of guardians, curators, committees, etc., to recover and enforce payment of any dues to their wards, including legacies and distributive shares;⁸ it is hardly necessary to mention, that payment made to any such, if it is within the scope of the authority vested in them to receive it, is a complete protection to the executor. In some of the States additional provisions are made to enable the executor to pay legacies, in whole or in part, to or on account of infant legatees. Thus, in Alabama, the executor may defray the reasonable expenses of minor legatees having no legal guardian out of their legacies.⁹ In Arkansas and North Carolina,¹⁰ the court may order

Statutory authority of guardians, curators, committees, etc., to receive legacies.

the executor to lend out the legacy on good security, if the [*1014] legatee for any reason cannot give a discharge therefor.

In Delaware, the executor may, in such case, deposit the

¹ "It very rarely has occurred that the court itself has broken in upon the capital for the mere purpose of maintenance": *per* Grant, M. R., in *Walker v. Wetherell*, 6 Ves. 473; *Matter of Kane*, 2 Barb. Ch. 375; *Dowling v. Feeley*, 72 Ga. 557, 563.

² *Williams v. Mobley*, 38 Ga. 241.

³ *Wms. Ex.* [1410].

⁴ *Sparhawk v. Buell*, 9 Vt. 41.

⁵ *Woerner on Guardianship*, § 50, as to minors, and § 147 as to persons of unsound mind.

⁶ *Ante*, § 454.

⁷ *Merritt v. Richardson*, 14 Allen, 239, 242.

⁸ *Woerner on Guardianship*, §§ 55, 56.

⁹ *Glover v. Hill*, 85 Ala. 41.

¹⁰ *Code*, 1883, § 1526.

legacy in the Farmers' Bank.¹ In Indiana,² New Jersey,³ and Texas,⁴ a minor's legacy is payable to his guardian, if so ordered by the court. So in Mississippi;⁵ but a legacy not exceeding \$200 in value may be ordered by the court to be delivered to the minor legatee, or to some person for him, if he have no guardian.⁶ In New York, a minor's legacy under \$50 may be paid to his father, if the court so order; but in the absence of such order, or if greater in amount, it must be paid to a guardian, or invested for the benefit of the minor until his majority.⁷

The payment of legacies to married women is governed by different statutes in the different States, greatly changing and modifying, and in some instances abrogating, the common law on the subject of property rights of married women.⁸ In the absence of statutory provisions, the rule is that the legacy to a married woman must be paid to her husband,⁹ who is the absolute owner and may dispose of it as he sees fit,¹⁰ unless given to her separate use and benefit, in which case she can in her own name give a good discharge, and payment to the husband will not bind her.¹¹ But the intention to create a separate estate in the wife must be unequivocal.¹²

The executor may refuse, however, to pay a married woman's legacy to her husband until he make a reasonable settlement upon her;¹³ and in such case, in a suit by husband and wife for a legacy to the wife, the court will withhold its * decree until he make a reasonable [* 1015] provision out of the legacy for the benefit of the wife and children,¹⁴ the extent whereof will depend upon the circumstances of each case, and include the whole legacy, if need be.¹⁵

¹ Code, 1874, p. 550, § 39.

² 1 Ann. Ind. St. 1894, § 2538.

³ 2 Gen. St. N. J. 1895, p. 1938, pl. 2.

⁴ Sayles' Tex. St. 1897, art. 2181.

⁵ Code, 1880, § 2100.

⁶ *Ib.*, § 2073.

⁷ Payment to father or mother of sums over \$50 entitles the executor to no discharge under the statute: *Whitlock v. Whitlock*, 1 Dem. 160; *Houghton v. Watson*, 1 Dem. 299; even if there be no guardian at the time: *Doris v. Crandall*, 101 N. Y. 311, 320.

⁸ In Ohio, for instance, a married woman may sue for her legacy in her own name: *Bates' Ann. St. 1897*, § 4996. So in Alabama: *King v. Brown*, 108 Ala. 68; New York: *Willard on Ex. & Surr.* p. 388; Illinois: *Nevins v. Gourley*, 95 Ill. 206, 213; Missouri: *Rev. St. 1889*, § 6864.

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⁹ *Wade v. Russell*, 17 Ga. 425; *Kent v. Dunham*, 106 Mass. 586, 591; *Rice v. Reynolds*, 8 Lea, 37; *Hargis v. Sewell*, 87 Ky. 63, 69.

¹⁰ *Jacks v. Adair*, 31 Ark. 616, 623. It is, however, a *chose in action*, which must be reduced to his possession: *Heart v. Leete*, 104 Mo. 315.

¹¹ *Windsor v. Bell*, 61 Ga. 671, 674; *Gest v. Williams*, 4 Del. Ch. 55; *Tarsey's Trust*, L. R. 1 Eq. 561; see also *Cannon v. Apperson*, 14 Lea, 553, 594.

¹² *Wade v. Russell*, 17 Ga. 425; *Bason v. Holt*, 2 Jones L. 323; *Heart v. Leete*, 104 Mo. 315; see *ante*, § 286, p. *607.

¹³ *Brown v. Elton*, 3 P. Wms. 202.

¹⁴ *Glen v. Fisher*, 6 John. Ch. 33; *Howard v. Moffatt*, 2 John. Ch. 206.

¹⁵ *In re Kincaid*, 1 Drew. 326; *Scott v. Spashett*, 3 Mac. & G. 599; see also *Davis*

It is now held that the wife is entitled to her equity of settlement, even against a particular assignee for a valuable consideration;¹ but courts permit the husband who lives with and supports his wife to receive the interest and produce of her property, though he refuses to make settlement.²

Distributees and legatees abroad and not heard from for a long time may be presumed to be dead;³ the proof must show that the distributee's family never heard from him; mere lapse of time is insufficient to raise the presumption. Nor does the law presume that a person proved or presumed to be dead left no descendants.⁴ On the presumptive proof the representatives of the legatees may be paid accordingly; the court in such case usually requiring security from the presumptive legatees to refund in case of the legatee's return.⁵

Where the executor has notice of the assignment of a legacy by a legatee, he should make no further payment to the legatee until the rights of the parties are definitely ascertained.⁶ The relation between assignees and assignors of legacies and the executor, and among themselves, is more fully considered in connection with the subject of distribution.⁷

It may be mentioned, as a proposition requiring no demonstration, that, when a legatee dies after the testator's death, his personal representative alone is entitled to collect his legacy, not his distributees.⁸ This principle extends to real estate equitably converted into personalty; the proceeds of the sale are payable to the executor of a deceased remainderman.⁹

§ 461. **The Doctrine of Election**, in its application to questions arising under wills, grows out of the equitable principle which estops one who accepts a benefit under a deed or will from asserting a right inconsistent with its validity.¹⁰ If, therefore, a

Assignees of legacies.

Legacy of legatee dying after the testator is payable to his representatives.

One cannot dispute a will and also accept a bequest or devise under it;

v. Newton, 6 Met. (Mass.) 537, 544; *Suggitt's Trust*, L. R. 3 Ch. App. 215.

¹ *State v. Reigart*, 1 Gill, 1, 27; *Scott v. Spashett*, 3 Mac. & G. 599, 604; *Kenny v. Udall*, 5 John. Ch. 464; *Farnsworth v. Lemons*, 11 Humph. 140, 145, and cases cited.

² *Kenny v. Udall*, *supra*; *Sleech v. Thorington*, 2 Ves. Sen. 560, 562.

³ The period is seven years at common law; but different periods are pointed out by statute in some of the States. See on the subject of presumption of death, *ante*, § 207; *Lewes' Trust*, L. R. 11 Eq. 236, and authorities.

⁴ *Shriver v. State*, 65 Md. 278; *Posey v. Hanson*, 10 App. D. C. 496; *Hurdle v.*

Stockley, 6 Houst. 447; *Still v. Hutto*, 48 S. C. 415. But on the latter point, says the court in *Chapman v. Kimball*, 83 Me. 389, 396: "If the man cannot be found or his fate ascertained, it would be a difficult hunt to find children," citing *Loring v. Steineman*, 1 Metc. (Mass.) 204, 211.

⁵ *Dowley v. Winfield*, 14 Sim. 277; *Cuthbert v. Purrier*, 2 Phill. C. C. 199.

⁶ *Wms. Ex.* [1421]; *Stephens v. Venables*, 30 Beav. 625.

⁷ *Post*, § 563, p. *1235.

⁸ See cases cited on this point, *post*, § 565, p. *1239.

⁹ *Parson's Estate*, 13 Phila. 406.

¹⁰ *Havens v. Sackett*, 15 N. Y. 365, 369;

testator undertakes to dispose of property belonging to another, and devises to that other lands, or bequeaths personal property to that other, the latter will not be permitted to keep his own property and also enjoy the fruits of such devise or bequest,¹ but but he must elect the one or the other. must elect whether he will part with his own estate and accept the provisions of the will, or keep his own property and reject that bequeathed.² This is so although the testator was not aware that the property which he undertook to dispose of was not his own;³ but where it appears that the testator meant only to dispose of such property as he had the power to dispose of, no case of election arises.⁴ But in such case, where it is apparent from the terms of the will that the intention of the testator was to devise the whole estate, including the interest of such third person, then the doctrine of election will apply.⁵ The intention to dispose of property not his own must be clear, either by demonstration or necessary implication.⁶ In case the donee elects to retain his own

Chipman v. Montgomery, 63 N. Y. 221, 234; *Cox v. Rogers*, 77 Pa. St. 160, 164. So where a testatrix had in her lifetime entered into a contract to convey a house and land, but in her will devised the same to another, it was held that such contract could not be enforced by the other party, who had accepted benefits under the will: *Gorham v. Dodge*, 122 Ill. 528, 535. And where there was a contract to pay for services by devising certain land, and the testator in his will substitutes another provision in the place of that contracted for, which is accepted by the devisee, the latter is estopped from specifically enforcing the contract: *Towle v. Towle*, 79 Wis. 596; as to the length of time allowed him to elect in such case, see *Vann v. Newsom*, 110 N. C. 122. So a devisee, who is also heir at law, will not be permitted to take realty under a will in one State, and disaffirm the validity of a devise to others of realty in another State, because the will may not be executed according to the laws of such other State: *Commings' Estate*, 153 Pa. St. 397.

¹ *Dillon v. Parker*, 1 Swanst. 359, 394. "The doctrine of election," says Swanston, in his notes to the above case, "originates in inconsistent or alternative donations; a plurality of gifts, with intention, express or implied, that one shall be a substitute for the rest. In the judgment of tribunals, therefore, whose decision is regulated by that intention, the donee will be entitled,

not to both benefits, but to the choice of either."

² *Woolley v. Schrader*, 116 Ill. 29, 36; *Smith v. Smith*, 14 Gray, 532; *Hyatt v. Vanneck*, 82 Md. 465; *Allen v. Boomer*, 82 Wis. 364; *Copp v. Hersey*, 31 N. H. 317, 330; *Smith v. Guild*, 34 Me. 443, 447; *Ridgway v. Manifold*, 39 Ind. 58, 62; *George v. Bussing*, 15 B. Mon. 558, 565; *Rogers v. Trevathan*, 67 Tex. 406. Thus, if the devisee is directed to convey his property to another, he becomes, on acceptance of the will, trustee for such other: *McQuerry v. Gilliland*, 89 Ky. 434.

³ *Cooper v. Cooper*, L. R. 7 H. L. 53, 71; *Isler v. Isler*, 88 N. C. 581; *Penn v. Guggenheimer*, 76 Va. 839, 845; *Van Shaack v. Leonard*, 164 Ill. 602; *Hartwig v. Schiefer*, 147 Ind. 64.

⁴ *Woolley v. Schrader*, 116 Ill. 29, 38; *Church v. Kemble*, 5 Sim. 525, 529; *Isler v. Isler*, *supra*.

⁵ *Ditch v. Sennott*, 117 Ill. 362, 368.

⁶ *Beall v. Schley*, 2 Gill, 181, 199; *Waters v. Howard*, 1 Md. Ch. 112, 119. When the testator owns a partial or future interest in the property devised, the established rule is, that the courts will strongly lean in favor of a construction which shows an intent to give only the interest of which he has the power of disposition and with which he is authorized to deal by virtue of his own rights: *Toney v. Spragins*, 80 Ala. 541, 544; *Pratt v. Douglas*, 38 N. J. Eq. 516, 536; *Sherman v*

property, given to another by the will, the interest or fund that would have passed to the former will be applied to secure compensation to the disappointed parties, and the surplus remaining after making such compensation, if any remains, will be restored to the donee.¹ And it must be observed that the doctrine of election does not apply between claims under one clause in a will and [* 1017] those under another clause in the same will,² * nor does it preclude a party claiming under the will from enjoying a derivative interest to which he is entitled at law, under a legal estate taken in opposition to the will.³ And a creditor may take the benefit of a devise for the payment of debts, and also enforce his legal claim against another fund disposed of by the will.⁴ But "when a testator declares in his will that his several bequests are made upon the condition that the legatees acquiesce in the provisions of his will, the courts wisely hold that no legatee shall without compliance with that condition receive his bounty or be put in a position to use it in the effort to thwart the expressed purposes."⁵ It has been held that where an executor proves the will he cannot elect to take against the will;⁶ hence where the testator bequeathed a legacy to his executrix stated to be in satisfaction and discharge of a debt due to her by him, and the executrix qualified, she was held estopped thereby from retaining the amount of her debt out of the assets, except as directed in the will.⁷ Since it may be the duty of an executor to submit a will for probate, and since the executor's commissions are deemed a fair compensation for administering the testator's estate, it would seem that neither the mere proving of the will, nor qualifying as executor thereunder, ought in fairness to defeat the right of election.

Lewis, 44 Minn. 107; *In re Gilmore*, 81 Cal. 240.

¹ *Ante*, § 119, p. * 273. Hence the doctrine of election cannot apply unless, in case the devisee chooses to assert his rights to his property against the will, there be a fund for his benefit given by the will, which can be laid hold of to compensate the parties whose right to take under the will is defeated by the election: *Carperr. Crowl*, 149 Ill. 465, 477, and cases cited. See further on this point: *Colvert v. Wood*, 93 Tenn. 454.

² *Wollaston v. King*, L. R. 8 Eq. Cas. 165, 174.

³ *Wms. Ex.* [1443], and authorities cited. See *Fifield v. Van Wyck*, 94 Va. 557, 562.

⁴ *Kidney v. Coussmaker*, 12 Ves. 136, 154.

⁵ *Brewer, J.*, in *Smithsonian Inst. v. Meech*, 169 U. S. 398, 415.

⁶ But see *ante*, § 228, p. * 501, note; whether, when a widow qualifies as executrix of her husband's will, she can afterwards dissent therefrom and claim dower, is differently held in different States: see § 119, p. * 271.

⁷ *Syme v. Badger*, 92 N. C. 706, in which *Smith, Ch. J.*, says: "The undertaking assumed by an executor is to carry out all the provisions of the will; but this does not obstruct the enforcement of a liability incurred by the deceased in his lifetime, unknown when the trust was accepted, and therefore not constituting a case of election. But when beyond this any gift of the testator is accepted, or benefit voluntarily received under the will, it involves a surrender of all claim to property disposed of in the instrument."

If a legatee die before he has had an opportunity of exercising his right of election, he will be presumed to take under the will, if its provisions are, as a whole, beneficial to him.¹ It has been held, that, where there is a right of election in legatees to take the proceeds of property devised to be sold, or the property itself, a court of equity may elect for an infant legatee, if such appear to be for his interest and advantage;² but this view has been criticised as permitting the court to make a will for the testator.³

The doctrine of election finds most frequent application in cases of devise or legacy to a widow in exclusion of her right of dower, and has been more extensively considered in connection therewith.⁴

§ 462. **Payment of the Residue.**—After all debts, expenses of administration, and legacies have been discharged by the executor, or administrator with the will annexed, the residue of the personal

English law giving residue to executor abolished by statute. estate is payable to the residuary legatee, if any has been named. The subtleties and refinements which have crept into the law of England by reason of the executor's right to the residue when not disposed of by the

testator, are no longer of importance in England, and never possessed much significance in America. The English statute⁵ of July

Executor trustee of residue undisposed of for next of kin. 16, 1830, makes the executor trustee for the next of kin of all undisposed personal estate in his hands, and thus enacted for England what had *been [* 1018]

the law in most of the American States before.⁶ "In America," says Story, "the surplus is by law universally distributed among the next of kin, in the absence of all contrary expressions of intention by the testator."⁷ It would therefore be unprofitable to notice the distinctions once recognized on this subject.

The residue, as already mentioned,⁸ is that part of a testator's estate not otherwise disposed of; hence a general residuary bequest

¹ *Yawger v. Yawger*, 37 N. J. Eq. 216, 218.

² *Turner v. Street*, 2 Rand. 404; *Swann v. Garrett*, 71 Ga. 566, 570. *Ante*, § 342.

³ See dissenting opinion of Jackson, C. J., in *Swann v. Garrett*, 71 Ga. 571.

⁴ *Ante*, ch. xi. § 119.

⁵ 11 Geo. IV. and 1 Wm. IV. The preamble of this statute recites the English law on this point as follows: "Whereas testators by their wills frequently appoint executors, without making any express disposition of the residue of their personal estate; and whereas executors so appointed become by law entitled to the

whole residue of such personal estate; and courts of equity have so far followed the law as to hold executors to be entitled to retain such residue for their own use, unless it appears to have been their testator's intention to exclude them from the beneficial interest therein, in which case they are held to be trustees for the person or persons (if any) who would be entitled to such estate under the Statute of Distributions, if the testator had died intestate; and whereas it is desirable," etc.

⁶ *Schoul. Ex.* § 494; 2 Redf. on Wills, 491, pl. 2.

⁷ 2 Sto. Ex. Jur. § 1208.

⁸ *Ante*, § 444.

carries with it everything not in terms disposed of,¹ and with such exceptions as are pointed out in connection with the subject of lapsed and void legacies,² everything not effectually or well disposed of, as well as lapsed legacies,³ unless a contrary intent clearly appear from the will.⁴ Where a specific disposition follows or is preceded by a general residuary gift, the specific disposition is regarded as an exception or qualification out of the general disposition;⁵ but the gift of a life estate specifically to one, and a gift of the residue to the same donee, will give him a fee in, or absolute title to, the property so given.⁶ A clause may operate as a residuary gift without the use of the words "rest," "residue," &c.,⁷ and conversely if by "rest," "balance," &c., the testator means to refer to a portion of land, parts of which are devised to others, these words will not prevent the gift from being specific.⁸ No particular form of words is necessary to constitute a residuary legatee; any expression is sufficient from which the testator's intention is discernible that the person designated shall take the surplus. Nor is it of controlling consequence that the clause is not the last of the disposing provisions, though such is the usual position.⁹

It seems that the word "money" is often and popularly used as the equivalent of "property," and when given in a residuary clause is frequently construed by courts, both in England and America, to include the personal estate of the testator.¹⁰

The testator may, by the terms employed, exclude the residuary legatee from lapsed legacies; as where he indicates that the residuary legatee shall have only what remains after *the payment*

¹ Vandewalker v. Rollins, 63 N. H. 460, citing numerous authorities.

² *Ante*, §§ 437, 438, *q. v.*

³ Bigelow v. Gillott, 123 Mass. 102, 106; Lamb v. Lamb, 131 N. Y. 227, 235, quoting Gray, J., in Riker v. Cornwell, 113 N. Y. 115, 127: "I think the doctrine is firmly established, that where a residuary bequest is not circumscribed by clear expressions in the instrument, and the title of the residuary legatee is not narrowed by special words of unmistakable import, he will take whatever may fall into the residue, whether by lapse, invalid disposition, or other accident." This announcement is repeated in Matter of Miner, 146 N. Y. 121; and Morton v. Woodbury, 153 N. Y. 243; see cases cited *ante*, § 437, p. *944.

⁴ Thayer v. Wellington, 9 Allen, 283, 295; Phelps v. Robbins, 40 Conn. 250, 264.

⁵ Davis v. Callahan, 78 Me. 313.

⁶ *Ib.*

⁷ Striewig's Estate, 169 Pa. St. 61.

⁸ Tittman's Estate, 182 Pa. St. 355, 360.

⁹ Morton v. Woodbury, 133 N. Y. 243 and cases cited.

¹⁰ Decker v. Decker, 121 Ill. 341, 347; Hamilton v. Serra, 6 Mackey, 168; Jacobs' Estate, 140 Pa. St. 268; Estate of Miller, 48 Cal. 165, 169, holding that the clause, "Seventh and lastly, that my mother receive the balance of my money for her benefit so long as she lives, and for her heirs after," includes not only all personal estate of the testator, but also all his real estate; and see authorities cited for the statement in the text; but in order for a construction broad enough to include real estate under the term "money," the intention must be so clear and plain as to be in effect compulsory: Sweet v. Burrett, 136 N. Y. 204, 210.

of *legacies;¹ but it is no ground for excluding property [*1019] from the residuary clause that the testator did not know, or believe, that he had title to it.²

Most of what is necessary to be said concerning the payment of residues has been anticipated in connection with the abatement of legacies,³ lapse of legacies,⁴ and will again be considered in connection with distribution,⁵ so that it is unnecessary to enlarge in this place.

¹ *Gibson v. Hale*, 17 Sim. 129; *Davers v. Dewes*, 3 P. Wms. 40, 42; *ante*, § 437.

² *Ireland v. Foust*, 3 Jones Eq. 498, 501.

³ *Ante*, § 452.

⁴ *Ante*, §§ 434 *et seq.*

⁵ *Post*, §§ 562-569.

* TITLE SEVENTH.

OF THE APPLICATION OF THE ASSETS FOR THE
PAYMENT OF DEBTS AND LEGACIES.

PART FIRST.

OF THE LIABILITY OF REAL ESTATE FOR THE DEBTS
OF DECEASED PERSONS.

CHAPTER L.

OF THE PROCEDURE IN OBTAINING THE ORDER OF SALE.

§ 463. **Nature of the Power to sell Real Estate for the Payment of Debts.**—Before considering the equitable aspect of the doctrine of marshalling assets, as applicable to the administration of the estates of deceased persons, it is necessary to dwell upon the method in which real estate is subjected, under the statutes of the several States, to the satisfaction of the claims of creditors against their estates. It has been shown in an earlier chapter, that in most of the States¹ the executor or administrator has no interest in, or title to, the real estate of his deceased testator or intestate, save a naked power to sell or lease the same, upon the order, generally, of the probate court, the exercise of which is conditioned upon an insufficiency of personal assets to pay the debts of the deceased.² This power is purely statutory; each State prescribes the conditions and circumstances under which a sale of the real estate may be authorized, as well as the method of procedure in selling. It results from the peculiar nature of probate courts, that in some of the States the validity of the sales is made dependent upon a very rigid and literal compliance on the part

Executors and administrators have nothing to do with real estate when not ordered by court, or executing a power.

Importance of a literal observance of the statute in selling real estate,

¹ The exceptions are noted, *ante*, § 337.

² *Ante*, ch. xxxvi. §§ 338 *et seq.*

of the courts, as well as of executors and administrators, with the statutory requirements; ¹ very slight deviations therefrom, or negligence on the part of the court or its officers in making the record entries, have been held sufficient to avoid the sale, even in collateral proceedings. While it is manifestly the policy of the law to uphold judicial sales made without fraud, so as not to deter purchasers by encouraging the apprehension that their substantial rights and interests may be sacrificed to technical considerations, — while courts will go very far to insure protection to innocent purchasers in collateral proceedings, even in cases of gross error arising out of blunders or carelessness of probate courts or their officers, — it is obviously of the gravest importance that every step taken in subjecting the real estate to sale for the payment of debts be as nearly as possible in literal compliance with the method pointed out by the statute upon which the proceeding is based.² Where particular forms are pointed out for the execution of a power, however immaterial they may appear in themselves, these forms are conditions that cannot be dispensed with.³ It is a pernicious error, fruitful of trouble and mischief, to suppose that any vague, inartificial statement of circumstances is sufficient to authorize an order for the sale of real estate, if the applicant and the judge both know all about the matter; or that the good faith and honesty with which the application is made are a sufficient safeguard against ruinous complications and litigation that may follow an oversight or mistake. The anxiety of courts to vindicate the validity of judicial sales should not be relied on as a pretext for the carelessness of executors and administrators, or the supineness of probate courts, in the several steps necessary for the sale of real estate. Even if the sale should be [*1022] held good as against a collateral attack, — and it is distressingly uncertain to what extent the trial, and even appellate, courts will go in that direction, — yet many acts of commission or omission which will not be allowed to invalidate the transaction in a collateral investigation may in a direct proceeding subject the

¹ See as to the nature of probate courts, *ante*, ch. xv., and particularly §§ 145 *et seq.*; also on the law controlling probate sales of the real estate of minors which is in most respects applicable to the sale of real estate of deceased persons, Woerner on Guardianship, § 87.

² *Alabama Conference v. Price*, 42 Ala. 39, 49; *Kelley's Estate*, 1 Abb. New Cas. 102, 107; *Worthey v. Johnson*, 8 Ga. 236, 244; *Finch v. Edmonson*, 9 Tex. 504, 512, *et seq.*; *Frazier v. Steenrod*, 7 Iowa, 339, 346; *State v. Conover*, 9 N. J. L. 338;

Grass v. Howard, 52 Me. 192, 195; *Haywood v. Haywood*, 80 N. C. 42; *Monahan v. Vandyke*, 27 Ill. 154; *Gelstrop v. Moore*, 26 Miss. 206, 209; *Vance v. Maroney*, 4 Col. 47; *Ventress v. Smith*, 10 Pet. 161, 175; *Knox v. Jenks*, 7 Mass. 488, 492; *Matter of Mahoney*, 34 Hun, 501; *Lynch v. Hickey*, 13 Ill. App. 139, 144; *Wright v. Edwards*, 10 Oreg. 298; *Long v. Long*, 142 N. Y. 545.

³ *Wyman v. Campbell*, 6 Port. 219, 245, with many authorities.

administrator to serious liability, the estate to loss and delay, and all parties concerned to vexatious and oftentimes ruinous litigation. No part of an administrator's duty claims more careful attention, and demands more imperatively the advice and assistance of a competent professional man, than his relations to and duties concerning the real estate of the deceased.

The earlier legislative records of the several States abound in private or special acts authorizing the sale of real estate of deceased persons, as well as of minors and of persons of unsound mind, by executors, administrators, guardians, or other persons named in such acts without judicial authorization, direction, or control. Authorities divided on the validity of such sales;¹ but in consequence of the Fourteenth Amendment to the Constitution of the United States, and of amendments to many of the State constitutions prohibiting special legislation, such acts are now held unconstitutional.²

The power to order the sale of real estate to enforce the payment of a decedent's debts, if the personal estate is insufficient, is ascribed to chancery courts, and is generally exercised by them, upon the application of creditors, in those States in which such jurisdiction is not vested exclusively in probate courts.³ Thus it is held in Alabama, that, where a court of chancery obtains jurisdiction over an estate, it will complete the administration, and, if necessary, direct the sale of real estate in the same manner as prescribed by statute for sales under order of the probate court;⁴ and if a creditors' bill be brought in chancery, all creditors must be made parties,⁵ as well as the heirs and devisees.⁶ In South Carolina it was held that the executor or administrator must be made a party to a creditors' bill, and that the heir or devisee is not bound by a judgment against the executor or administrator.⁷ In Maryland the personal representative must ordinarily be made a party.⁸ In Wisconsin the application may be made to an

Power of chancery courts to order sale of real estate.

¹ The United States Supreme Court and the supreme courts of Alabama, Indiana, Kentucky, Missouri, and Vermont upheld such sales, while those of California, Tennessee, and Wisconsin, and for a time Indiana, held such acts to be unauthorized usurpations of judicial power. See also cases cited § 469, p. * 1038, n. 3; and a discussion with citation of authorities *pro* and *con* in 7 South. L. R. (N. S.), pp. 867-870.

² Johnson v. Branch, 9 S. D. 116, 122, and authorities. See also Woerner on Guardianship, § 69.

³ Waples v. Marsh, 19 Iowa, 381, 383; Buford v. McKee, 3 B. Mon. 224; Gaither v. Welch, 3 Gill & J. 259, 263; Frazier v. Pankey, 1 Swan, 75, 79; Tennent v. Pat-

tons, 6 Leigh, 196; Smythe v. Henry, 41 Fed. R. 705, 711; Allen v. Shanks, 90 Tenn. 359; Bloom v. Cate, 7 Lea, 471; Dean v. Central Press Co., 64 Ga. 670, 674.

⁴ Wilson v. Crook, 17 Ala. 59; Sharp v. Sharp, 76 Ala. 312, 317; Bragg v. Beers, 71 Ala. 151.

⁵ Sharp v. Sharp, *supra*; Scott v. Ware, 64 Ala. 174.

⁶ Scott v. Ware, *supra*.

⁷ Vernon v. Valk, 2 Hill Ch. 257, 260.

⁸ Macgill v. Hyatt, 80 Md. 253, holding that resort should be had to the probate court to sell the realty, save under exceptional circumstances.

equity court, but the insufficiency of the assets must be ascertained by the court having probate jurisdiction.¹

Where the statute provides that application shall be made to the probate court, that court has usually exclusive jurisdiction.² And in such case, if the real estate be situated without the county, yet the court of the county where the administration has been taken out is the proper court to make the order to sell.³

Since the authority of the court extends no further than its territorial jurisdiction, it results that a decree for the sale of real estate does not authorize the sale of land situate outside of the State.⁴

It has been held that an application to sell realty to pay debts is a suit within the Act of Congress providing for the removal of causes to the federal courts.⁵

An administrator's sale of real estate by order of the probate court, in those States which require the sale to be reported to the court for approval, is a judicial sale; * but a sale under a power in the will is not strictly a judicial sale.⁷

It has been heretofore mentioned that in the absence of express statutory provision the court has no authority to authorize a mortgage of the decedent's real estate to raise funds to pay debts.⁸

§ 464. **Who may apply for the Order to sell Real Estate.** — Application to chancery courts to order the real estate of a deceased person to be sold for the payment of his debts is, as above intimated, usually made by one or more of the * creditors, the executor or administrator and the devisees or heirs being made parties to the proceeding.⁹ But it is provided by statute in most of the States, that the application shall be made

Creditors, executors, or administrators may apply to chancery, where all having any interest must be made parties;

¹ *German Bank v. Leyser*, 50 Wis. 258, 265.

² See next section.

³ *Stock v. Royce*, 34 Neb. 833, 844; *Gordon v. Howell*, 35 Ark. 381 (both holding void an order to sell by a court in the county where the land lay); *Chaney v. Gray*, 7 Rob. (La.) 144, approved in *Alexander v. Bourdier*, 43 La. An. 321; *Walker v. Yowell*, 94 Ky. 205. In Pennsylvania, when the real estate is in a county other than that in which the administration is pending, it is provided that the orphan's court having jurisdiction of the account passes on the sufficiency of the personality and the propriety of the sale of the realty; the court of the county where the land lies has the power thereupon to make the

order of sale: *Spencer v. Jennings*, 123 Pa. St. 184, 192.

⁴ *Allen v. Shanks*, 90 Tenn. 359, 372.

⁵ This though the federal court could have no original jurisdiction: *Elliott v. Shuler*, 50 Fed. R. 454.

⁶ *Noland v. Barrett*, 122 Mo. 181, 189; *Maul v. Hellman*, 39 Neb. 322.

⁷ *In re Pearsons*, 102 Cal. 569, 574. But if such a sale under a power in a will must be reported to and approved by the court (as is the case in some States: see next section), it is then held to be a judicial sale: *Warehine v. Graff*, 83 Md. 98.

⁸ *Ante*, § 345, p. *731.

⁹ *Supra*, § 463.

by the executor or administrator to the probate court, whenever it appears that the personal assets are insufficient for the payment of the debts; and the power is in such case usually exclusively in the probate court.¹ An application by one who acts, but has not been legally qualified, as administrator, gives no jurisdiction to the court, and although such court order a sale and approve the same as made, such sale is void.² So of an administratrix after she has married.³ So a special administrator, appointed for the purpose of temporarily preserving the estate, has no authority to make such application;⁴ but he may be continued in the management and general charge of the estate, and will then, of course, be authorized to petition for such sale.⁵ In Texas, the petition must come from some person interested in the estate as creditor, heir, or legatee; a sale ordered upon the petition of the administrator alone is held void.⁶

but in most States the statutes give exclusive jurisdiction to probate courts. Sale on application of one having no authority is void.

When power to sell is conferred upon an executor by the will, it is not necessary to make application to the probate court, but he may sell under the will;⁷ and un-

Power of sale conferred by will.

¹ *Rambo v. Rumer*, 4 Del. Ch. 9, 13; *Appeal of Miskimins*, 114 Pa. St. 530; *Priest v. Spier*, 96 Mo. 111; *Lebanon Savings Bank v. Waterman*, 65 N. H. 88.

² *Pryor v. Downey*, 50 Cal. 388, 399; *Whitesides v. Barber*, 24 S. C. 373, 375.

³ *Rumph v. Truelove*, 66 Ga. 480.

⁴ Hence a sale made by him is simply void: *Long v. Burnett*, 13 Iowa, 28, 34.

⁵ *Reade v. Howe*, 39 Iowa, 553, 560.

⁶ *Miller v. Miller*, 10 Tex. 319, 333 (based upon the statute of January 16th, 1843).

⁷ *Ante*, §§ 339 *et seq.*; *Rollins v. Rice*, 59 N. H. 493; *Pennsylvania Co.'s Appeal*, 168 Pa. St. 431; *Bailey v. Rinker*, 146 Ind. 129, 133; *Davis v. Hoover*, 112 Ind. 423, 427; *Northrop v. Marquan*, 16 Oreg. 173, 187; the executor may sell for an honest debt owing to himself: *O'Flynn v. Powers*, 136 N. Y. 412, 423. In Iowa, when the executor sells in pursuance of a power in the will for the purpose of raising funds to pay debts, or mortgages the realty to raise such funds, if such power is lawfully conferred by the will, his vendee takes a good title, which cannot be divested by a subsequent order of the probate court to sell the realty in the statutory method to pay debts, on application of creditors of the estate: *Iowa L. & T. Company v. Holderbaum*, 86 Iowa, 1; see also

Matter of Bolton, 146 N. Y. 257. But if the executor, in the exercise of the testamentary power to pay debts, sells the realty in bad faith for less than its value, he is accountable for the difference: *Brown v. Reed*, 56 Ohio St. 264. In California, where the will creates a naked power, the executors, unless there are special directions in the will, must conduct the sale in all respects as if made under an order of court: *Perkins v. Gridley*, 50 Cal. 97; *Durham's Estate*, 49 Cal. 490, 495; and the title does not pass until the sale is confirmed by the court: *Bennalack v. Richards*, 116 Cal. 405; but this statute is inapplicable where the executor has not merely a power, but is devised the fee in trust: *Delaney's Estate*, 49 Cal. 76, 85; *In re Williams*, 92 Cal. 183. In Maryland, also, an executor selling under the will must have the sale ordered by the probate court (art. 93, § 276), unless the testator expressly gives the power of sale without application to the court: *Brooks v. Bergaer*, 83 Md. 352; and the sale must be confirmed by the Orphan's Court: Code, 1888, art. 93, § 282; but this statute does not apply to the executor of a non-resident testator: *Smith v. Montgomery*, 75 Md. 138; so, in Indiana, it is said that "even when real estate is specifically devised to be sold for the payment of debts, it is

der the statutory provisions in Alabama and New York it is held that where full power to sell for the payment of debts is given to the executor under the will the probate court has no jurisdiction to order the sale of lands.¹ Obviously this rule does not apply where the power of sale is discretionary and given for the sole benefit of the devisee; such a power cannot be converted into a power of sale to pay debts;² nor can a power of sale to pay debts be exercised after the debts are all paid, or barred by the Statute of Limitations;³ and where the power to sell exists, the rights of the devisees in the realty are not affected until the sale actually takes place.⁴ We have seen that in those States where the residuary legatee, who is also executor, may take the estate without further administration, upon giving bond to pay debts and legacies, he may sell the realty without an order of the probate court.⁵

In cases where two or more persons are qualified as executors or administrators, their powers and duties are frequently held to be joint, so that all of them must join in an application for an order to sell real estate; a license granted to one of several executors is irregular⁶ and invalid;⁷ * but cases are also found assert- [* 1024]

necessary to obtain an order of court for the sale, unless by the terms of the will a different course of proceeding is prescribed": *Duncan v. Gainer*, 108 Ind. 579, 584 (see, however, *Davis v. Hoover*, *supra*).

¹ *Wilson v. Holt*, 83 Ala. 528; and in New York, in permitting a creditor to compel the executor to execute a power of sale to pay debts, the court expresses the same opinion; "a power of sale to pay debts," says Maynard, J., in *Matter of Gantert*, 136 N. Y. 106, 110, "sufficient to defeat creditors' application under the statute, must be one the exercise of which is imperative; . . . the creditor cannot be deprived of his statutory remedy unless the debtor has, by his testamentary act, provided him with another which is equally prompt and effective in its operation;" and see s. c. in the lower court, 63 Hun, 280, and *Matter of Hervy*, 67 Hun, 13. That the mere charging of the testator's debts upon his realty will not confer a power upon the executor to sell is mentioned in connection with the charge of debts on realty: *post*, § 490.

² *In re McComb*, 117 N. Y. 378; but whether or not the power be for the payment of debts or only a general power to sell and receive the proceeds, if the execu-

tor in fact executes the power and sells, the realty is converted into personalty for the purposes of administration; before distributing to the residuary devisees the executor may pay the balance of the testator's debts, or reimburse himself for debts paid by him in excess of the personalty: *Matter of Bolton*, 146 N. Y. 257. In case of an imperative direction to sell, the purchaser under a testamentary power takes subject only to recorded liens; but where the direction to sell is discretionary, he must see to the application of the proceeds: *Seeds v. Burk*, 181 Pa. St. 281.

³ *Griffin v. Griffin*, 141 Ill. 373, 385.

⁴ *Pennsylvania Co.'s Appeal*, 168 Pa. St. 431, holding that the executor has no right to collect the rent.

⁵ *Ante*, § 202.

⁶ *Personette v. Johnson*, 40 N. J. Eq. 173, 175. See also *Stowe v. Banks*, 123 Mo. 672.

⁷ *Hannum v. Day*, 105 Mass. 33; *Cobb v. Kempton*, 154 Mass. 266, 270; *Gregory v. McPherson*, 13 Cal. 562, 578. In Missouri it is held that, where two executors qualify, one alone cannot exercise the power to both to sell: *Littleton v. Addington*, 59 Mo. 275, 278. Where the license is to two, both must concur in the sale: *Blythe v. Hoots*, 72 N. C. 575.

ing the contrary doctrine.¹ In Michigan, a sale by one administrator, against the refusal and protest of the other, which was otherwise regularly made and approved by the court, was held irregular and voidable, but not void or assailable collaterally.² In New Jersey, where the direction to sell was to two administrators, and the deed executed by only one, the heirs were enjoined in equity from prosecuting in ejectment to recover the land on the ground of the irregularity.³ In Tennessee, where one of two executors refused to join in a sale, the court ordered him to join in the deed;⁴ but in Massachusetts it was intimated that the only remedy against the executor refusing is to procure his removal by the probate court.⁵ This subject has already been considered in connection with the power of co-executors,⁶ and of several donees of power to sell real estate.⁷

It is obvious, that, where the administrator can allege no statutory ground upon which an order to sell real estate can be based, the joinder in the petition by the guardian of a minor heir will not help the validity of the sale.⁸

A creditor is not compelled to look to a devisee whose devise is charged with the payment of the debt; the administrator may, in such case, if the personalty is insufficient, obtain leave to sell the real estate.⁹ And so an administrator may be compelled to make the application.¹⁰

Administrator may obtain order to sell, although payment of the debt is charged upon a devisee.

§ 465. **Within what Time Application may be made.**—The necessity for a prompt and speedy settlement of the administration of the estates of deceased persons, in order that creditors may be satisfied and devisees and heirs be put in the indisputable possession of their inheritance as early as a just regard for the rights of creditors will permit, requires a limitation upon the time when either creditors or executors and administrators may apply [*1025] *for the subjection of real estate to the payment of debts.

It is admitted by all the authorities that, in the absence of statutory regulation of the subject, it is the duty of courts to determine what shall be considered a reasonable time in this respect, and to refuse the application if the parties who demand it have been guilty of palpable *laches*. Courts have found this duty

In the absence of statutes it is the duty of courts to determine whether the application is in time to sustain an order.

¹ Jackson v. Robinson, 4 Wend. 436, 441; see dissenting opinion of Wells, J., in Hannum v. Day, *supra*; Melms v. Pfister, 59 Wis. 186, 196.

² Osman v. Traphagen, 23 Mich. 80, 86.

³ Wortman v. Skinner, 12 N. J. Eq. 358. See also Corley v. Anderson, 5 Tex. Civ. App. 213.

⁴ Love v. Love, 3 Hayw. 13.

⁵ Southwick v. Morrell, 121 Mass. 520.

⁶ *Ante*, § 346; and as to the necessity of all joining in the deed under a sale by several, see *post*, end of § 480.

⁷ *Ante*, § 339.

⁸ Newcomb v. Smith, 5 Ohio, 447.

⁹ Bennett v. Gaddis, 79 Ind. 347.

¹⁰ Wilson v. Bynum, 92 N. C. 717, 724; Clement v. Cozurt, 109 N. C. 173.

No precise rule has been laid down.

not without difficulty,¹ and no precise rule to be inflexibly followed has been anywhere laid down. Chancellor

Kent suggested one year after the executor or administrator entered upon the duties of his office as a reasonable limit to the time, but was careful to add, "unless under peculiar circumstances, and with some reasonable cause for delay."²

Rule suggested by Judge Story,

Justice Story, upon mature consideration of this question, reached the conclusion that the Statute of Limitation

furnished an analogy which might be safely followed, and accordingly held that no application should be entertained to subject

based upon analogy of the Statute of Limitation, followed in several States.

real estate to the payment of debts after the period which would bar the right of entry on lands.³ The analogy of the Statute of Limitation is followed in many of the American States; so held in Arkan-

sas,⁴ Connecticut,⁵ Illinois,⁶ * Indiana,⁷ Iowa,⁸ [* 1026]

¹ Killough v. Hinton, 54 Ark. 65, 68. "Reflection and experience both," says Ewing, C. J., in Liddel v. McVickar, 11 N. J. L. 44, 56, "teach the extreme difficulty of prescribing any fixed rule which would in general operate safely and justly. The lesson is more impressively taught by the very wide conclusions to which enlightened courts have been led. The time, reasonable according to the situation of one estate, would in another be very unreasonable." Quoted with approbation by Lawrence, J., in Rosenthal v. Renick, 44 Ill. 202, 205.

² Mooers v. White, 6 John. Ch. 360, 378. "All I mean at present to say is, that the judge of probate or surrogate must be entitled to determine, in sound discretion, what is a reasonable time under the circumstances of the case, and to determine when the executor did first discover, or had any ground to suspect, the insufficiency of the personal estate; and whether, *as soon as conveniently might have been*, he made out an account, and filed an inventory, and applied the assets according to the requirements of the statute": Ib. 376.

³ In the thoroughly considered case of Ricard v. Williams, 7 Wheat. 59, 115 *et seq.*, argued on the one side by Pinkney, and on the other by Ogden and Webster. He cited, as holding a similar doctrine, Gore v. Brazier, 3 Mass. 523, 542; Wyman v. Brigden, 4 Mass. 150, 155; and Summer v. Child, 2 Conn. 607.

⁴ Roth v. Holland, 56 Ark. 633, 638, adopting the seven years' statute, without determining, however, whether the analogy of some shorter statute would not apply.

⁵ Summer v. Child, *supra*.

⁶ McCoy v. Morrow, 18 Ill. 519, 523; Wolf v. Ogden, 66 Ill. 224 (adopting the seven years' statute for the recovery of lands); in Dorman v. Lane, 6 Ill. 143, 148, the court held that no application would be granted after the expiration of one year after final settlement of the estate in the probate court. See also Moore v. Ellsworth, 51 Ill. 308, 310; Bursen v. Goodspeed, 60 Ill. 277; Dubois v. McLean, 4 McLean, 486, 489; Reed v. Colby, 89 Ill. 104, 107.

⁷ Nettleton v. Dixon, 2 Ind. 446; Scherer v. Ingberman, 110 Ind. 428 (fifteen years' statute). The statute does not begin to run until the administrator discovers the insufficiency of the personal estate and the necessity of sale to make assets: Falley v. Gribbling, 128 Ind. 110, 117.

⁸ McCrary v. Tasker, 41 Iowa, 255, 260; Waters v. Crossen, 41 Iowa, 261. In Iowa it is held that application should be made within eighteen months from the time the executor gives notice of his appointment: McCrary v. Tasker, 41 Iowa, 255, 260; but that there may be excuse for delay beyond that period: Conger v. Cook, 56 Iowa, 117, 119; Creswell v. Slack, 68 Iowa, 110, 115; Schlarb v. Holdersbaum, 80 Iowa, 394.

Maine,¹ Massachusetts,² Michigan,³ Mississippi,⁴ and New Hampshire.⁵

The Statute of Limitation applied in some of these States is the special statute in favor of executors and administrators, or Statute of Non-claim,⁶ requiring claims against the estates of deceased persons to be established within a certain time, after which they are forever barred. The principle underlying these statutes seems to include the liability of real estate for the satisfaction of these claims, and to suggest a simple and efficient rule, securing justice alike to the creditor, who has no one but himself to blame if he fails to subject the real estate of his deceased debtor to the payment of his demand within the allotted time; and to the heir and devisee, who may then, upon the expiration of such time, enter upon the enjoyment of their inheritance, and be enabled to improve it without the hazard of losing the value of their improvements as well as the land, or to sell it at a price not diminished by the cloud upon its title raised by the possibility of defeasance by a creditor of his ancestor.⁷ The statutes of non-claim express the object of all modern legislation on the subject of administration, that the period within which the property of a deceased person is withheld from those to whom it eventually devolves shall be as brief as is compatible with the rights of creditors; or, as it is usually expressed, that estates shall be finally settled as speedily as possible. To this end probate courts are vested with the necessary jurisdiction to satisfy creditors, who are allowed a limited time within which to establish their claims; and if the creditor neglects to avail himself of this opportunity, his [*1027] claim should be *barred, not only against the executor or administrator, but against heirs and devisees likewise, since real estate is, in every American State, assets which the executor or administrator is bound to apply to the payment of debts.⁸ It results from this, that no application should be entertained to

On the basis of the special limitation in favor of executors and administrators.

¹ *Smith v. Dutton*, 16 Me. 308, 312; *Nowell v. Nowell*, 8 Me. 220. 'Two years' delay is not too long: *Lebroke v. Daman*, 89 Me. 113.

² *Ex parte Allen*, 15 Mass. 57; *Heath v. Wells*, 5 Pick. 140, 143; *Palmer v. Palmer*, 13 Gray, 326; *Tarbell v. Parker*, 106 Mass. 347; *Edmunds v. Rockwell*, 125 Mass. 363.

³ *Estate of Godfrey*, 4 Mich. 308, 312.

⁴ *Ferguson v. Scott*, 49 Miss. 500, 503. Under the Code of 1880 a creditor cannot, it is held, compel the sale of land by presenting his claim when the personalty is exhausted, if he fails to register his claim within the year: *Ales v. Plant*, 61 Miss.

259. But "as long as there is a valid and subsisting debt due from the estate, no one claiming as heir or doweress of the decedent can successfully object to an order to sell the land or decree the estate insolvent on the mere lapse of time": *Yandell v. Pugh*, 53 Miss. 295, 301.

⁵ *Hall v. Woodman*, 49 N. H. 295, 304.

⁶ See *ante*, § 400, as to these limitations.

⁷ *Ferguson v. Scott*, 49 Miss. 500, 503; *Mays v. Rogers*, 37 Ark. 155, 159.

⁸ *Titterington v. Hooker*, 58 Mo. 593, 596; *Pearce v. Calhoun*, 59 Mo. 271, 274; *Public Works v. Columbia College*, 17 Wall. 521, 530.

sell real estate for the satisfaction of a debt, which the creditor has neglected or failed to establish within the time fixed by the Statute of Non-claim.

If debts have been established and constitute judgments against the estate or its representative, it should be the business of the representative to apply for the sale of the real estate as soon as he ascertains that the personal assets are insufficient for their payment; and if he neglects to do so, the creditor may compel him, or the heir, or even the court *ex mero motu*; ¹ and he cannot obtain his discharge, or finally settle the estate, until he shows, either that he has paid all debts established, or exhausted all assets, including real estate. Consequently, there is no necessity or propriety in allowing real estate to be sold to pay debts (not accruing or maturing after the debtor's death), after final settlement has been made, or the executor or administrator has been discharged upon due notice given or published as required by statute.

This seems to be, substantially, the view taken in the States above mentioned.² But in most of the cases cited the courts intimate that particular circumstances would prevent the application of such a

Adjudications indicating what is a reasonable time, or not, within which an order to sell may be granted.

rule. So, where there was no final settlement of the estate, nor discharge of the executor or administrator, it was held that, while a delay of seven years, if unexplained, is a sufficient reason for refusing the order,³ yet nine years, where pending litigation rendered it

impossible sooner to determine whether a sale of real estate would be necessary,⁴ or thirteen years, and in another case twenty years,⁵ where the creditors themselves and the court and administrator believed that the interest of all parties would be subserved by postponing the sale, * would not. And [* 1028] the party who causes the delay, cannot, it seems, raise that objection to defeat the sale;⁶ and if he is one of several heirs his undivided interest may be sold without subjecting the shares of the

¹ At least in Missouri: Rev. St. 1889, § 169; *Grayson v. Weddle*, 63 Mo. 523. But where the sale would be made under disadvantageous circumstances, as because of disputed title to the property, it may be proper to stay proceedings until this ground be removed: see § 467; so where by the will the debts are charged on land devised, the court should not proceed under this provision to sell so long as the will is contested, if no creditors are injured by the delay: *Smith's Estate*, 177 Pa. St. 17.

² See also *Pratt v. Houghtaling*, 45 Mich. 457, applying the analogy of the Statute of Non-claim in favor of, as

well as against, the right to sell the real estate.

³ *Per* Lawrence, J., in *Moore v. Ellsworth*, 51 Ill. 308, 310; *McKean v. Vick*, 108 Ill. 373, 375; *Furlong v. Riley*, 103 Ill. 628.

⁴ *Moore v. Ellsworth*, *supra*. See also *Brogan v. Brogan*, 63 Ark. 405, 411.

⁵ *Burson v. Goodspeed*, 60 Ill. 277, 281; *Killough v. Hinton*, 45 Ark. 65, 69. The delay in these cases arose because the lands were subject to dower and homestead, the application in each case being made soon after the widow's death.

⁶ *Beniteau's Estate*, 88 Mich. 152.

other heirs to sale.¹ In Michigan the order to sell real estate is held not to be invalidated by a delay of five years after grant of letters, if the probate court has retained jurisdiction over the estate.² In New Hampshire a delay of seven years,³ in Pennsylvania,⁴ Minnesota,⁵ and Arkansas of ten,⁶ and in South Carolina,⁷ Massachusetts,⁸ and California⁹ of seventeen, and in another case of thirteen¹⁰ years, has been held sufficient to authorize the rejection of an application. In Arkansas a delay in taking out letters of administration has the same effect to defeat the power to sell as if the delay had been in applying for leave after the appointment.¹¹ In Missouri claims not presented within two years are barred by the special statute, not only as against the estate in the hands of the executor or administrator in the probate court, but also as against the heirs in equity;¹² but where the claim has been allowed, and the personalty is insufficient to pay it, application must be made in a reasonable time for the sale of the real estate; in the absence of peculiar conditions¹³ a delay of twelve or thirteen years is inexcusable and a court of equity will enjoin the sale if ordered by the probate court.¹⁴ In Rhode Island, the probate court may order the sale of real estate at any time while it remains in the hands of the heirs.¹⁵ The statute of New Jersey authorizes the sale of real estate by order of the probate court at any time within one year;¹⁶ if made subsequently, the sale will vest in the purchaser such estate only as the heir or devisee was seised of at the time of making the order.¹⁷ In New York, the statute bars application to the surrogate after the expiration of three years from the grant of letters,¹⁸ not including the time during which

¹ *Brogan v. Brogan*, 63 Ark. 405 (in this case the heir whose share was sold was also administrator).

² *Pratt v. Houghtaling*, 45 Mich. 457, 459.

³ *Hatch v. Kelly*, 63 N. H. 29.

⁴ *Allen v. Krips*, 125 Pa. St. 504.

⁵ *State v. Probate Court*, 40 Minn. 296.

⁶ *Mays v. Rogers*, 37 Ark. 155, 160; *Brown v. Hanauer*, 48 Ark. 277, 282.

⁷ *Gregory v. Rhoden*, 24 S. C. 90.

⁸ In a case where the evidence was not preserved the court refused to declare that as a matter of law seventeen years is too late: *Abbott v. Downs*, 168 Mass. 481.

⁹ *Estate of Crosby*, 55 Cal. 574. It was suggested in this case, but not decided, that the statutory limitation to "a special proceeding of a civil nature" was applicable: p. 587. The probate court has discretionary power to deny the petition in case of unreasonable delay: *In re Arguello*, 85 Cal. 151.

¹⁰ *Wingenter v. Wingenter*, 71 Cal. 105.

¹¹ *Roth v. Holland*, 56 Ark. 633, 636.

¹² *Titterington v. Hooker*, 58 Mo. 593.

¹³ As, for instance, where there are several changes in the administration, and delay is due to pending litigation to remove a cloud from decedent's title to the realty: *Macey v. Stark*, 116 Mo. 481, 498; or where the court and the administrator deem it advisable to await an intervening homestead interest: *Barlow v. Clark*, 67 Mo. App. 340 (where there was a delay of nearly eighteen years).

¹⁴ *Gunby v. Brown*, 86 Mo. 253, 257, *et seq.* It is to be remembered that the sale, when authorized by the probate court, cannot be collaterally attacked on the ground that there was too great a delay: *Howell v. Jump*, 140 Mo. 441.

¹⁵ *Mowry v. Robinson*, 12 R. I. 152.

¹⁶ *Rev. St. 1877*, p. 766, § 70.

¹⁷ *Bockover v. Ayres*, 22 N. J. Eq. 13.

¹⁸ *Slocum v. English*, 62 N. Y. 494, 497; *Platt v. Platt*, 105 N. Y. 488, 497. See also *O'Flynn v. Powers*, 136 N. Y. 412.

an action is pending against the estate in a court of record, if the creditor files notice of *lis pendens*;¹ thereafter the creditor must proceed against the heir or devisee, and if the land has not been aliened the debt may be collected out of it, and the judgment as a lien has priority over a judgment against the heir or devisee for his individual debt, but the right of a purchaser in good faith is explicitly saved and protected, although he claims under the heir or devisee;² and no real estate of a deceased person, the title to which has passed out of the heir or devisee by conveyance or otherwise to a purchaser in good faith for value, can be sold to pay debts, if administration has not been applied for within four years after his death.³ In Pennsylvania, debts of a deceased person continue to be liens against his real estate for five (now two) years after his death, except as to mortgages or judgments, which are not thus limited; and if not enforced in that time, the real estate vests * absolutely in the heirs.⁴ In Minnesota, it was held, — [* 1029] under a statute which has since been repealed,⁵ providing that debts shall not continue to be a lien against the estate of a deceased person after the lapse of three years, unless the lien had attached during his lifetime,⁶ — that no real estate can be sold after three years from the debtor's death for the payment of debts not a lien before.⁷ It is now held that an application, unless clear and satisfactory reasons appear, should not be granted after the expiration of ten years.⁸ In Wisconsin, under a statute similar to the Minnesota statute referred to, there can be no application in

¹ Matter of Bingham, 128 N. Y. 296, 307.

² Cunningham v. Parker, 146 N. Y. 29, 31. The subject of the liability of the devisee or heir for the ancestor's debt after final settlement of the estate is fully discussed in later sections; see *post*, §§ 577, 578.

³ Parkinson v. Jacobson, 18 Hun, 353, 354.

⁴ Emerick's Estate, 172 Pa. St. 191, 194. And a previous order of sale made within that time does not extend the lien as to realty not sold under the prior order: Bindley's Appeal, 69 Pa. St. 295, 298. But obviously an application made within the limit is sufficient, though the entering of the decree be delayed until after the period allowed has expired: Hook v. McCune, 184 Pa. St. 292. Where the creditor takes none of the means pointed out by the statute to preserve his lien against the realty for his debt, he must lose his claim, even though it be in favor of the administrator by reason of his having paid

off debts against the estate: Markel's Estate, 154 Pa. St. 285. It has even been held (by a bare majority, however) that a sale by the Orphan's Court made after the expiration of the time limited for the lien is void for the lack of jurisdiction, although the application did not show on its face the lack of jurisdiction: Smith v. Wildman, 178 Pa. St. 245, three judges dissenting in a vigorous opinion delivered by Chief Justice Sterritt. This statutory limitation does not apply to the lien of a judgment obtained against the decedent in his lifetime, which is without limit as against the heirs and devisees: Colenburg v. Venter, 173 Pa. St. 113.

⁵ Gen. L. Minn. 1885, p. 32, ch. 19, § 1, approved March 5, 1885.

⁶ Gen. Stat. Minn. 1878, p. 565, § 3, pl. 10.

⁷ *In re Ackermann*, 33 Minn. 54; see also *Gates v. Shugrue*, 35 Minn. 392; *Culver v. Hardenbergh*, 37 Minn. 225.

⁸ *State v. Probate Court*, 40 Minn. 296.

the probate court after the lapse of three years, for the sale of the realty.¹ In North Carolina, an administrator cannot sell lands, to pay debts, which the devisee has sold more than two years after the grant of letters, nor such as were sold by the devisee within that time and after the expiration of the two years sold by his vendee to a purchaser for value, without notice.² In Tennessee the creditor must proceed within seven years from the time of the final adjudication of his claim against the estate.³

§ 466. **Notice of the Application to Heirs and Devisees.**—Since the executor or administrator does not, in most of the States,⁴ represent the devisee or heir in the matter of paying the debts of the deceased, holding for that purpose the personalty, which is the primary fund out of which they must be paid, he assumes a relation rather antagonistic to the heirs whenever he seeks to subject the real estate, which has descended not to him, but to them, to sale for the payment of debts.⁵ It follows, that a judgment against him in favor of creditors, although binding upon the personalty, is not necessarily binding upon the heirs to the extent of subjecting the real estate descended to them for the satisfaction of such judgment,⁶ although it may be of *prima facie* validity.⁷ Hence, before there

Judgment against an executor or administrator does not bind the heir or devisee in respect of the real estate.

¹ *Fisk v. Jennewein*, 75 Wis. 254, holding, however, that the creditor had his remedy in equity against the heirs.

² *Murchison v. Whitted*, 87 N. C. 465; *Davis v. Perry*, 96 N. C. 260.

³ *Carrigan v. Rowell*, 96 Tenn. 185.

⁴ See *ante*, § 337, as to the States in which the real estate passes through the custody of the executor or administrator before it descends to the heir.

⁵ *Anderson v. Levy*, 33 Ark. 665, 676; *Jenkins v. Young*, 35 Hun, 569, 572; *Chandler v. Wynn*, 85 Ala. 301, 309.

⁶ *Nichols v. Day*, 32 N. H. 133; *Jackson v. Weaver*, 98 Ind. 307, and many Indiana cases cited, p. 308; *First Baptist Church v. Lyons*, 51 N. J. Eq. 363; *In re Haxtun*, 102 N. Y. 157, 159. In the absence of a statute to that effect, even its *prima facie* validity is denied in the following cases: *Staples v. Staples*, 85 Va. 76; *Hunt v. Russ*, 7 Mackey (D. C.), 527; *Sadler v. Kennedy*, 26 W. Va. 636; so in New York, except where the judgment is recovered on the merits: *O'Flynn v. Powers*, 136 N. Y. 412, 419; *Long v. Long*, 142 N. Y. 545, 552.

⁷ *Willett v. Malli*, 65 Iowa, 675; *Hopkins v. Stout*, 6 Bush, 375; *Stevenson v. Flournoy*, 89 Ky. 561; *Stone v. Wood*, 16

Ill. 177, 180; *Mason v. Bair*, 33 Ill. 194, 206; *McGarvey v. Darnall*, 134 Ill. 367; *Steele v. Lionberger*, 59 Pa. St. 308, 313; *Paul v. Grimm*, 183 Pa. St. 330; *Hoffman v. Wheellock*, 62 Wis. 434, 438; *Goertner v. Leitzelmann*, 98 Ill. 409; *Scherer v. Ingberman*, 110 Ind. 428, 438; *Woolridge v. Page*, 1 Lea, 135, 137. Hence the allowance of the claim against the executor or administrator does not have the effect of creating a technical lien on the land as against the heir: *Noe v. Moutray*, 170 Ill. 169; *Scott v. Whitehill*, 1 Mo. 764; even if the executor is the devisee: *Mott v. Newark*, 55 N. J. Eq. 722. But if the heirs appear and contest the claim with the administrator against the creditor, such adjudication is conclusive against such heir: *post*, § 467, on p. *1033, note. It is also to be observed that in Missouri and North Carolina a judgment against the administrator is held to be conclusive against the heir or devisee also, as to the realty as well as the personalty, unless the heir can show collusion or fraud: *Moody v. Peyton*, 135 Mo. 482; *Proctor v. Proctor*, 105 N. C. 222. (But see *Brace, P. J.*, in *Clark v. Bettelheim*, 144 Mo. 258, 271). See also *Tate v. Norton*, 94 U. S. 746, on p. 751, where

An order to sell real estate is therefore void unless there has been notice to the heir or devisee.

can be a valid order divesting them of their title by a sale for the payment of debts, they must have an opportunity to be heard, and to contest not only the necessity or propriety of the sale, but also the justice * and validity of the debts for the payment of [* 1030] which the sale is demanded. There can be,

therefore, no valid order, decree, or license for the sale of real estate to pay debts without notice to the parties interested, in some form, either by actual personal service or by publication.¹ A difference is suggested as to the theory in requiring notice of the application for an order to sell the real estate of a decedent for the payment of his debts, and for the sale of the real estate of a minor, which it

Even where the sale is held to be a proceeding *in rem*.

may be profitable to bear in mind.² Even where, as is held in many States,³ the proceeding is *in rem*, binding upon all parties claiming under the decedent without special notice to them, analogous to the doctrine applied in admiralty with respect to prize property, or in common-law courts to property seized under attachment, there must be notice, corresponding to the

The purchaser may be protected, but the administrator liable.

monition in admiralty, to all the world. And in such case, although the purchaser may be protected in such States if he has acted in good faith,⁴ the administrator himself is liable to an heir who had no notice, if the

sale was unwarranted.

the court suggest that in Arkansas the allowance of the claim has the effect of a judgment, both as against the administrator and the heirs.

¹ Sample v. Barr, 25 Pa. St. 457, 459; Bienvenu v. Parker, 30 La. An. 160; Ferguson v. Scott, 49 Miss. 500, 505, *et seq.*; Dorrance v. Raynsford, 67 Conn. 1; Hopkins v. Van Valkenburgh, 16 Hun, 3, 4, *et seq.*; Colson v. Brainard, 1 Redf. 324, 327; Wilson v. White, 109 N. Y. 59, 61. One who appears and takes part in the proceedings becomes a party: Matter of Bingham, 128 N. Y. 296, 306. But a creditor of an heir who buys in the heir's interest at an execution sale is not entitled to notice, though he may intervene in a proceeding by the administrator to sell the realty to pay decedent's debts: Nichols v. Lee, 16 Col. 147. Where notice had been given to an heir who died before the sale, and no further notice was given to the heirs of such heir to whom a share of the realty descended, it was held that the validity of the sale could not be attacked on that ground in a collateral proceeding: Palmerton v. Hoop, 131 Ind. 23. Where

personal service is not required the publication need not generally set forth the names of the heirs, but will be sufficient if directed to "all persons in interest": Stack v. Royce, 34 Neb. 833; Hobson v. Evan, 62 Ill. 146; Furth v. U. S. M. Co., 13 Wash. 73; an heir who has conveyed his interest is not a necessary party: Platt v. Brickley, 119 Ind. 333.

² Woerner on Guardianship, § 73.

³ As to the question whether the sale of real estate of a decedent to pay his debts is a proceeding *in rem*, see *ante*, § 148, where the subject is discussed in connection with proceedings in the probate court.

⁴ Rorer on Jud. Sales, § 253; McPherson v. Cunliff, 11 S. & R. 422, 430, *et seq.*; Grignon's Lessee v. Astor, 2 How. (U. S.) 319, 338; King v. Kent, 29 Ala. 542, 549; Garrett v. Bruner, 59 Ala. 513, 515; Lyons v. Hamner, 84 Ala. 197; Lynch v. Baxter, 4 Tex. 431, 437; Robb v. Irwin, 15 Oh. 689, 698; Beauregard v. New Orleans, 18 How. (U. S.) 497, 503; Apel v. Kelsey, 47 Ark. 413, 418. And see also the cases in the notes referring to the law in the individual States below cited.

Notice is held necessary in Alabama,¹ Arkansas,² California,³ Connecticut,⁴ Florida,⁵ Georgia,⁶ Illinois,⁷ Indiana,⁸ Iowa,⁹ Kansas,¹⁰ Louisiana,¹¹ * Massachusetts,¹² Minnesota,¹³ Mississippi,¹⁴ Missouri,¹⁵ New Hampshire,¹⁶ New Jersey,¹⁷ New York,¹⁸ North Carolina,¹⁹ Ohio,²⁰

Decisions holding notice necessary.

¹ *Williams v. Williams*, 49 Ala. 439; *Spragins v. Taylor*, 48 Ala. 520. See *Lyons v. Hamner*, *supra*.

² *Rogers v. Wilson*, 13 Ark. 507, 509. But the sale is not void when confirmed: *Apel v. Kelsey*, 52 Ark. 341.

³ *Burris v. Kennedy*, 108 Cal. 331; *Townsend v. Tallant*, 33 Cal. 45, 51.

⁴ A sale without notice is void; *Dorance v. Raynsford*, 67 Conn. 1.

⁵ *Price v. Winter*, 15 Fla. 66, 104 (but appearance, even of a minor by his guardian, is sufficient).

⁶ *Davy v. McDaniel*, 47 Ga. 195, 206; *Davis v. Howard*, 56 Ga. 430, 433.

⁷ *Marshall v. Rose*, 86 Ill. 374; *Harding v. Le Moyne*, 114 Ill. 65, 72. Sale without notice to the heirs is void, and the heirs may attack it collaterally: *Burr v. Bloemer*, 174 Ill. 638. It was held in Illinois, that where the return of the officer as to service of the notice contradicts the finding of the court, the want of service appearing from the return will overcome the presumption arising from the finding, and prove want of jurisdiction even in a collateral proceeding: *Barnett v. Wolf*, 70 Ill. 76. Also, that it is proper for the heir to join with the administrator in the petition, although they are not in privity, because the heir, who is not bound by the admissions of the administrator, may thus bind himself: *Hopkins v. McCann*, 19 Ill. 113. Where a posthumous heir was born, although in another State and unknown to the parties in Illinois, and who was for that reason not made a party in chancery to enforce a creditor's lien against the estate, a sale under such proceedings was held void as to the posthumous heir: *McConnel v. Smith*, 39 Ill. 279, 288.

⁸ *Doe v. Anderson*, 5 Ind. 33, holding that an infant cannot waive service, even by a guardian; *Helms v. Love*, 41 Ind. 270; *Martin v. Neal*, 125 Ind. 547, 553, holding the rule that notice must be given applicable to the mortgaging or leasing of the realty; *Clark v. Hillis*, 134 Ind. 421, in which the court says: "If the record were

silent on the subject of notice to those who were parties to the proceeding, it would be presumed that such notice had been given," citing earlier cases.

⁹ *Good v. Norley*, 28 Iowa, 188; *Thorn-ton v. Mulquinne*, 12 Iowa, 549. Want of notice cannot, it seems, be raised collaterally: *Spurgeon v. Bowers*, 82 Iowa, 187.

¹⁰ *Johnson v. Clark*, 18 Kans. 157, 168; *Mickel v. Hicks*, 19 Kans. 578; *Fleming v. Bale*, 23 Kans. 88.

¹¹ *Gibson v. Foster*, 2 La. An. 503, 508, holding a sale void where an attorney was appointed to represent an absent heir; *Wright v. Steed*, 10 La. An. 238; *Tertrou v. Comeau*, 28 La. An. 633.

¹² *Norton v. Norton*, 5 Cush. 524.

¹³ *Spencer v. Sheehan*, 19 Minn. 338, 343.

¹⁴ *Yerger v. Ferguson*, 55 Miss. 190; *Winston v. McLendon*, 43 Miss. 254, 257.

¹⁵ *Vallé v. Fleming*, 19 Mo. 454, 461; *Cunningham v. Anderson*, 107 Mo. 371 (holding that on appeal from the probate court, the circuit court could not order a sale if the probate court had no jurisdiction to make such order); *Young v. Downey*, 145 Mo. 250; *Hutchinson v. Shelley*, 133 Mo. 400 (holding that no subsequent notice of sale, report or approval of sale, could save this incurable defect). But in this State the probate court may of its own motion order the sale of real estate to pay debts: Rev. St. § 170; and in such case no notice to the heirs has been held necessary: *Patee v. Mowry*, 59 Mo. 161, 164; *Teverbaugh v. Hawkins*, 82 Mo. 180, 183; *Day v. Graham*, 97 Mo. 398. See *infra*, note 6.

¹⁶ *French v. Hoyt*, 6 N. H. 370; *Merrill v. Harris*, 26 N. H. 142, 147.

¹⁷ *McDonald v. Hutton*, 8 N. J. Eq. 473.

¹⁸ *Farrington v. King*, 1 Bradf. 182; *Corwin v. Merritt*, 3 Barb. 341; *Havens v. Sherman*, 42 Barb. 636, 639; *Jenkins v. Young*, 35 Hun, 569; *Wilson v. White*, 109 N. Y. 59.

¹⁹ *Harrison v. Harrison*, 106 N. C. 282, holding the proceedings absolutely void for want of notice.

²⁰ *Calkins v. Johnston*, 20 Oh. St. 539,

Oregon,¹ Pennsylvania;² Tennessee,³ Texas,⁴ and Wisconsin.⁵ In Missouri, where the probate court may of its own motion order the sale of real estate, if on any annual settlement it appear that the personal assets are not sufficient to pay the debts, no notice to the heirs is held necessary to the validity of such order.⁶ Where the notice is by publication, given by the administrator, this notice may be availed of by his successor in the same estate.⁷ In Louisiana the sale may be ordered on the application of creditors without notice to the heirs,⁸ other than the notice requiring them to show cause why creditors should not be paid;⁹ but there can be no sale without notice to the administrator.¹⁰

§ 467. **Who may appear, and what may be shown against the Application.**—The office of the notice is to give to the heirs, devisees, and others interested in the real estate, a [*1032] full opportunity to be heard, and to offer evidence in re-

spect of the justice or policy of ordering the sale. Hence the hearing must be at the time or term which is specified in the notice, whether given by actual service upon the parties, or by publication; if the application is not passed upon or continued at such time, the order, if granted at any other time, will be held void as being without notice.¹¹ If no particular day is required to be named by the statute,

547. But if minor children, although not named in the petition, have an appearance actually entered for them in court, pending the application by their guardian, they are bound by the order of sale: *Ewing v. Higby*, 7 Oh., pt. 1, p. 198; *Ewing v. Hollister*, 7 Oh., p. 2, p. 138.

¹ *Fiske v. Kellogg*, 3 Oreg. 503.

² *Dean's Appeal*, 87 Pa. St. 24; *Sager v. Mead*, 164 Pa. St. 125.

³ *Trafford v. Young*, 3 Tenn. Ch. 496; *Taylor v. Walker*, 1 Heisk. 734; *Ridgely v. Bennett*, 13 Lea, 210, 217.

⁴ *Finch v. Edmonson*, 9 Tex. 504, 513. This case is questioned by later decisions: *Lyne v. Landford*, 82 Tex. 58, 64, holding a sale without notice not assailable collaterally; *Heath v. Layne*, 62 Tex. 686, 692. It is held in this case, that the doctrine is firmly established in Texas, that orders to sell real estate without notice to the heirs are not void, but irregular and voidable, relying on *George v. Watson*, 19 Tex. 354, 369, in which the doctrine of *Grignon v. Astor*, 2 How. 319, is asserted, according to which the purchaser is not bound to look beyond the decree of a court having jurisdiction.

⁵ *Gibbs v. Shaw*, 17 Wis. 197, 201; *Blodgett v. Hitt*, 29 Wis. 169, 176.

⁶ *Patee v. Mowry*, 59 Mo. 161, 164.

The reason given by Judge Wagner in stating the opinion of the court is, that such an order can only be made "upon the settlement of the accounts of any executor or administrator," which, the court say "is made at a time prescribed by law, and when everybody is legally notified of that fact." It is to be observed, however, that in Missouri annual "settlements" are held to be *ex parte* proceedings, conclusive of nothing, binding on no one; and for that reason an order of sale of the heir's or devisee's real estate without notice to him seems really an *ex parte* adjudication of his rights. See *supra*, note 15, for additional authorities.

⁷ *Rogers v. Johnson*, 125 Mo. 202, 215.

⁸ *Dubuch v. Wildermuth*, 3 La. An. 407.

⁹ *Carte v. McManus*, 15 La. An. 676.

¹⁰ *Succession of Spears*, 28 La. An. 804; and Louisiana cases, *supra*.

¹¹ *Turney v. Turney*, 24 Ill. 625; *Morris v. Hogle*, 37 Ill. 150, 154; *Foley v. McDonald*, 46 Miss. 238, 244; *Hendricks v. Pugh*, 57 Miss. 157, 161.

the application may be heard at any time during the term for which the notice has been given.¹ The naming of the first day of the term does not confine the right to be heard to that day; if the person served with the notice be present in court on that day, he may take a rule on the other party to proceed, or have the proceeding dismissed, otherwise the application may be made at any time during the term;² but if not presented until a succeeding term, the order would be void, unless regularly continued to such term, and a continuance from one term to another cannot be shown except by the record of the court.³

The heirs, devisees, or any other person interested in the real estate to be affected by an order of sale, may appear on the trial or hearing of the application, and make themselves parties, if necessary, to oppose the order of sale, and, if unsuccessful in the probate court, they may appeal from its decision.⁴ They may show, for the purpose of defeating such an order, that the claims proposed to be satisfied out of the proceeds of the sale had been unjustly or improperly allowed; or that they are barred by the general or special statute of limitations;⁵ or that the administratrix has collected rents, which they may treat as money in her hands to pay debts with;⁶ [* 1033] *or that any other legal or equitable ground exists why the land should not be sold,⁷ for the heirs or devisees are not bound by the judgment rendered against the administrator.⁸ An unliquidated demand against a creditor

Any person interested may become a party at the hearing, and appeal from the order.

May show that the debts have been improperly allowed, or are barred by limitation, or that the administrator has sufficient assets to pay them.

Unliquidated demand

¹ *Goudy v. Hall*, 36 Ill. 313; *Finch v. Sink*, 46 Ill. 169, 171.

² *Shoemate v. Lockridge*, 53 Ill. 503, 506.

³ *Schnell v. Chicago*, 38 Ill. 382, 391.

⁴ *Ex parte Marr*, 12 Ark. 84; *Paine v. Pendleton*, 32 Miss. 320, 322; *Ferguson v. Carson*, 86 Mo. 673, 677; *Richardson v. Judah*, 2 Bradf. 157; *Gibson v. Pitts*, 69 N. C. 155; *Ridgely v. Bennett*, 13 Lea, 210, 217; *Lynch v. Hickey*, 13 Ill. App. 139. A purchaser of the heir's interest may appear: *Speers v. Banks*, 114 Ala. 323. See on the right to appeal, *post*, § 545, and § 473, p. *1049.

⁵ *Champion v. Cayce*, 54 Miss. 695; *Warren v. Hearne*, 82 Ala. 554. See on this point *ante*, § 401, and cases cited p. *843, holding that the heirs may plead the Statute of Limitations when the real estate is sought to be subjected to sale to pay debts. The Statute of Limitations may also be pleaded by one to whom the intes-

tate gave land in fraud of creditors, in such a proceeding: *Syme v. Riddle*, 88 N. C. 463.

⁶ *Goepfner v. Leitzelmann*, 98 Ill. 409.

⁷ *In re Haxtun*, 102 N. Y. 157, 159; *Callahan v. Griswold*, 9 Mo. 784, 792; *Casey v. Murphy*, 7 Mo. App. 247; *Beckett v. Selover*, 7 Cal. 215, 220; *Moovers v. White*, 6 John. Ch. 360; *Campbell v. Renwick*, 2 Bradf. 80; *Dean's Appeal*, 87 Pa. St. 24; *Bienvenu v. Parker*, 30 La. An. 160; *Matter of Mahoney*, 34 Hun, 501, 503; *Hunter v. French*, 86 Ind. 320; *Feenix v. Feenix*, 80 Mo. 27.

⁸ *Ante*, § 466, and cases there cited. But when the validity of the debt has been once established in proceedings to sell the realty, and the debts are not fully paid, necessitating a second petition to sell other realty, the heirs cannot plead the invalidity of the debt in the second proceeding: *Judd v. Ross*, 146 Ill. 40; and so if, when the claim is filed against the

against the creditor cannot defeat his right to the order, unless the heirs, or any person in interest, will give bond to pay the debt, and hold the administrator harmless.

Agreement of heirs to pay with a view to exonerate lands is enforceable.

Validity of administrator's appointment cannot be questioned, nor title to the land, nor can any collateral questions be raised.

Proceedings stayed until title determined.

cannot be set up against his right to have the real estate sold to pay a debt for which he has judgment;¹ but if the heirs, or any of them, will give bond for the payment of the debts, and to hold the administrator harmless, no order for the sale of land will be granted.² So an agreement by the elder children of a decedent to account to the administrator for advancements made to them in the decedent's lifetime, in order to enable the administrator to pay the debts and exonerate the land, will be enforced;³ and the court may order the guardian of a minor heir to borrow the money necessary to pay the debts, and to execute a mortgage on the land, so that the debts may be paid out of the rents of the land.⁴ So the court may order the administrator to inventory assets improperly withheld by him from the estate, and shown to be in his hands, and direct him to apply the same to the payment of the debts, instead of ordering the sale of the real estate.⁵ But the validity of the appointment of the administrator cannot be questioned on such hearing;⁶ nor can the title of the deceased to the land proposed to be sold be passed on;⁷ nor any collateral questions of trespass, boundary, delay in settlements, etc.⁸ If it appear that the title is disputed, and that by reason thereof the sale would be made under disadvantageous circumstances, it is proper to stay proceedings until the title may be ascertained in a court of competent jurisdiction.⁹ Injunction is a proper

administrator, the heir or his grantee appear and assist in defending a claim, an adjudication that the claim is valid is conclusive upon such parties, and cannot afterwards be questioned on a proceeding to sell the land to pay such debt: *Smith v. Gorham*, 119 Ind. 436.

¹ *Brown v. Roberts*, 21 La. An. 508.

² *Jenness v. Robinson*, 10 N. H. 215, 218; *Davisson v. Burgess*, 31 Oh. St. 78; *Studley v. Josselyn*, 5 Allen, 118. And in West Virginia it was held error not to give the heirs a reasonable time to pay off the creditors before directing a sale: *Hart v. Hart*, 31 W. Va. 688, 700.

³ *Smith v. Axtell*, 1 N. J. Eq. 494, 500.

⁴ *West v. Cochran*, 104 Pa. St. 482, 487.

⁵ *Duffield v. Walden*, 102 Iowa, 676, 679.

⁶ *Riser v. Snoddy*, 7 Ind. 442; *Carnan v. Turner*, 6 Har. & J. 65, 67; *Waldow v. Beemer*, 45 Neb. 626.

⁷ *Shields v. Ashley*, 16 Mo. 471, 473; *Hewitt v. Hewitt*, 3 Bradf. 265; *Succession of Renneberg*, 15 La. An. 661; *Kline's Appeal*, 39 Pa. St. 463, 469; *Harding v. Le Moyne*, 114 Ill. 65; *Swackhamer v. Kline*, 25 N. J. Eq. 503. But in Indiana an issue may be framed as to the ownership of land, and tried together with the application to sell it for the payment of debts; and such judgment is held conclusive against the heirs: *Gavin v. Graydon*, 41 Ind. 559, 563. So also under the statutes of Ohio, where all parties having any interest in or liens upon the realty may be made parties to the proceedings, and all questions affecting the title determined: *Doan v. Bitely*, 49 Oh. St. 588. As a general rule, however, the purchaser at an administrator's sale to pay debts takes the land subject to all encumbrances upon it: this subject is considered *post*, § 481.

⁸ *Clement v. Foster*, 71 N. C. 36; *Estate of Houck*, 23 Oreg. 10.

⁹ *Trent v. Trent*, 24 Mo. 307, 311;

[* 1034] remedy * in such case;¹ but a court of equity will not interfere with the discretion vested in the probate court in cases of mere doubt.² Where it appears that the title of the deceased was a mere life estate, the petition should, of course, be dismissed.³

In some of the States the appointment of a guardian *ad litem* is a necessary prerequisite to an order of sale of the real estate of minor heirs. It is the duty of such guardian to make any defence in protection of the interest of his ward which an adult heir could make. Such appointment is held essential in Alabama,⁴ Illinois,⁵ Indiana,⁶ Iowa,⁷ New York,⁸ North Carolina,⁹ Ohio,¹⁰ Tennessee,¹¹ and Virginia.¹² Unless the statute requires the appointment of a guardian *ad litem*, the sale will be valid without, in direct as well as in collateral proceedings; it has been so held in Kansas,¹³ Massachusetts,¹⁴ Missouri,¹⁵ Nebraska,¹⁶ New Hampshire,¹⁷ and Wisconsin.¹⁸

Guardians *ad litem* to minor heirs necessary in some States, but not in others.

Hewitt v. Hewitt, 3 Bradf. 265; Vallé v. Bryan, 19 Mo. 423; Homer's Appeal, 55 Pa. St. 337, 340; Thayer v. Lane, Harr. (Mich.) 247, 253; Grider v. Apperson, 38 Ark. 388; Marshall v. Blass, 82 Mich. 518, 529.

¹ Fisk v. Wilson, 15 Tex. 430, 432.

² Sprague v. West, 127 Mass. 471.

³ Grim's Appeal, 1 Grant Cas. 209, 211.

But the question whether the decedent had an interest in the land is one for the court to which the application is made, and if error is committed it must be corrected by direct proceedings, and cannot be taken advantage of collaterally: Manson v. Duncanson, 166 U. S. 533.

⁴ Craig v. McGehee, 16 Ala. 41, 49; Johnson v. Johnson, 40 Ala. 247.

⁵ Whitney v. Porter, 23 Ill. 445. But the failure to appoint a guardian *ad litem* does not affect the jurisdiction of the court, nor render the subsequent proceedings void, although it may be error: Gage v. Schroder, 73 Ill. 44. This view seems to result necessarily from the provision of the Illinois statute, which allows the administrator to give notice by publication in a newspaper, or by personal service upon the heirs, and from the further fact that the statute does not require the names or ages of the heirs to be stated in the petition: Gibson v. Roll, 27 Ill. 88; Stow v. Kimball, 28 Ill. 93.

⁶ It is error to decree the sale of the real estate of a minor without first appointing a guardian to appear for him: Timmons v. Timmons, 6 Ind. 8; but the

omission does not render the sale void: Thompson v. Doe, 8 Blackf. 336.

⁷ Good v. Norley, 28 Iowa, 188.

⁸ In this State the sale is void if no guardian has been appointed for a minor heir: Havens v. Sherman, 42 Barb. 636; Schneider v. McFarland, 2 N. Y. 459; Matter of Mahoney, 34 Hun, 501. He must be appointed six weeks before the hearing of the application: Sheldon v. Wright, 7 Barb. 39, 43.

⁹ Hyman v. Jarnigan, 65 N. C. 96, 98.

¹⁰ The appointment of a guardian *ad litem*, who appeared and answered for the infant heirs, is sufficient in this State to support a sale in a collateral suit: Robb v. Irwin, 15 Oh. 689 (Read, J., dissenting, p. 704); so if they appear by their general guardian, upon whom alone citation has been served: Ewing v. Hollister, 7 Oh. pt. 2, p. 138; Sheldon v. Newton, 3 Oh. St. 494, 498.

¹¹ Ridgely v. Bennett, 13 Lea, 210, 218.

¹² The statute of Virginia requires all persons to be made parties who would be heirs or distributees of the infant if he were dead; and it was held that the sale of the property of an infant *in ventre sa mère* at the time was valid, although not made a party to the proceedings: Knotts v. Stearns, 91 U. S. 638, 640.

¹³ Fudge v. Fudge, 23 Kans. 416, 420.

¹⁴ Holmes v. Beal, 9 Cush. 223, 226.

¹⁵ Overton v. Woodson, 17 Mo. 442, 452.

¹⁶ McClay v. Foxworthy, 18 Neb. 295.

¹⁷ Boody v. Emerson, 17 N. H. 577, 579.

¹⁸ Sitzman v. Pacquette, 13 Wis. 291, 320.

* The answer of a guardian *ad litem* is not sufficient to [* 1035]. support the order of sale; the court must hear proof, and this must appear of record.¹

§ 468. **What the Petition must show.** — The necessity of a strict compliance with the requirements of the statute, in selling real estate for the payment of debts by order of courts having jurisdiction of the administration of estates of deceased persons, has already been pointed out;² it cannot be too deeply impressed upon executors and administrators, as well as upon their counsel and the officers of the court conducting the proceedings. This is particularly true of the petition, because upon its sufficiency the jurisdiction of the probate court most frequently depends. Unless it appear

Petition must aver existence of debts of decedent, and of real estate liable for their satisfaction, as well as lack of personal assets.

thereunder,

Schedule of personal assets.

List of debts due.

Inventory of real estate.

from its averments that debts which the decedent had contracted during his lifetime are still unpaid, and that there are not personal assets sufficient to discharge them, but real estate which is liable for their payment, the court will have no power to order or license such sale, and therefore any order so made, and any sale must be void.³ To this end there should be a schedule or detailed account of the personal property available, or that could be made available, for the payment of debts,⁴ filed with or made part of the petition;⁵ also a list of the debts due and remaining unpaid,⁶ and an inventory of the real estate.⁷

¹ *Fridley v. Murphy*, 25 Ill. 146. So in Indiana, where the omission is erroneous, but does not avoid the sale: *Thompson v. Doe*, 8 Blackf. 336; *Martin v. Starr*, 7 Ind. 224; *Guy v. Pierson*, 21 Ind. 18, 21. And see also *White v. Joyce*, 158 U. S. 128, 146, *et seq.*; *Manson v. Duncanson*, 166 U. S. 533 (where a guardian *ad litem* was appointed for a non-resident minor).

² *Ante*, § 463.

³ *Sermon v. Black*, 79 Ala. 507, 509; *Sharp v. Sharp*, 76 Ala. 312, 317; *Harding v. Le Moyne*, 114 Ill. 65, 72; *Estate of Boland*, 55 Cal. 310, 315; *Kertchem v. George*, 78 Cal. 597; *Needham v. Salt Lake City*, 7 Utah, 319; *Wattles v. Hyde*, 9 Conn. 10, 13; *Wright v. Edwards*, 10 Oreg. 298; *Frazier v. Pankey*, 1 Swan, 75, 79 (in a chancery court); but in Alabama the debts due and the personal property need not be particularly described, if it is averred that the personalty is not sufficient to pay the debts: *Quarles v. Campbell*, 72 Ala. 64; *Wilson v. Hastings*, 66 Cal. 243. It is not strictly necessary in Alabama to allege in the petition a specified or certain

amount of debts, or the value of the personalty: *Cotton v. Holloway*, 96 Ala. 544, 548; it is sufficient that the petition allege an insufficiency to pay the debts, and that a sale is necessary: *Smith v. Brannon*, 99 Ala. 445.

⁴ *Gregory v. McPherson*, 13 Cal. 562, 576; *Crippen v. Crippen*, 1 Head, 128.

⁵ *Bray v. Neill*, 21 N. J. Eq. 343, 346; *Ford v. Walsworth*, 15 Wend. 449; *Rapp v. Matthias*, 35 Ind. 332, 338; *Gregory v. Taber*, 19 Cal. 397 (holding that filing, but not *with* or as part of the petition, insufficient).

⁶ *Crippen v. Crippen*, 1 Head, 128; *Van Nostrand v. Wright*, Hill & Den. 260; *In re Haxtun*, 102 N. Y. 157. In Indiana a petition to sell in order to make assets for the payment of the widow's statutory allowance, which shows that there is a will, should also show whether she has taken under its provisions: *Renner v. Ross*, 111 Ind. 269.

⁷ *Maeck v. Sinclear*, 10 Vt. 103; see *infra*, p. * 1037, notes 2 *et seq.*

The courts of the various States are not in harmony with each other in respect of the degree of minuteness and accurate [* 1036] literal * compliance with the provisions of the statute deemed essential to give jurisdiction, — a subject which has been more fully considered in connection with the jurisdiction of probate courts,¹ and must be again referred to in discussing the validity of sales made by their order.² Thus it has been held in California,³ Connecticut,⁴ New Jersey,⁵ and Tennessee,⁶ that the petition is fatally defective if it omit a statement of the personal property and its value; while in other States a reference to the inventory,⁷ or a statement that the decedent left no personal property,⁸ or that the personal property as appraised is not available,⁹ has been held sufficient, at least in collateral proceedings.¹⁰ The personal property and outstanding claims of the estate should be reckoned at such value in money as they will probably yield on sale or collection.¹¹

States holding petition defective if it omit statement of the personalty and its value;

general in-

States holding reference to general inventory sufficient, or a simple statement that personalty is insufficient.

So, too, the debts or claims must, in some States, be first adjudicated, or established, before there can be a valid sale of real estate to satisfy the creditors,¹² while in others this is not required;¹³ but they may be proved subsequently.¹⁴ Where a debt must first be established before there can be an order of sale, the averment in the petition that the debt is due, and the admission of the administrator to that effect, are not sufficient;¹⁵ nor the allowance of a

States holding a previous allowance of debts necessary to support an order of sale.

States holding otherwise.

¹ *Ante*, §§ 142 *et seq.*

² *Post*, § 488.

³ See California cases, *supra*. But an indefinite statement of the condition of the property, though objectionable as indefinite if challenged at the hearing, may be sufficient to give the court jurisdiction, and the order of sale based thereon cannot be attacked collaterally: *Devincenzi v. Figone*, 119 Cal. 498.

⁴ *Wattles v. Hyde*, 9 Conn. 10, 13.

⁵ *Bray v. Neill*, 21 N. J. Eq. 343, 346.

⁶ *Crippen v. Crippen*, 1 Head, 128.

⁷ *Richmond v. Foote*, 3 Lans. 244, 252.

⁸ *Bree v. Bree*, 51 Ill. 367; *Meadows v. Meadows*, 73 Ala. 356.

⁹ *Bostwick v. Skinner*, 80 Ill. 147, 157.

¹⁰ *Mount v. Vallé*, 19 Mo. 621; *Reynolds v. Schmidt*, 20 Wis. 374.

¹¹ *Bridge v. Swayne*, 3 Redf. 487, 490.

¹² *Colson v. Brainard*, 1 Redf. 324;

Rozier v. Fagan, 46 Ill. 404; *Walker v. Diehl*, 79 Ill. 473; *Sample v. Barr*, 25 Pa. St. 457; *Starkey v. Hammer*, 1 Baxt. 438; *Tarbell v. Parker*, 106 Mass. 347; *Kent v. Waters*, 1 Md. 53; *Carey v. Dennis*, 13 Md. 1; *Lynch v. Hickey*, 13 Ill. App. 139; *New v. Boss*, 92 Va. 383; *Turner v. Amsdell*, 3 Dem. 19, 22, citing earlier New York cases and disapproving contrary decisions.

¹³ *Smith v. Smith*, 27 N. J. Eq. 445 (except in insolvent estates), 446; *Tenney v. Poor*, 14 Gray, 500; *Maeck v. Sinclear*, 10 Vt. 103; *Person v. Montgomery*, 120 N. C. 111. The cases of *Barnett v. Kincaid*, 2 Lans. 320, 323, and *Ex parte Glann*, 2 Redf. 75, so holding, are disapproved in *Turner v. Amsdell*, *supra*.

¹⁴ *Farrington v. King*, 1 Bradf. 182, 191; *Little v. Sinnett*, 7 Iowa, 324, 333; *Grayson v. Weddle*, 63 Mo. 523, 537.

¹⁵ *Chamberlin v. Chamberlin*, 4 Allen, 184.

claim against the same decedent against an administrator in another State.¹

The inventory of the real estate must also be made part of, or * filed with, the petition; and that portion which is [* 1037] intended to be sold must be described with sufficient particularity to enable it to be identified.² In collateral proceedings very vague or slight descriptions have been held sufficient,³ and where it is necessary to show in what county the land is situated, so as to confer jurisdiction, the court will supply facts which are within its judicial knowledge,⁴ or hold the statement sufficient that the land is situated in such county.⁵ So, also, the description in the petition is allowed, in some States, to be corrected from the papers in the case;⁶ while in others the amendment of the description of real estate is held to constitute a new petition, requiring proceedings *de novo*.⁷ The requirement to describe the lands in the petition is held to be directory in Texas;⁸ but a description of other land than that which is clearly described in the proceedings cannot be engrafted for the purpose of showing that it was in fact the land intended to be sold.⁹

The statutes of some of the States require the names of the heirs or devisees,¹⁰ their ages, and, if married females, the names and ages of their husbands, to be fully set out in the petition.¹¹

¹ *Hobson v. Payne*, 45 Ill. 158. See also *McGarvey v. Darnall*, 134 Ill. 367.

² *Frazier v. Steenrod*, 7 Iowa, 339, 346; *Weed v. Edmonds*, 4 Ind. 468, 470; *Williams v. Childress*, 25 Miss. 78, 82; *Schnell v. Chicago*, 38 Ill. 382; *Smith's Estate*, 51 Cal. 563, 565; *McNitt v. Turner*, 16 Wall. 352; *Moffitt v. Moffitt*, 69 Ill. 641; *Graham v. Hawkins*, 38 Tex. 628; *Succession of Boudreaux*, 6 La. An. 78; *Blythe v. Hoots*, 72 N. C. 575; *Gilchrist v. Shackelford*, 72 Ala. 7. In California the petition may refer to the inventory for a particular description of the realty; at least in a collateral attack this will be sufficient: *Richardson v. Butler*, 82 Cal. 174; and in Missouri the description is obtained from the exhibits required to be filed with the petition; and the order is not invalidated because the exhibits cannot be found after the lapse of years: *Bray v. Adams*, 114 Mo. 486.

³ *Monk v. Horne*, 38 Miss. 100; *Clements v. Henderson*, 4 Ga. 148; *Davie v. McDaniel*, 47 Ga. 195, 205; *Pittenger v. Pittenger*, 3 N. J. Eq. 156. And see *Nichols v. Lee*, 16 Colo. 147. But the

land must be so described that it can be identified, or the sale will be void on collateral attack, *Blackwell v. Townsend*, 91 Ky. 609.

⁴ *Smitha v. Flournoy*, 47 Ala. 345, 360; *Money v. Turnipseed*, 50 Ala. 499.

⁵ *Bryan v. Bander*, 23 Kans. 95.

⁶ *Schnell v. Chicago*, *supra*; *Lamkin v. Reese*, 7 Ala. 170; *Lasure v. Carter*, 5 Ind. 498; *West v. Cochran*, 104 Pa. St. 482; *Collins v. Ball*, 82 Tex. 259.

⁷ *Gharky v. Werner*, 66 Cal. 388.

⁸ *Davis v. Touchstone*, 45 Tex. 490, 497, citing earlier Texas cases.

⁹ *Collins v. Ball*, 82 Tex. 259, 267.

¹⁰ *Meadows v. Meadows*, 73 Ala. 356, 358; *Underwood v. Underwood*, 22 W. Va. 303; *Blount v. Pritchard*, 88 N. C. 446; *Mead v. Sherwood*, 4 Redf. 352.

¹¹ *Griffin v. Griffin*, 3 Ala. 623; *Bingham v. Jones*, 84 Ala. 202; *Guy v. Pierson*, 21 Ind. 18, 21; *Turney v. Turney*, 24 Ill. 625; *Cloud v. Barton*, 14 Ala. 347; *Page v. Matthews*, 41 Ala. 719; *Jenkins v. Young*, 35 Hun, 569; *Wright v. Edwards*, 10 Oreg. 298, 301.

§ 469. **Proof of the Existence of Debts.**—The petition, as appears from the preceding section, must aver the existence of debts remaining unpaid; and it is self-evident that the court must be satisfied in a lawful way, of their existence, before there can be an order of sale of real estate. The averment in the petition, together with the admission of the guardian of an infant heir, is not sufficient to warrant the order;¹ Existence of debts must be proved.

the court must hear proof, and this should appear of record.² [*1038] Even *the enactment of the legislature cannot supply the judicial proof necessary to support such an order; hence acts of legislature directing the sale of real estate of a deceased person are in some States held unconstitutional.³ Nor will an order of sale be granted to pay a debt not established by a court, but agreed on by compromise.⁴ But the fact that the claim of a creditor has been presented to and rejected by the executor or administrator does not deprive the surrogate of jurisdiction to determine the validity of the claim in proceedings instituted by a creditor to sell the realty for the payment of debts.⁵ We have seen that generally, but not in all States, the claims must have been first established before the order of sale.⁶

The debts so proved to exist must be such as were contracted by the deceased himself. No sale of real estate will be ordered to pay expenses of administration alone, or any debts incurred by the executor or administrator, after the death of the testator or intestate, except funeral expenses.⁷ It has been so held in Alabama,⁸ Arkansas,⁹ Illinois,¹⁰ Massachusetts,¹¹ Mississippi,¹² Missouri,¹³ New York,¹⁴ and

Debts contracted by the deceased alone can support the order to sell real estate.

¹ *Clark v. Thompson*, 47 Ill. 25; *Thompson v. Doe*, 8 Blackf. 336; so even in chancery: *Hooper v. Hardie*, 80 Ala. 114.

² *Fridley v. Murphy*, 25 Ill. 146; *Martin v. Starr*, 7 Ind. 224; *Timmons v. Timmons*, 6 Ind. 8; *Doe v. Anderson*, 5 Ind. 33, 35; *Quarles v. Campbell*, 72 Ala. 64.

³ *Rozier v. Fagan*, 46 Ill. 404; *Lane v. Dorman*, 4 Ill. 238; *Hegarty's Appeal*, 75 Pa. St. 503, 517; *Jones v. Perry*, 10 Yerg. 59, 69; *Brenham v. Story*, 39 Cal. 179, 183; *Pryor v. Downey*, 50 Cal. 388, 398, *et seq.*; *Culbertson v. Coleman*, 47 Wis. 193. See *ante*, § 463, p. *1022.

⁴ *Kavanagh v. Wilson*, 5 Redf. 43.

⁵ *In re Haxtun*, 102 N. Y. 157.

⁶ *Ante*, § 468.

⁷ Including a suitable tombstone: *Owens v. Bloomer*, 14 Hun. 296.

⁸ *Owens v. Childs*, 58 Ala. 113; *Beadle v. Steele*, 86 Ala. 413, 421.

⁹ *Mays v. Rogers*, 52 Ark. 320.

¹⁰ *Dubois v. McLean*, 4 McLean, 486, 489; *Glancy v. Murray*, 49 Ill. 465, 468; *Walker v. Diehl*, 79 Ill. 473, 475.

¹¹ *Dean v. Dean*, 3 Mass. 258, 262; *Drinkwater v. Drinkwater*, 4 Mass. 354, 358.

¹² *Moore v. Ware*, 51 Miss. 206, 211; *Hollman v. Bennett*, 44 Miss. 322, 325, *et seq.*

¹³ *Farrar v. Dean*, 24 Mo. 16; *Presbyterian Church v. McElhinney*, 61 Mo. 540. But the sale is not collaterally assailable on that ground: *Rogers v. Johnson*, 125 Mo. 202. And if *bona fide* made to pay debts, the mere fact that the proceeds are sufficient only to pay costs and expenses will not invalidate the sale: *Howell v. Jump*, 140 Mo. 441.

¹⁴ *Cornwall's Estate*, Tuck. 250; *Fitch v. Witbeck*, 2 Barb. Ch. 161, 163; *Wood v. Byington*, 2 Barb. Ch. 387, 393.

Expenses of administration will not support the order. Pennsylvania.¹ In Maine the legality of a sale for the payment of the expenses of administration has been questioned, but there is no direct adjudication upon the point.² No decision has come to the notice of the writer from any of the States, in which the sale of real estate for the payment of the expenses of administration alone is held valid, except an intimation in a very briefly considered case in Indiana,³ which, however, was subsequently affirmed in a case fully argued,⁴ a dictum in New Jersey,⁵ and several cases in California, * where there [* 1039] is a statutory provision to that effect;⁶ besides some other States in which the realty goes to the administrator, like personalty.⁷ In Georgia, it was held that the heirs could not recover the purchase-money for real estate sold to pay the widow's award.⁸

Where an executor or administrator has paid debts of the decedent in excess of the personal assets of the estate, he will be subrogated in equity to the rights of the creditors whose debts he has discharged.⁹ In such case it is incumbent upon him to prove, in order to obtain a decree for the sale of the land to reimburse him, the validity of the debts which he has paid; the passing of the account in the probate court is not even *prima facie* proof thereof, or that they would have been chargeable upon the real estate, either at law or in

Subrogation of administrator having paid debts to the right of the creditor.

¹ Grice's Estate, 11 Phila. 107.

² Gross v. Howard, 52 Me. 192, 196.

³ Dunning v. Driver, 25 Ind. 269, 270.

⁴ Falley v. Gribbling, 128 Ind. 110.

⁵ Personnette v. Johnson, 40 N. J. Eq. 173, 177. The Ordinary in this case reaches the conclusion, that "the statutory provision for the sale of land to pay debts should be construed to include by implication authority to sell to pay the expenses of administration": but this conclusion was not necessary to support the judgment rendered.

⁶ Abila v. Burnett, 33 Cal. 658; *In re* Coutts, 87 Cal. 480. And see also Richardson v. Butler, 82 Cal. 174, 179, where a petition was sustained seeking to sell realty for a family allowance and future expenses of administration.

⁷ So in California; *ante*, § 337, and cases, *supra*, Washington: Ackerson v. Orchard, 7 Wash. 377 (a sale to pay family allowance and administration expenses); Nebraska: Waldow v. Beemer, 45 Neb. 626 (see p. 628).

⁸ Miller v. Defoor, 50 Ga. 566.

⁹ Woolley v. Pemberton, 41 N. J. Eq. 394, 397; Livingston v. Newkirk,

3 John. Ch. 312, 318; *Ex parte* Street, 1 Bland Ch. 532, note; Watkins v. Dorsett, 1 Bland Ch. 530; Pea v. Waggoner, 5 Hayw. 242; Franklin v. Armfield, 2 Sneed, 305, 357, *et seq.*; Ingram v. Ingram, 5 Heisk. 541; Byrd v. Jones, 84 Ala. 336, 341; Turner v. Shuffler, 108 N. C. 642; Denton v. Tyson, 118 N. C. 542; Pendergrass v. Pendergrass, 26 S. C. 19, 30; Nichols v. Shearon, 49 Ark. 75, 82. As to the right to subrogation of a purchaser at an unauthorized sale, see *post*, § 481, p. *1071; § 485. This principle has been extended to subrogating one who has advanced a fund to the executor with which the debts were paid, to the right of the executor against the realty: De Concillio v. Brownrigg, 51 N. J. Eq. 532. But where the executor of an insolvent estate in good faith discharges a senior debt secured on the realty, while he will be entitled to subrogation of the creditor's rights as against the general assets, he will not be entitled as against junior liens to the encumbrance he has paid off: Searight's Estate, 163 Pa. St. 222.

equity.¹ If, therefore, he has paid debts barred by the Statute of Limitations,² or fails to make application until after the time limited for the enforcement of claims of creditors,³ or pays such debts voluntarily,⁴ or with the view of making the heir his debtor, so as to avoid the question of fully administered in the proper forum,⁵ he will not be entitled to relief in equity.

There seems to be no objection on principle to the exercise of this power by probate courts. It is clearly within the scope of those functions which in America are intrusted to this class of courts, as affording the speediest, least expensive, and most convenient method of settling the estates of deceased persons.⁶ The sale of real estate by order of probate courts, to reimburse administrators or executors who paid debts of the deceased out of their own [*1040] means, in default of sufficient personal assets, has *been held valid in several States;⁷ but it is unsafe, in States where this question has not been settled by judicial decision or statutory enactment, to rely upon the power of the probate court to order the sale of real estate, if it be necessary, before such order can legally be made, to exercise the equitable power of subrogation.

It follows from the principle elsewhere stated, of non-privity between administrators of the same estate, whose letters were granted in different States, that a judgment against an administrator in one State is incompetent to show, even *prima facie*, the validity of such claim, for the purpose of subjecting real estate to sale in another State.⁸

§ 470. **Proof of the Insufficiency of the Personalty.**—It must also clearly appear that the personal assets are, at the time when the application is heard, insufficient to pay the debts and expenses of administration;⁹ and that they were so at the time of the grant of letters, or have become so in the course of administration for causes beyond the control of the executor or administrator, and without fault on the part of the creditor or person demanding the sale.¹⁰ Where the

Proof must be made that the personal assets are insufficient.

Where personalty, having

¹ *Gist v. Cockey*, 7 Har. & J. 134, 139; *Collinson v. Owens*, 6 Gill & J. 4, 9.

² *Gilchrist v. Rea*, 9 Pai. 66, 70, 73; *Pea v. Waggoner*, 5 Hayw. 1; *Heath v. Wells*, 5 Pick. 140, 145.

³ *Ex parte Allen*, 15 Mass. 57, 60.

⁴ *Sanders v. Sanders*, 2 Dev. Eq. 262, 264; *Evans v. Halleck*, 83 Mo. 376.

⁵ *Williams v. Williams*, 2 Dev. Eq. 69, 71.

⁶ *Titterton v. Hooker*, 58 Mo. 593.

⁷ So in Massachusetts: *Ex parte Allen*, *supra*; New York: *Jackson v. Halladay*, 3 Redf. 379; *Gilchrist v. Rea*, *supra*; Ohio: *Welsh v. Perkins*, 8 Oh. 52; Pennsylvania: *Miskimins's Appeal*, 114 Pa. St.

530. See as to the powers of the probate court to marshal assets in general, *post*, § 495.

⁸ *Ante*, § 158, p. *360; *McGarvey v. Darnall*, 134 Ill. 367; *Hull v. Hull*, 35 W. Va. 155.

⁹ *Ante*, § 468; *Thompson v. Joyner*, 71 N. C. 369.

¹⁰ *Shields v. McDowell*, 82 N. C. 137; *Hall v. Sayre*, 10 B. Mon. 46; *Tilton v. Tilton*, 41 N. H. 479, 482; *Wiley v. Wiley*, 63 N. C. 182; *Martin v. Rellehan*, 3 W. Va. 480; *Newcomer v. Wallace*, 30 Ind. 216; *Elliott v. George*, 23 Gratt. 780, 783; *Phelan v. Bird*, 20 La. An. 355.

originally been sufficient, became insufficient by *devastavit* or neglect of administrator, the creditor's remedy is against the executor or administrator personally and his sureties.

Secus, if assets become insufficient without administrator's fault.

other remedy, they may resort to the probate court for an order to sell the real estate for the payment of * their [* 1041] claims.² Whether the land may be subjected to sale by creditors, where the personal assets have been squandered by the executor or administrator, and all remedies have been exhausted against him and his sureties without success, is not very clear, and has been held differently in different States. The Mississippi cases just cited are emphatic in their denial of such right; the courts of Pennsylvania and Tennessee are likewise opposed thereto.³ In other States, however, a different opinion seems to prevail. Thus it is said in Iowa, that, upon a misapplication of funds by the executor or administrator, the loss should not fall upon the creditors *if the estate is sufficient*.⁴ In Alabama, it is held that, on a bill to subject lands devised to the payment of debts on the ground that the personal assets have been appropriated by the personal representative, and he and his sureties are insolvent, the burden of proving such insolvency is upon the creditor, and the

personal property was originally sufficient for the payment of the debts, but became insufficient in consequence of *devastavit* or neglect of duty by the executor or administrator, the distributees or legatees may insist on this as a defence against an order for the sale of lands devised or descended; and the remedy of creditors will be against the administrator personally and the sureties on his official bond, and not against the land.¹ But if the personal assets, although ample at the time of the grant of letters, become insufficient in the course of the administration, for any cause not arising out of the fault of the executor or administrator, so that neither he nor his sureties can be held liable, and the creditors have no

Whether remedy lies against the lands after all remedies against the sureties have been exhausted, is held differently.

¹ Wyse v. Smith, 4 Gill & J. 295, 302; Kingsland v. Murray, 133 N. Y. 170; Banks v. Speers, 103 Ala. 436; Bennett v. Coldwell, 8 Baxt. 483, 487; Merritt v. Merritt, 62 Mo. 150, 154; Foley v. McDonald, 46 Miss. 238, 245; Hollman v. Bennett, 44 Miss. 322, 331; Paine v. Pendleton, 32 Miss. 320, 323; Turner v. Ellis, 24 Miss. 173, 180; State v. Conover, 9 N. J. L. 338; Carlton v. Byers, 70 N. C. 691; Bland v. Hartsoe, 65 N. C. 204; Buford v. McKee, 3 B. Mon. 224, 226.

² Evans v. Fisher, 40 Miss. 643, 674, Harris, J., dissenting, on the ground that, if the personal assets were originally sufficient, the lands descended to the heirs discharged of the debts: p. 678 *et seq.*

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Merritt v. Merritt, 62 Mo. 150; Faran v. Robinson (ordering a sale on petition of the administrator after final settlement and partition of the land among the heirs), 17 Oh. St. 242, 252; Lilly v. Wooley, 94 N. C. 412 (where surety was out of the jurisdiction); Lee v. Beaman, 101 N. C. 294.

³ Pry's Appeal, 8 Watts, 253; Kelly's Estate, 11 Phila. 100; Maxwell v. Smith, 86 Tenn. 539, 546, in which Lurton, J., says: "The loss of the assets by the administrator, and the insolvency of his sureties, furnish no ground of relief against the heir, either in law or equity."

⁴ Per Adams, C. J., in Conger v. Cook, 56 Iowa, 117, 121.

admission of the personal representative is not evidence against the devisees.¹ In Indiana and North Carolina, the real estate was ordered to be sold to pay creditors upon the death of the administrator *de bonis non*, who had wasted the estate, and both he and his surety proved insolvent.² So in Alabama³ and Virginia.⁴ In New York, where application was made by creditors to whom no *laches* were imputable, the court held that "whatever view may be taken in cases where are appointed administrators who must secure performance of their duties by the requisite bond, there is no reason for denial of the rights of creditors to the payment of their debts out of the proceeds of the real estate of a testator whose executor has squandered the personal property which came to his hands as such."⁵ In Missouri it is held inequitable to allow heirs to hold possession of real estate improved by an administrator, and to resist the application of creditors to subject it to sale for the payment of their debts, on the ground that the expenditures for the improvement constitute waste, for which the creditors should resort to a suit on the administrator's bond.⁶

In some of the States, the probate court is invested with power to order the whole or any part of the personal estate to be reserved, and the real estate to be sold for the payment of debts. So in Alabama,⁷ Connecticut,⁸ Maryland, ⁹ * Missouri,¹⁰ New York,¹¹ and probably in other States. Such order will not, of course, be made without notice to the heirs or devisees, and proof satisfying the court that it will conduce to the benefit of the estate. It can only be applied for by one who is interested in the real as well as in the personal estate; and the widow, if she take dower, can in such case take no share of the personality,¹² or only so much as she would have been entitled to if the debts had been paid out of the personality.¹³

It may also be stated, in this connection, that if, by operation of a stay law, the collection of debts due to an estate is postponed, so that by reason thereof there is a temporary insufficiency of personal assets to pay the creditors of the estate, they cannot for that reason

¹ May v. Parham, 68 Ala. 253, 257.

² Nettleton v. Dixon, 2 Ind. 446, 448; Smith v. Brown, 99 N. C. 377.

³ Beadle v. Steele, 86 Ala. 413, 420.

⁴ Scott v. Ashlin, 86 Va. 581.

⁵ Matter of Bingham, 127 N. Y. 296, the executor's responsibility being personal merely: 309. The contrary was held in Illinois: Rowland v. Swope, 39 Ill. App. 514.

⁶ Van Bibber v. Julian, 81 Mo. 618.

⁷ King v. Kent, 29 Ala. 542, 550.

⁸ Gen. St. 1875, p. 394, § 37. This pro-

vision seems to be omitted in later statutes, but in lieu thereof since 1885 the probate court is given the power to determine in its sound discretion whether and under what circumstances the realty may be sold, whether or not there is sufficient personality to pay debts, thus enlarging its powers: Buel's Appeal, 60 Conn. 63, 67.

⁹ Waring v. Waring, 2 Bland. 673.

¹⁰ Rev. St. 1889, § 160.

¹¹ Moore v. Moore, 14 Barb. 27, 30.

¹² Waring v. Waring, *supra*.

¹³ Rev. St. Mo. 1889, § 245.

insist on a sale of the real estate; they are affected by the stay law equally with the debtors.¹ But where the personalty is not in condition to be applied, though ascertained, the court may treat such assets as good, and decree a sale of land sufficient to pay the excess of debts over the whole amount of assets, without delaying the sale until the assets can be actually applied.²

Where a decedent died leaving property in more than one State, the existence of personal assets in the State of the domicile sufficient to pay debts constitutes no objection to an order of sale of real estate under an ancillary administration to pay debts in the ancillary forum, if the executrix refuses to pay them,³ and although the same administrator is appointed in both States.⁴ Where, however, an administratrix administered on the same estate in different States, and after paying all debts in the State of the auxiliary administration, voluntarily distributed the assets there remaining to the heirs in that State, it was held, upon application to sell the realty to pay debts in the State of the domicile, that the real estate could not be sold, it being the duty of the administratrix to pay the debts of the domiciliary creditors with the assets distributed to the heirs in the State of the auxiliary administration.⁵

§ 471. **What Interest of the Decedent in Lands may be ordered to be sold.**—Any interest in land, whether legal or equitable, in possession or reversion, including inchoate equities, is liable for the debts of the owner, and may after his * death be sold, if necessary to obtain the [* 1043] means of payment. But if it appears that the interest of the deceased was a mere life estate, the petition should be dismissed,⁶ and so if the deceased had in his lifetime conveyed the land by a valid deed though not recorded until after the claims were established for which it is sought to sell.⁷ The equity of redemption of a deceased mortgagor or grantor in a deed of trust is liable to be sold by order of the probate court to pay his debts,⁸ although proceedings upon the mortgage are pending in

¹ Elliott v. George, 23 Grat. 780.

² Doherty v. Choate, 16 Lea, 192, 200.

³ Lawrence's Appeal, 49 Conn. 411, 427.

⁴ Cowden v. Jacobson, 165 Mass. 240. But in Massachusetts the court may in its discretion decline to order a sale of realty to the prejudice of the heirs, if it appear that there is sufficient personalty in the State of the domiciliary administration to pay the creditor, at least unless it is shown that the creditor has used some diligence to collect the debt at the domicile and has met with some legal impediment: Liver-

more v. Haven, 23 Pickering, 116 (this case is cited and distinguished in several subsequent cases).

⁵ Young v. Wittenmyre, 123 Ill. 303.

⁶ Ante, § 467, p. * 1034.

⁷ Noe v. Moutray, 170 Ill. 169.

⁸ Jackson v. Magruder, 51 Mo. 55, 58; Kenley v. Bryan, 110 Ill. 652, 658; Jennings v. Jenkins, 9 Ala. 285, 290; Peebles v. Watts, 9 Dana, 102; Diehl's Appeal, 33 Pa. St. 406; Sahler v. Signer, 44 Barb. 606, 614; Biggs v. Bickel, 12 Oh. St. 49, 59; Bolling v. Jones, 67 Ala. 508, 516.

a common-law court;¹ nor can the heirs, by obtaining a decree for the legal title, defeat the administrator's right to sell the equity of redemption for the payment of the debts;² nor will a deed from the legal holder, to the heirs after the death of the equitable owner, defeat the administrator's right to sell such equitable title.³ Land entries paid for, but upon which patents have not been obtained,⁴ titles to lands which are in fact complete but imperfect of record,⁵ head-right certificates,⁶ final settlement certificates,⁷ title bonds and executory contracts for the sale of land,⁸ as well as resulting trusts,⁹ are all equitable estates in land liable to be sold by order of the probate court to pay the debts of the deceased owner. Estates in reversion and remainder are likewise such interests in land as will support a sale by an executor or administrator;¹⁰ so, also, the interest of a purchaser at an administrator's sale who dies after confirmation by the court, but before payment of the purchase-money.¹¹

Pre-emption claims descend to the heirs. It is the policy of the pre-emption laws to secure to the actual settler the possession of the public land while the title is in the government, and the right to acquire the title, by perfecting the entry to him, and after his death to his heirs. To postpone the right of the heirs to the claims of

Pre-emption claims go to heirs free of claims of the pre-emptor's creditors.

[*1044] *the ancestor's creditors would defeat this policy; hence a contract to advance money to the administrator, to enable him to procure the patent for the purpose of selling it to pay the debts of the estate, is void.¹² Lands entered in the name of an original settler after his death are not liable for his debts, and a sale of them by an administrator, under order of the probate court, is void.¹³ Where the head of a family makes entry and dies before final proof, his administrator advancing the money to obtain a

But improvements made by the settler are chattels, and subject to sale for settler's debts.

¹ Fitzimmons's Appeal, 40 Pa. St. 422, 427.

² Wolf v. Robinson, 20 Mo. 459.

³ Howell v. Jump, 140 Mo. 441, 452.

⁴ Avery v. Dufrees, 9 Ohio, 145; McDonald v. Burton, 68 Cal. 445.

⁵ Woods v. Monroe, 17 Mich. 238, 243.

⁶ Soye v. Maverick, 18 Tex. 100. The law which prohibits lands of deceased soldiers from being sold for their debts also protects head-right certificates from sale: Duncan v. Veal, 49 Tex. 603, 612. And land certificates fraudulently obtained are not allowed to be sold, and the order of the probate court can confer no title in such case: Roehl v. Pleasants, 31 Tex. 45.

⁷ Strodes v. Patton, 1 Brock. 228. But would not such certificates constitute personal property?

⁸ Williams v. Stratton, 10 Sm. & M. 418, 426; Baxter v. Robinson, 11 Mich. 520, 522; Prevo v. Walters, 5 Ill. 35, 38. But in New Jersey this was denied: Hendrickson v. Hendrickson, 41 N. J. Eq. 375, 380.

⁹ Vallé v. Bryan, 19 Mo. 423, 425. So the separate estate of a married woman which she had mortgaged to secure the payment of her husband's debts may be sold after her death by order of the probate court: Estate of Marden, Myr. 184.

¹⁰ Williams v. Ratcliff, 42 Miss. 145, 154.

¹¹ Vaughan v. Holmes, 22 Ala. 593, 595; Hand v. Motter, 73 Mo. 457.

¹² Cothran v. McCoy, 33 Ala. 65, 67.

¹³ Johnson v. Collins, 12 Ala. 322, 326; Cothran v. McCoy, *supra*.

patent which is issued directly to the heirs, such land is no part of the decedent's estate, and a sale by the probate court is a nullity.¹ But the improvements made by a settler on public lands constitute chattels real, which go to the administrator, and may be sold by him as personal property,² while the right of pre-emption vests in the heirs alone.³

It is held in some early cases, that lands of which the deceased was actually, not colorably, disseised at the time of his death cannot be sold by the executor or administrator.⁴ This rule probably originated in the common-law doctrine that sale of land cannot be made without livery of seisin, since the administrator could not be in a better position than his intestate. This doctrine, like that resulting in the maxim, *Non jus sed seisinam facit stipitem*, according to which one could not inherit from an ancestor who was not actually seised,⁵ has been abolished by statute or judicial construction in most States; but in some of them an administrator will not be permitted to sell property held adversely by a third person; he must first recover possession.⁶ The reason of such a rule is held to be the impracticability of giving possession to the purchaser under such circumstances, and the consequent depression of the price which such a sale would bring.⁷

Since the rights of creditors are paramount to those of heirs and devisees, the validity of sales by the personal representative for the payment of debts, within the time and under the requirements fixed by law, is not affected by any previous alienation by the heirs or devisees; the * purchaser at such sale takes a title superior to [* 1045] that of the purchaser from them.⁸ There is

Common-law rule that sale of land cannot be made without livery of seisin, abolished.

Alienation of land by devisees or heirs no bar to the sale; title of purchaser under the admin-

¹ Coulson v. Wing, 42 Kans. 507.

² Pelham v. Wilson, 4 Ark. 289, 293.

³ Grover v. Hawley, 5 Cal. 485; Dean v. Wade, 8 La. An. 85; Hawkins v. Johnson, 4 Blackf. 21.

⁴ Thorndike v. Barrett, 2 Me. 312, 318; Poor v. Robinson, 10 Mass. 131, 135. The question is left open in Rhode Island: Knowles v. Blodgett, 15 R. I. 463, 465, holding that the administrator cannot be disseised.

⁵ Thompson v. Sandford, 13 Ga. 238.

⁶ Hall v. Armor, 68 Ga. 449; Spoons v. Coen, 44 Oh. St. 497.

⁷ Per Jackson, C. J., in Hall v. Armor, *supra*. See *ante*, § 467, as to the discretion of the judge in such cases.

⁸ Ferguson v. Carson, 9 Mo. App. 497, 500; Lemmon v. Lincoln, 68 Mo. App. 76; Fike v. Green, 64 N. C. 665, 667; State v.

Probate Court, 25 Minn. 22; Den v. Hunt, 11 N. J. L. 1; Horner v. Hasbrouck, 41 Pa. St. 169, 179; Smith v. Anderson, 31 Oh. St. 144; Clark's Estate, 3 Redf. 225; Prescott v. Walker, 16 N. H. 340; Faran v. Robinson, 17 Oh. St. 242, 253; Seymour v. Seymour, 22 Conn. 272; Mowry v. Robinson, 12 R. I. 152; Rogers v. Johnson, 125 Mo. 202, 216; Marx v. Bloch, 21 Oreg. 86 (holding that the surplus after payment of debts was, however, subject to a lien in favor of the heirs' mortgagee); Armstrong v. Loomis, 97 Mich. 581 (holding that the purchaser cannot recover the price paid the heir); Smith v. Seaton, 117 Pa. St. 382, 388, holding the rule to apply where the title of the devisee was sold on execution for his individual debt; the purchaser's title was invalid as against the title of a subsequent purchaser at the ad-

no distinction, in this respect, between the rights of heirs and devisees; property devised is equally liable to be sold for the payment of the testator's debts, as property descended to heirs.¹

The right of an executor or administrator to subject real estate to sale for the payment of debts of the deceased testator or intestate, which had been conveyed in fraud of creditors, depends upon his authority to sue at law or in equity to set aside such conveyances. This question has been fully discussed in a previous chapter.² Where the executor or administrator has such authority, it must be exercised in the manner pointed out by the statute, and the sale may be compelled, even where one of the executors is the fraudulent grantee.³ The effect of the right of dower and of the homestead, upon the court's power to order a sale of the realty, is referred to elsewhere,⁴ as well as the purchaser's liability for other encumbrances.⁵

§ 472. **Of the Bond and Oath required of Executors and Administrators.** — Since the real estate is not assets available to the executor or administrator until it appears that the personal estate is insufficient to pay the debts of the deceased,⁶ it is held in some States that the conditions of the original administration bond do not include the proceeds of real estate, so that the sureties on such bond are not liable for the loss or misapplication of the funds arising out of the sale of lands.⁷ Hence a new bond, conditioned faithfully to administer the assets arising out of the sale of real estate, is held necessary, in some of the States, before there can be an order for the sale; and when required by statute, and neglected to be given, the sale is generally held void. It is so held in

New bond held necessary before there can be an order of sale of real estate.

ministrator's sale to pay the ancestor's debts; to similar effect, *Knowles v. Blodgett*, 15 R. I. 463, and *Nichols v. Lee*, 16 Colo. 147. But in Tennessee it is held that a sale by the heir is good, if *bona fide*: *Raht v. Meek*, 89 Tenn. 274; notice of the ancestor's debt, however, avoids the conveyance as to creditors; *Gibson v. Jones*, 13 Lea, 684. And it is held that if the executor sells, in pursuance of a power in the will to sell for payment of debts, before the probate court orders a sale for the same purpose, a *bona fide* purchaser gets a good title: *Iowa, L. & T. Co. v. Holderbaum*, 86 Iowa, 1; see also *ante*, § 464, p. *1023 and cases cited. *Contra* when the power of sale is not for the payment of debts: *Duncan v. Gainey*, 108 Ind. 579, *post*, § 481.

v. Kent, 29 Ala. 542, 545; *Succession of McLean*, 12 La. An. 222; *Hannum v. Spear*, 2 Dall. 291, 292; *Grenawalt's Appeal*, 37 Pa. St. 95, 97; *Myers v. Pierce*, 86 Ga. 786, 789.

² *Ante*, § 296.

³ *Lichtenberg v. Herdtfelder*, 103 N. Y. 302.

⁴ *Post*, § 483.

⁵ *Post*, § 482.

⁶ *Ante*, § 463.

⁷ *Strother v. Hull*, 23 Gratt. 652, 668; *Murphy v. Carter*, 23 Gratt. 477, 482; *Rucker v. Dyer*, 44 Miss. 591, 605; *Warwick v. State*, 5 Ind. 350, 352; *Nelson v. Jaques*, 1 Me. 139. The general bond usually covers proceeds of real estate: see text, *infra*; the sureties were held in *Evans v. Gerken*, 105 Cal. 311.

¹ *Shaw v. Nicholas*, 30 Mo. 99; *King*

* Indiana,¹ Maine,² Massachusetts,³ Minnesota,⁴ Mississippi,⁵ [* 1046] Nebraska,⁶ Pennsylvania,⁷ South Carolina,⁸ and Texas.⁹ In Michigan, if the judge of probate omit to require such bond, the failure to give it is not such a defect as will affect the rights of an innocent purchaser in a collateral suit.¹⁰ In other States, where the

But not in other States. statute does not require a new bond to be filed in contemplation of the sale of real estate, there is little doubt that the original administration bond, if conditioned faithfully to administer the estate, is sufficient to cover and protect the assets arising out of the sale. It is clearly the duty of probate courts, however, to inquire into the sufficiency of the bond, whether the statute affirmatively provide so or not, whenever an order is prayed for the sale of real estate; and if found inadequate in amount of the penalty, or unsafe by reason of the character of the sureties, to order new bond to be given in a sum at least double the value of the assets, including the anticipated yield of the real estate.¹¹ This subject is fully treated in connection with the similar subject of the relative liability of sureties on general and special bonds of guardians selling realty, in Woerner on Guardianship.¹²

For a similar reason, the executor or administrator is required, in some of the States, to take an oath before selling real estate upon the order of the probate court,¹³ and sales are sometimes

¹ But the heirs must refund the purchase-money before the sale is held void: *Foster v. Birch*, 14 Ind. 445, 447.

² *Moody v. Moody*, 11 Me. 247.

³ *Hannum v. Day*, 105 Mass. 33, 38.

⁴ *Babcock v. Cobb*, 11 Minn. 347, 352.

The order of license having fixed the amount of the bond, it was held that the court could subsequently approve a bond for a smaller sum without invalidating the sale: *In re Winona Bridge Co.*, 51 Minn. 97.

⁵ *Williamson v. Williamson*, 3 Sm. & M. 715; *Currie v. Stewart*, 26 Miss. 646, 649; *Washington v. McCaughan*, 34 Miss. 304, 307; *Hamilton v. Lockhart*, 41 Miss. 460, 479; *Buckner v. Wood*, 45 Miss. 57, 62; *Clay v. Field*, 115 U. S. 260, 261.

⁶ *McClay v. Foxworthy*, 18 Neb. 295.

⁷ *Thorn's Appeal*, 35 Pa. St. 47, 49, but allowing the bond to be given before consummation of the sale.

⁸ Rev. St. 1873, p. 459, § 11.

⁹ In this State the statute requires the administration bond to be annually renewed. It was decided that if the new bond be given before the confirmation of the sale, although required before the

order of sale was made, it is sufficient: *Edwards v. Raguet*, 19 Tex. 164, 166.

¹⁰ *Norman v. Olney*, 64 Mich. 553, 563; see also *Woods v. Monroe*, 17 Mich. 238 (with dissenting opinion by Christiancy, J., p. 244). In this State it is also held that the bond on the sale of real estate is only an additional security to the general bond to secure the proceeds of the sale of the realty, for which both bonds are liable; *Durfee v. Joslyn*, 92 Mich. 211.

¹¹ *Estate of Arguello*, 50 Cal. 308; *Hasty v. Johnson*, 3 Me. 282; *National Bank v. Stanton*, 116 Mass. 435, 438. See *Higgins v. Reed*, 48 Kans. 272, 278.

¹² § 41, p. 132, citing numerous cases equally applicable to the text.

¹³ *Parker v. Nichols*, 7 Pick. 111, 117; *Cooper v. Sunderland*, 3 Iowa, 114, 137, 138; *Thornton v. Mulquinne*, 12 Iowa, 549, 554; *Babbett v. Doe*, 4 Ind. 355, 359; *Fowle v. Coe*, 63 Me. 245, 250; *Voorhees v. Bank of United States*, 10 Pet. 449, 470; *Hugo v. Miller*, 50 Minn. 105. The same subject is treated, in connection with the sale of real estate of minors, in *Woerner on Guardianship*, § 76, the authorities cited being equally applicable here.

held void where the administrator had omitted to take such oath.¹ But long acquiescence by the heirs, and other circumstances tending to show the publicity and fairness of the sale, will raise a presumption from which the jury may infer that the oath has been taken.²

Oath sometimes held necessary.

The verification of the petition will be presumed in a [*1047] collateral * proceeding;³ and its omission is held, in North Carolina, not fatal to the validity of the decree of sale made without,⁴ but in California was held to avoid the sale.⁵ The verification of the non-residence of the heirs, required, in some States, to authorize publication in lieu of personal service, may be made by affidavit not entitled as in the case, and without caption;⁶ and may be made on information and belief.⁷

Verification of the petition.

§ 473. **The Order, License, or Decree to Sell.**—Like every other step in the proceeding to subject real estate to the payment of the debts of a deceased person, the order, license, or decree of sale must be in strict compliance with the requirements of the statute, and this should be affirmatively shown by the record.⁸ It constitutes the warrant of power to the executor or administrator to sell,⁹ without which based on a proper petition the sale is void,¹⁰ and should be certain and specific in its terms,¹¹ accord with the petition,¹² describe the land to be sold with sufficient accuracy for its identification,¹³ specify the place of sale,¹⁴ and prescribe the method¹⁵ and terms

Order should be in strict compliance with the statute;

certain and specific; accord with the petition; identify the land;

¹ *Campbell v. Knights*, 26 Me. 224.

² *Gray v. Gardner*, 3 Mass. 399.

³ *Weed v. Edmonds*, 4 Ind. 468, 470.

⁴ *Stradley v. King*, 84 N. C. 635, 638.

⁵ *Wills v. Pauly*, 116 Cal. 575.

⁶ *Harris v. Lester*, 80 Ill. 307, 311.

⁷ *Rowand v. Carroll*, 81 Ill. 224.

⁸ *Gelstrop v. Moore*, 26 Miss. 206, 209; *Teverbaugh v. Hawkins*, 82 Mo. 180; *Rose's Estate*, 63 Cal. 346; *Ethell v. Nichols*, 1 Idaho (n. s.), 741.

⁹ *Goforth v. Longworth*, 4 Ohio, 129.

¹⁰ *Gilchrist v. Shackelford*, 72 Ala. 7; *Landford v. Dunklin*, 71 Ala. 594.

¹¹ *Graham v. Hawkins*, 38 Tex. 628, 632; *Blythe v. Hoots*, 72 N. C. 575.

¹² *Verry v. McClellan*, 6 Gray, 535; *Williams v. Childress*, 25 Miss. 78, 82.

¹³ If the order refer to the petition, and the petition contain a sufficient description of the land, the order will be good in a collateral proceeding: *Montgomery v. Johnson*, 31 Ark. 74, 80; *Jemison v. Gaston*, 21 Tex. 266, 271; *Davis v. Touchstone*, 45 Tex. 490, 497; *Crawford v.*

McDonald, 88 Tex. 626. It has been held that the license to sell need not specify the land to be sold: *Kingsbury v. Wild*, 3 N. H. 30, 33; but the much safer plan is to identify the lands intended to be sold in the order as well as in the petition, and the current of decisions requires this to be done. In Missouri the administrator's deed will pass no title to land not described in the order of sale: *Greene v. Holt*, 76 Mo. 677; unless it be described in the petition and appraisement: *Adams v. Larrimore*, 51 Mo. 130, 132. The omission to describe the land in the order of sale cannot be supplied, either by the notice of sale, report of sale, or approval thereof: *Melton v. Fitch*, 125 Mo. 281. In New York it was held not irregular to order the conveyance of the right, title, and interest which the testator had at the time of his decease: *In re Dolan*, 88 N. Y. 309, 322.

¹⁴ *Brown v. Brown*, 41 Ala. 215; *Cruikshank v. Luttrell*, 67 Ala. 318, 321.

¹⁵ In most States it is discretionary with

and prescribe method, time, and terms of the sale.

* thereof,¹ as well as direct the manner of [*1048] advertising.² In some of the States the sales

are required to be for ready money,³ in the legal currency of the country;⁴ but the rule generally prevailing is to

allow the court discretion to order the sale for cash or on credit.

or on credit, or partly cash and partly on credit, as may appear from the circumstances to be most conducive to the interests of the estate. This is a matter regulated by the statutes of each State.⁵ In New Jersey the order should specify the sum adjudged necessary to be raised.⁶

It is irregular to order the whole of the real estate to be sold in gross,⁷ unless it appear that by the sale of a part the residue would be greatly injured,⁸ or that it would plainly be beneficial to heirs and creditors to sell the whole;⁹ it is a gross error, also, to omit to state whether the whole or only part of the land is to be sold, but such irregularity does not destroy the validity of the sale.¹⁰ Where the property to be sold consisted of several lots an order was held proper which directed that the "sale shall cease when an amount not less than \$10,000 and not exceeding \$11,000 has been obtained."¹¹ And where one of two devisees has paid his share of the debts of the estate, the other refusing, it is proper to order the interest of the latter only to be sold;¹² so it is error to ignore the previous acts of devisees, and so frame the order that the property of one of the devisees shall escape contribution for the payment of debts.¹³

probate courts to order either a public or private sale, as under the circumstances may be deemed most advantageous; or the option may be conferred upon the administrator by an alternative order; but in some States the sale is required to be at public outcry to the highest bidder: *Logan v. Gigley*, 9 Ga. 114; *Herrick v. Grow*, 5 Wend. 579; *Coggins v. Griswold*, 64 Ga. 323; *Hand v. Motter*, 73 Mo. 457; *Tillett v. Aydlett*, 90 N. C. 551.

¹ *Bailey's Appeal*, 32 Pa. St. 40; *Weakly v. Gurley*, 60 Ala. 399, 406.

² *Parker v. Allen*, 4 Atl. 300.

³ *Foster v. Thomas*, 21 Conn. 285. See, as to the law in Louisiana, requiring a sale for cash in the first place, but allowing twelve months' credit to be given if at the first sale the appraised value is not offered, the dissenting opinion of Taliaferro, J., in *Succession of Stolz*, 28 La. An. 175, 177; also *Davidson v. Davidson*, 28 La. An. 269; *Norton v. Citizens' Bank*, 28 La. An. 354; *Campbell v. Owens*, 32 La. An. 265.

⁴ *Doe v. Hileman*, 2 Ill. 323; *Paine v. Fox*, 16 Mass. 129, 133.

⁵ *Moffitt v. Moffitt*, 69 Ill. 641, 648; *Reynolds v. Wilson*, 15 Ill. 394.

⁶ *Furman v. Furman*, 45 N. J. Eq. 744; this case was reversed on the ground that an omission to state in the order the amount of the deficiency, should have been remedied in the appellate court by directing the proper judgment: *Robinson v. Furman*, 47 N. J. Eq. 307.

⁷ *Runyan v. Newark Co.*, 24 N. J. L. 467, 473.

⁸ *Black v. Meek*, 1 Ind. 180; *Hasty v. Johnson*, 3 Me. 282; *Merrill v. Harris*, 26 N. H. 142, 148.

⁹ *Clements v. Henderson*, 4 Ga. 148; *In re Dolan*, 88 N. Y. 309, 319.

¹⁰ *Griffith v. Phillips*, 9 Lea, 417.

¹¹ *Richardson v. Butler*, 82 Cal. 174, 179.

¹² *Prescott v. Walker*, 16 N. H. 340.

¹³ For instance, by ordering the residue to be sold after one of the devisees has sold his interest: *Bray v. Neill*, 21 N. J. Eq. 343, 350; *Clark's Estate*, 3 Redf. 225.

A defective order of sale cannot be aided in equity.¹ An order made subsequent to the sale is void;² nor can there be an order *nunc pro tunc* upon parol proof, or unless there be some minute in writing to support the same.³ So there can be no valid order of sale after a final settlement of the estate in the probate court, unless unadministered property has been discovered;⁴ but where [*1049] an entry of record, passing the final account and discharging the administrator, was disregarded by all of the parties and by the court, it was not allowed to be invoked to defeat a *bona fide* sale subsequent thereto.⁵ These and similar questions, however, are governed by the policy of each State, and cannot be further considered in detail.

If the proceedings have not resulted in a valid sale, the title to the real estate has not, of course, been affected, and the order of sale may be renewed;⁶ or if, before the sale is effected, some defect in the proceeding is discovered, for instance, that the description of the real estate in the petition or order is erroneous or incomplete, a new order may be based upon the amended petition or corrected proceeding.⁷ But where a valid sale produces an insufficient amount to pay all the debts, there must be a new proceeding based upon a new notice to the heirs; an order based upon the old petition, without new notice, for the sale of further real estate, is void.⁸ It may be stated in this connection, that in most States an appeal lies from the order of sale, even before it is consummated;⁹ or from an order refusing a sale;¹⁰

Appeal from
the order of
sale.

¹ Tiernan v. Beam, 2 Ohio, 383, 393.

² Ludlow v. Park, 4 Ohio, 5, 12. Nor can a sale without an order be subsequently confirmed on the ground of the necessity of the sale as having been made for the benefit of the heirs: Bjonerland v. Eley, 15 Wash. 101.

³ Ludlow v. Johnston, 3 Ohio, 553. But an order erroneously made may be rescinded: Radford v. Westcott, 1 Desaus. 596.

⁴ Withers v. Patterson, 27 Tex. 491, 502.

⁵ Alexander v. Maverick, 18 Tex. 179.

⁶ If the debts have meanwhile been paid with the proceeds of the former invalid sale, there must still be a new sale, because the administrator is liable to refund the purchase-money: Willson v. Bergein, 28 N. H. 96, 99.

⁷ Sheldon v. Wright, 7 Barb. 39, 48, et seq.

⁸ Ackley v. Dygert, 33 Barb. 176, 191; Cunningham v. Anderson, 107 Mo. 371.

But where part of the realty described in the petition has been sold the order may be renewed as to the residue without a new petition: Sledge v. Elliott, 116 N. C. 712.

⁹ Simpson v. Pearson, 31 Ind. 1; Wilson v. Brown, 21 Mo. 410 (per Ryland, J.); Wolff v. Wohlien, 32 Mo. 124; Jones v. Jones, 42 Ala. 218; Weisne's Appeal, 39 Conn. 537 (per Seymour, J.). In Colorado a writ of error will lie: Sloan v. Strickler, 12 Colo. 179. And so in Illinois, where an appeal or writ involving sale of freehold goes to the Supreme Court, otherwise to the Appellate Court; Lynn v. Lynn, 160 Ill. 307. See in the right to appeal, ante, § 467, p. *1032; post, § 545, p. *1197, *1198. In Massachusetts a sale made before the time to appeal from the decree of license has expired is void: Daley v. Francis, 153 Mass. 8.

¹⁰ Ferguson v. Carson, 86 Mo. 673, 677; Daly's Appeal, 47 Mich. 443. See post, § 545, on appeals.

and the sale cannot be collaterally attacked for any objection to the petition which might have been corrected upon a direct appeal, unless the petition was so defective as not to confer jurisdiction on the court.¹

¹ And an objection made by a purchaser at the sale to an order confirming it, is a collateral attack: *Devincenzi v. Figone*, 119 Cal. 498.

[* 1050]

* CHAPTER LI.

OF THE SALE AND ITS CONSUMMATION.

§ 474. **Time of Selling.** — The executor or administrator selling under order of the probate court must strictly pursue the authority under which he acts.¹ He has no discretion, except as to the mode of conducting the sale so as to secure the highest price, within the scope pointed out by the statute or order of sale.²

Executor selling must strictly pursue his authority.

The sale must be made at the time appointed by the court, or, if no time is mentioned in the order, within the statutory duration of the license, if any be provided.³ If made within the time, however, it will not be avoided by a subsequent delivery of the deed.⁴ Where a deed was not delivered or executed by an administrator until out of office, equity granted relief on the ground that it constituted a case of defective execution of a power.⁵ An order requiring a report of sale at the next term, but mentioning no time of sale, was held not to limit the time.⁶ If the authority of the court under whose order the administrator is acting ceases, his authority ceases also, and his subsequent acts under such order are void.⁷ So, also, where the law under which the court made the order is repealed.⁸

Sale must be made at the time appointed by the court, or within duration of license.

If authority of court cease, the authority of the administrator ceases.

¹ *Wiley v. White*, 3 Stew. & P. 355; *Lockwood v. Sturdevant*, 6 Conn. 373; *Reynolds v. Wilson*, 15 Ill. 394; *Broadwater v. Richards*, 4 Montana, 80.

² Described as being the discretion of a sheriff on an execution, or of a master on a sale: *In re Lawrence*, 1 Redf. 310, 320.

³ Some of the early cases in Maine and Massachusetts are very strict in this particular. It was held in *Macy v. Raymond*, 9 Pick. 285, that, under the statute limiting the license to one year, the sale was void unless completed within that time by delivery of the deed. See also *Chadbourne v. Rackliff*, 30 Me. 354, 359; *Marr v. Boothby*, 19 Me. 150; *Mason v. Ham*, 36 Me. 573; *Wellman v. Lawrence*, 15 Mass. 326, 329. See, on the kindred subject of executing orders of sale of the real

estate of minors, *Woerner on Guardianship*, § 79.

⁴ *Howard v. Moore*, 2 Mich. 226, 234; *Osman v. Traphagen*, 23 Mich. 80, 85; *Cooper v. Robinson*, 2 Cush. 184, 190; *Jewett v. Jewett*, 10 Gray, 31; *Poor v. Larrabee*, 58 Me. 543, in which case the deed was held good, being executed and delivered within the year, but not acknowledged until long afterward.

⁵ *Howard v. Moore*, *supra*.

⁶ *Bowen v. Bond*, 80 Ill. 351, 357.

⁷ *McLaughlin v. Janney*, 6 Gratt. 609, 614. See *Bender v. Bean*, 52 Ark. 132, 143.

⁸ *Perry v. Clarkson*, 16 Ohio, 571; *Campau v. Gillett*, 1 Mich. 416, 419; *Bank of Hamilton v. Dudley*, 2 Pet. 492, 523; *Ludlow v. Wade*, 5 Ohio, 494, 501; *Ludlow v. Johnston*, 3 Ohio, 553.

* But the removal of the administrator after the filing of a [* 1051] petition for the sale of lands to pay debts,¹ or even after the order of sale,² is no reason for dismissing the proceedings; they should be continued by the successor as soon as he is appointed and qualified.

§ 475. **Notice or Advertisement of the Sale.**—In all cases of public sale, — that is to say, where the sale is ordered to be made to the highest bidder at public outcry, at a designated time and place, — it is obviously of importance to bring together at such time and place the greatest possible number of persons desiring to purchase, in order that by reason of the competition among them the highest price may be secured for the land. To this end provision is made in the statutes of the several States requiring publication of the time, place, and terms of the proposed sale, together with a description of the property offered. This is generally provided to be by posting notices at a number of public places in the county or vicinity, or by publication in a newspaper for a stated length of time before the day of sale, or by both these methods of giving notice. Since the utmost publicity attainable with the means designated is the object of such publication, it must be shown that the means have been used to that end. Hence, publication in a newspaper printed in the German language, although the notice itself be in the English language, is insufficient, and will not support a valid sale.³ Judge Wagner, in the case of *Graham v. King*, argues that “the insertion of an English advertisement in a German paper would generally give less publicity to it than if it were published in the German language, as those among whom the paper circulates would not be able to read it in the English tongue;”⁴ but under a statute requiring publication in a paper published in the German language, it was held, that such publication must be in the English language, though the statute was silent on that subject.⁵ The publication of a notice in the English language on the English side of a newspaper printed in both the English and German languages is, however, sufficient.⁶ In Louisiana the statute requires publication of the notice of sale for thirty days in

¹ *Steele v. Steele*, 80 Ill. 51, 53.

² *Gress Lumber Co. v. Leitner*, 91 Ga. 810, 813. So where the executor dies pending the proceedings: *Massey's Succession*, 46 La. An. 126.

³ *Graham v. King*, 50 Mo. 22; *Doerge v. Heimenz*, 1 Mo. App. 238; *Heilkamp v. Biedenstein*, 3 Mo. App. 450.

⁴ *Graham v. King*, *supra* (p. 23). To same effect, *State v. Orange*, 54 N. J. L. 111, 116, distinguishing between “the

publication of a notice and the publication of an instrument or statute or ordinance.”

⁵ On the ground that the prior statute of jeofails requiring “all proceedings whatever in every court of law or equity in this State” to be in the English language, was not necessarily repealed thereby: *Tappan v. Dayton*, 51 N. J. Eq. 260, reversing, *pro tanto*, *State v. Orange*, *supra*.

⁶ *McLean v. Bergner*, 80 Mo. 414.

a daily newspaper,¹ and it is held that publication in one paper is sufficient; hence an administratrix, having advertised in several, was allowed the cost of advertising in one only.² Where the statute required publication in one paper only, but the court directed publication in two, it was held that the confirmation by the court of a sale after publication in one paper only made it valid.³ So publication made in accordance with the statutory provision, under an order erroneously directing advertisement in a different manner, was held to be in compliance with law.⁴ The publication must be continuous in the same newspaper for the whole time required by the statute.⁵ A statute requiring advertisement for three weeks successively is satisfied by three publications in a daily newspaper, one each week, on regular publication days separated by intervals of one week each.⁶ Where two modes of giving notice are pointed out by two several statutes, compliance with either will be sufficient.⁷ A statute requiring publication in such paper as the court may direct, for two weeks successively next before the day on or after which the sale is to be made, as often during the prescribed period as the paper is regularly issued, is complied with by publication in a weekly paper, and need not in such case be made on the day of sale.⁸ The requirement of notice "for three weeks successively next before such sale" is complied with by a publication of three weeks, the last of which is within the week next before the week of the sale;⁹ but not if there is an interval of nine days between the completion of the last publication and the day of sale;¹⁰ or, it has been held, of eight days,¹¹ and where the publication was required to be daily; an interval of one day was held fatal.¹²

Where the law or the order of court requires notice of the sale to be posted in public places, it must be shown in the return or report of sale that the places of posting were public places; a description of them is not sufficient.¹³ It has been held that, in cities, the notices should be posted in the public ward where the land is situated.¹⁴ Proof of posting notices may be

¹ Succession of Curley, 18 La. An. 728.

² Succession of Hauteau, 32 La. An. 54, 57.

³ Sankey's Appeal, 55 Pa. St. 491.

⁴ Lawrence's Appeal, 49 Conn. 411 428.

⁵ Townsend v. Tallant, 33 Cal. 45.

⁶ Dayton v. Mintzer, 22 Minn. 393, 395; to similar effect Harris's Petition, 14 R. I. 637; Estate of Osgood, Myr. 153.

⁷ Frothingham v. March, 1 Mass. 247, 253, affirmed in Dexter v. Shepard, 117 Mass. 480, 484.

⁸ *In re* O'Sullivan, 84 Cal. 444.

⁹ Wilson v. Thompson, 26 Minn. 299.

¹⁰ Hartley v. Croze, 38 Minn. 334; the sale was held void for this and other irregularities.

¹¹ Tappan v. Dayton, 51 N. J. Eq. 260.

¹² Hellman v. Merz, 112 Cal. 661.

¹³ It will not, for instance, be presumed that schoolhouses are public places within the meaning of the statute; nor that roads are public places, unless this be shown: Sowards v. Pritchett, 37 Ill. 517, 521.

¹⁴ McFeeley's Estate, 2 Redf. 541.

made by secondary evidence, since the originals must necessarily be destroyed by the posting.¹

The notice must state the time and place of sale, or the sale will be void.² It was held in an early Massachusetts case,³ that it is not necessary to state in the notice the terms of the sale; but such an omission is obviously unsafe in any State where the court is intrusted with discretion in respect to the terms upon which the sale is to be made. A misdescription of the street number of a house advertised for sale does not render the notice invalid, if the boundaries are correctly given;⁴ nor will a sale be set aside because the description of the premises to be sold was not * full if it did not mislead the bidders;⁵ and if the advertisement is sufficient to put a man of ordinary prudence on inquiry, and such an inquiry would readily disclose the true facts, a misdescription in the advertisement will not release the bidder from complying with his bid.⁶ But where the advertisement does not fairly include a tract of land concerning which there is doubt or dispute, such tract will not be deemed to pass by the sale.⁷

The day of sale must be set out with sufficient precision to enable those who may wish it to be present as bidders. A misstatement of the day, or the statement of an impossible day, will render the sale void. Hence, where the notice stated that the sale would be on Friday, the seventeenth day of a month named, when Friday was in fact the sixteenth day of such month, the sale was held void, although the last notice on the morning of the day of sale stated both the day of the week and the day of the month correctly.⁸

Where the order is to sell at private sale, notice of the sale is not usually necessary, though in some States it is even then required.⁹

§ 476. Appraisement required before the Sale. — The statutes of nearly all of the States require the property to be sold to be first appraised — usually by three disinterested freeholders of the county in which the land lies — before it can be legally sold. Such appraisement is necessary to guide the discretion of the court in approving or disapproving the sale, and as a means of furnishing *prima facie*

¹ Brown v. Redwyne, 16 Ga. 67, 76.

² Blodgett v. Hitt, 29 Wis. 169, 178, et seq. This and similar points arising in the sale of real estate of minors are discussed in Woerner on Guardianship, § 81, with authorities equally applicable to the matters treated in the text.

³ Paine v. Fox, 16 Mass. 129, 133.

⁴ New England Hospital v. Sohler, 115 Mass. 50.

⁵ Succession of Wadsworth, 2 La. An. 966.

⁶ Wyly v. Gazan, 69 Ga. 506.

⁷ Bradford v. McConihay, 15 W. Va. 732, 757.

⁸ Wellman v. Lawrence, 15 Mass. 326, 330.

⁹ Hellman v. Merz, 112 Cal. 661.

evidence of value in questions affecting the liability or *fides* of executors or administrators and purchasers.¹ The functions of the appraisers, and the nature of their duties in respect of the appraisal of personal property, have been commented on in an earlier chapter.² What is there said is applicable, in a general way, to the functions and duties of the appraisers of real estate, subject of course to such modifications as may result from the statutory provisions regulating the subject. In appraising real estate, as well as in appraising personal property, the essential purpose

Property should be appraised at such sum as the appraisers believe it will bring at compulsory public sale.

is to ascertain the equivalent of the land in money; hence, [*1054] appraisers should indicate the amount of dollars * and cents which it will bring when exposed to sale in the mode pointed out by the statute, which is usually by public outcry to the highest bidder.³

The sale of real estate by an executor or administrator without first having had the same appraised is an irregularity which will cause it to be set aside in a direct proceeding for that purpose,⁴ and the purchaser cannot in such case be compelled to comply with the terms of sale.⁵ But in most States the sale is not on this account absolutely void in a collateral proceeding.⁶ In Louisiana, the appraisement must be made within one year of the date of appointment, if the

Sale without appraisement generally voidable in a direct proceeding, but not void.

sale is to be on credit, but not so if the sale is for cash;⁷ and the sale for cash must bring the appraised value, and if no bid of that amount is obtained the property must be re-advertised, and the second sale must be on a credit of twelve months, at which the sale may be made at any price;⁸ and it is held under this law that sales made for cash at less than the appraisement will not be disturbed, if it be shown that the property brought its *actual* value.⁹ Many States provide a minimum price below which a private sale will not be allowed to be made; but at a public sale the fact that the property brought less than three-fourths or two-thirds,¹⁰ or even one-half, of the appraised value, will

States providing a minimum price.

¹ Noland v. Barrett, 122 Mo. 181, 187.

² *Ante*, § 320.

³ *Per Green, Pr.*, in *Bradford v. McConihay*, 15 W. Va. 732, 763. See as to the rule under the similar requirement in sales of minors' real estate, cases cited in *Woerner on Guardianship*, § 80.

⁴ *Bell v. Green*, 38 Ark. 78.

⁵ *Succession of Curley*, 18 La. An. 728.

⁶ *Bell v. Green, supra*; *Apel v. Kelsey*, 47-Ark. 413, 419. *A fortiori*, an appraisement made before the order of sale will

not make void the sale: *Noland v. Barrett*, 122 Mo. 181.

⁷ *Johnson v. Hamilton*, 2 La. An. 206, 207.

⁸ *Herrmann v. Fontelieu*, 29 La. An. 502; *Succession of Hood*, 33 La. An. 466, 472; *Succession of Quinn*, 34 La. An. 879.

⁹ *Herrmann v. Fontelieu*, 29 La. An. 502, 505.

¹⁰ *Fudge v. Fudge*, 23 Kans. 416, 420; *Lewis v. Labauve*, 13 La. An. 382; *Carter v. McManus*, 15 La. An. 641.

not alone justify the setting aside of the sale, unless a better price can be relied on at a subsequent sale.¹

The appraisement is sufficient if it be signed by two of three appraisers appointed and qualified;² so if it be not signed by the appraisers, but attached to and immediately following their affidavit.³ Where the law requires the appraisers to be freeholders, it is competent to show by parol proof that the appraisers described in the report as "householders" were in fact freeholders;

* and that any one in possession of land, notoriously claiming to own it, is a freeholder in the sense of the statute.⁴

§ 477. **Conducting the Sale.** — In selling the real estate of a deceased person, the executor or administrator must act within the scope of his powers under the statute, and according to the directions contained in the order of sale.⁵ He is personally liable on his bond for the consequences of any deviation therefrom. Thus, if he

Administrator is personally liable for consequences of departing from the powers conferred on him. is directed to sell for cash, a sale on credit is in excess of his authority, and may therefore be void, unless confirmed in chancery or by the heirs;⁶ and the administrator is liable to the estate for the price at which the land was sold.⁷ So, if he report that he has complied

with the order of the court, when the fact is otherwise, he is liable for any loss arising out of the failure.⁸ A private sale by him confers no title, unless the order given by the court under its statutory power so direct.⁹ Since he has no power to sell without order or

Contracts to sell land before the court has ordered a sale are void. decree of court, an agreement or bond made by him before obtaining such order to sell the land of the deceased is utterly void, incapable of being enforced at law or in equity. It is held to be against public policy to allow

the administrator to place himself in a position where the exercise of his lawful authority would be influenced or controlled by previous contracts binding upon him.¹⁰ In those States which require the sale to be by public outcry to the highest bidder, such an agreement would make it his interest to discourage bidding, because he would be liable for the difference between the price agreed on and what the land would bring at auction.¹¹ Such an agreement may, however, render the executor or administrator liable in damages to the person

¹ *Bradford v. McConihay*, 15 W. Va. 732, 763. See *post*, § 478, as to the principles governing the court in approving or disapproving sales.

² *Moore v. Wingate*, 53 Mo. 398, 407; *Johnson v. Beazley*, 65 Mo. 250, 253.

³ *McVey v. McVey*, 51 Mo. 406, 418.

⁴ *Exendine v. Morris*, 8 Mo. App. 383.

⁵ *Filmore v. Reithman*, 6 Col. 120, 130.

⁶ *McCully v. Chapman*, 58 Ala. 325.

⁷ *Richards v. Adamson*, 43 Iowa, 248.

⁸ *Heath v. Layne*, 62 Tex. 686, 693; *Payne v. Pippey*, 49 Ala. 599; *James v. Faulk*, 54 Ala. 184; *Fontenet v. De Bailon*, 8 La. An. 509.

⁹ *Fambro v. Gantt*, 12 Ala. 298; *Schlicker v. Hemenway*, 110 Cal. 579.

¹⁰ *Stuart v. Allen*, 16 Cal. 473, 498; *Bridgewater v. Brookfield*, 3 Cow. 299.

¹¹ *Herrick v. Grow*, 5 Wend. 579; *Logan v. Gigley*, 9 Ga. 114.

with whom he has contracted¹ or constitute a binding contract on the administrator personally;² and in Georgia the statute allows a sale by private contract, if it is afterward made good by a sale at public auction.³

[* 1056] * Inasmuch as the authority of the administrator is derived from the order of sale, he has no authority to change or vary the terms and conditions therein stated,⁴ and can sell only so much land as is specified or indicated therein; if he sell more, the sale is void.⁵ And so if he sell more than is necessary to pay debts, although the order so direct, where the order is itself void.⁶ But he is not bound to sell all the land included in the order, if the sale of a part of it will yield a sufficient sum of money to pay the debts; and if he make proclamation at the time of the sale of a restriction of the quantity to be sold, purchasers will be bound thereby, although they may not have heard him.⁷ It has been decided that the sale of an equity of redemption is utterly inoperative to convey the fee of unencumbered land.⁸

Administrator cannot vary or change the terms and conditions contained in the order to sell;

but may sell less land than the order includes.

The statements and representations made by the administrator at the time of the sale bind the estate only as to such matters as are prescribed in the order, or concerning which he has discretionary power;⁹ hence, the estate is not, for instance, bound by his representations of the validity of the title. If he mislead purchasers by false statements which he is not authorized to make, or in respect of matters lying beyond the scope of his discretion, he may make himself personally liable thereby, but not the estate.¹⁰ And fraudulent misstatements by the administrator may result in relieving the purchaser, in equity.¹¹ Puffing, the employment of sham bidders, and similar contrivances to stimulate

He cannot bind the estate by representations made at the sale.

Puffing, sham bidders, etc., are discountenanced by courts.

¹ *Dresel v. Jordan*, 104 Mass. 407, 414.

² *Logan v. Gigley*, 9 Ga. 114, 116.

³ It should be proclaimed at such public sale that its purpose is to make the title good; and it is open to review: *Nosworthy v. Blizzard*, 53 Ga. 668, 673.

⁴ *Cruikshank v. Luttrell*, 67 Ala. 318, 322.

⁵ *Wakefield v. Campbell*, 20 Me. 393, 400; *Litchfield v. Cudworth*, 15 Pick. 23, 32 (holding the whole sale void, as no distinction will be made between what was and what was not authorized to be sold); *Gregson v. Tuson*, 153 Mass. 325 (holding a sale void where more was sold than was necessary to pay debts and charges, under an order to sell only what was necessary for such purpose); *Adams v. Morrison*,

4 N. H. 166; *Wells v. Mills*, 22 Tex. 302, 304, *et seq.*

⁶ *Gill v. Givin*, 4 Met. (Ky.) 197.

⁷ *Lee v. Hester*, 20 Ga. 588, 592.

⁸ *Braley v. Simonds*, 61 N. H. 369.

⁹ *Dunlap v. Robinson*, 12 Oh. St. 530; *Giles v. Moore*, 4 Gray, 600; *Randolph's Appeal*, 5 Pa. St. 242, 245; *Cruikshank v. Luttrell*, 67 Ala. 318, 322, 325; *Selb v. Montague*, 102 Ill. 446, 451; *Foot v. Overman*, 22 Ill. App. 181. Consult also *Woerner on Guardianship*, § 82.

¹⁰ *Mellen v. Boarman*, 13 Sm. & M. 100; *Westfall v. Dungan*, 14 Oh. St. 276; *Arnold v. Donaldson*, 46 Oh. St. 73; *Riley v. Kepler*, 94 Ind. 308, 311; *West v. Wright*, 98 Ind. 335; *Fritz v. McGill*, 31 Minn. 536, 539; *Wells v. Harper*, 81 Ga. 194.

¹¹ *Post*, § 485.

bidding at public sales, are discountenanced by courts; the current of authorities is now, that the employment of such means taints the transaction with fraud, against which probate or chancery courts will relieve a purchaser, upon his complaint, by setting aside the sale.¹ But * within the scope of his authority [* 1057]

Administrator may within the bounds of his authority bind the purchaser and estate.

he may bind both the purchaser and the estate, by statements publicly made in connection with the sale, or by agreement with the purchaser. Thus he may agree to pay off a mortgage constituting an encum-

brance upon the land offered for sale, and such agreement is binding if not in violation of the terms of the order or statute,² but is void otherwise.³ So he may agree to pay the taxes accrued since the decedent's death;⁴ and the purchaser may, under an agreement with the administrator, discharge his note given for property purchased at the administrator's sale, by paying creditors of the estate.⁵ And the purchaser is bound by a sale stated by the administrator to be subject to an existing easement, although not alluded to in the order of sale.⁶ Where the administrator is

Changing the terms of sale.

empowered to fix the terms of sale, it has been held that he may by proclamation change the advertised terms; but the proof must be clear that the change was made known to the purchaser, else he will not be bound thereby.⁷ The power of the administrator to bind the estate by covenants in the deed, and the rights of purchasers, will be considered hereafter.⁸

In some of the States, provision is made for the appointment of commissioners of sale;⁹ in others, the sale may be under execution

No one can, as a general rule, conduct the sale except the

by the sheriff.¹⁰ But in the absence of statutory authority to the contrary the sale must be conducted by the executor or administrator in person. The court can

¹ "To screw up the price, as it has been aptly termed, by secret machinery, can be no less than a fraud; and a sham bidder can be used for no other purpose": *per* Gibson, C. J., in *Pennock's Appeal*, 14 Pa. St. 446, 450; *Schug's Appeal*, 14 W. N. C. 49; *De Haven's Appeal*, 106 Pa. St. 612. See also *Crosson's Appeal*, 125 Pa. St. 380, 385.

² *May v. Taylor*, 27 Tex. 125, 128; *Stebbins v. Field*, 43 Mich. 333; *Wanzer v. Eldridge*, 33 N. J. Eq. 511. But, as hereinafter stated, the purchaser must, in most States, assume all encumbrances, the sale being simply of the decedent's interest: *post*, § 482, and authorities there cited.

³ *Maul v. Hellman*, 39 Neb. 322, 330.

⁴ *Brown v. Evans*, 15 Kan. 88, 92.

⁵ *Pittman v. Pittman*, 59 Miss. 203.

⁶ *Overdeer v. Updegraff*, 69 Pa. St. 110, 117.

⁷ "By the common-law rule, written or printed particulars and conditions of sale cannot be contradicted, added to, or altered by verbal declarations made by the auctioneer at the time of the sale": *per* Warner, C. J., in *Daniel v. Jackson*, 53 Ga. 87, 90.

⁸ *Post*, § 480.

⁹ For instance, in Mississippi: *Alcorn v. The State*, 57 Miss. 273; North Carolina: *Roberts v. Roberts*, 65 N. C. 27; West Virginia: *Ellett v. Reid*, 25 W. Va. 550.

¹⁰ For instance, in Florida: *Union Bank v. Powell*, 3 Fla. 175, 196; Louisiana: *Succession of Fontelieu*, 28 La. An. 638; *Dobard v. Bayhi*, 36 La. An. 134.

appoint neither the sheriff,¹ nor the creditor,² nor any executor or administrator, to person but the executor or administrator, to administrator.

[*1058] *do so.³ It would seem that, as a general rule, in analogy with the doctrine denying to a trustee the power to delegate his authority,⁴ the administrator cannot authorize an agent or attorney in fact to make the sale;⁵ but this point has been doubted in Missouri;⁶ and in Arkansas,⁷ Georgia,⁸ and New Hampshire,⁹ sales made by agents have been sustained; but of course the sale is voidable if such agent purchase for himself or for another.¹⁰ The adjournment of a sale may be announced by an attorney in the absence of the administrator, and the sale made upon the day to which it was adjourned is not thereby invalidated.¹¹ If the sale be at public outcry, the administrator may himself act as auctioneer,¹² or employ a professional auctioneer or other person to act as crier in his presence,¹³ whose acts and announcements in such case are deemed to be those of the administrator himself.¹⁴

It is held in some States, that if, from the extremity of the weather or other unavoidable cause, there be no bidders present, or if the competition be so low that the property would not bring above one-half its value, it is the duty of the administrator to adjourn the sale to some future day; and a sale on such adjourned day, if the adjournment was *bona fide*, will be sustained.¹⁵ The safer course, however, seems to require a report of the result to the probate court, and to obtain its order for a new sale if a better result may be hoped for.¹⁶

It is usual to require a deposit of part of the price bid, in order to secure the consummation of the sale on its approval. This is held to be a reasonable precaution; one-fourth the amount bid is not too much to be demanded.¹⁷

¹ *Jarvis v. Russick*, 12 Mo. 63.

² Even if the administrator be adversely interested: *Brown v. Woody*, 22 Mo. App. 253, 260.

³ *Swan v. Wheeler*, 4 Day, 137, 140; *Crouch v. Eveleth*, 12 Mass. 503; *Alcorn v. The State*, 57 Miss. 273; *State v. Younts*, 89 Ind. 313, 316.

⁴ *Graham v. King*, 50 Mo. 22, 24.

⁵ *Kellogg v. Wilson*, 89 Ill. 357.

⁶ *Rugle v. Webster*, 55 Mo. 246, 250.

⁷ *Sturdy v. Jacoway*, 19 Ark. 499, 518.

⁸ *Cheever v. Hora*, 22 Ga. 600.

⁹ *Currier v. Green*, 2 N. H. 225.

¹⁰ *Bond v. Watson*, 22 Ga. 637.

¹¹ *Hicks v. Willis*, 41 N. J. Eq. 515.

¹² *Lafiton v. Doiron*, 12 La. An. 164.

¹³ *Kellogg v. Wilson*, *supra*.

¹⁴ *Estate of Schwartz*, 12 Phila. 71; *Vandever v. Baker*, 13 Pa. St. 121, 126.

¹⁵ *Norris v. Howe*, 15 Mass. 175; *Noland v. Barrett*, 122 Mo. 181; *Beaubien v. Poupard, Harr.* (Mich.) 206. See *Hicks v. Willis, supra*.

¹⁶ See *infra*, § 478, as to the confirmation or rejection of sales by the court.

¹⁷ *Allen v. Shepard*, 87 Ill. 314, 316. In Mississippi it was held that the purchaser was under no obligation to pay the administrator before confirmation of the sale, that the latter held the money paid, as a mere depositary, and if misappropriated by him the loss must be borne by the purchaser: *Pool v. Ellis*, 64 Miss. 555, 563. It was held that earnest-money paid on account of a void sale is not held by

* § 478. **Report and Confirmation of the Sale.** — To [*1059] enable the probate court to examine into the doings of the

Report of what has been done under the order must be made to the probate court;

until confirmation, there is no sale.

Confirmation of the sale is the judicial announcement of its validity.

administrator in respect of the sale of real estate, and to determine whether he has complied with all the requirements of the statute and of the order of the court touching the same, it is the duty of the executor or administrator to report to the court what he has done in the premises.¹ Until confirmed, the sale is incomplete,²

no title, either legal or equitable, passes to the purchaser,³ and the sale is void,⁴ or voidable.⁵ The confirmation or

approval of the sale by the court is the judicial ascertainment of its validity and legality, and the decree so made cannot thereafter, in any collateral proceeding, be questioned,⁶ except in those States in which the judgments of probate courts are collaterally assailable.⁷ Upon the confirmation the purchaser is entitled to a deed and writ of possession, and therefore to the rent; he is bound to pay the purchase-money, and assumes the hazard of accidental destruction of the property.⁸ The confirmation operates to cure previous irregularities in the proceedings.⁹

the executor as such, and the estate is not liable to the expected purchaser for the return of the money, unless it has actually gone into the assets of the estate: *Schlicker v. Hemenway*, 110 Cal. 579.

¹ *In re McFeeley*, 2 Redf. 541, 542; *Kelley's Estate*, 1 Abb. N. C. 102, 105; *Smith v. Wert*, 64 Ala. 34. See cases cited on the subject of report of sales of real estate of infants by guardians, in *Woerner on Guardianship*, §§ 83, 84.

² *Comer v. Hart*, 79 Ala. 389, 394; *Cruikshank v. Luttrell*, 67 Ala. 318, 321; *Apel v. Kelsey*, 47 Ark. 413, 419.

³ *Henry v. McKerlie*, 78 Mo. 416, 428; *Mason v. Osgood*, 64 N. C. 467; *Halliburton v. Sumner*, 27 Ark. 460, 463; *Yerby v. Hill*, 16 Tex. 377; *Pool v. Ellis*, 64 Miss. 555.

⁴ *Mitchell v. Bliss*, 47 Mo. 353, citing and approving earlier Missouri cases holding the sale void if not regularly confirmed; *Neill v. Cody*, 26 Tex. 286; *Graham v. Hawkins*, 38 Tex. 628, 632; *Rea v. McEachron*, 13 Wend. 465, 468.

⁵ *Moore v. Neil*, 39 Ill. 256, 263; *Bonner v. Greenlee*, 6 Ala. 411; *Smith v. Denson*, 2 Sm. & M. 326, 338; *Wallace v. Hall*, 19 Ala. 367, 371 (sale by commissioners); *Bradbury v. Reed*, 23 Tex. 258; *Littlefield v. Tinsley*, 26 Tex. 353. See

Missouri cases *infra* as to confirmation at an improper term.

⁶ *Noland v. Barrett*, 122 Mo. 181, 194; *Sturdy v. Jacoway*, 19 Ark. 499; *Thorn v. Ingram*, 25 Ark. 52, 58; *Osman v. Traphagen*, 23 Mich. 80, 88; *Camden v. Plain*, 91 Mo. 117, 128. See also *Keller v. Amos*, 31 Neb. 438, 444. But the approval cannot by any retroactive effect impart validity to a sale which is wholly void: *Cunningham v. Anderson*, 107 Mo. 371, 376; *Schlicker v. Hemenway*, 110 Cal. 579.

⁷ See on this point, *ante*, §§ 145 *et seq.*; also *post*, § 488.

⁸ *Ball v. Bank*, 80 Ky. 501, 506. The intermediate rents belong to the heirs: *Strange v. Austin*, 134 Pa. St. 96. In *Pearson v. Gillenwaters*, 99 Tenn. 446, 457, it was held that in case of an appeal the heir is entitled to the rents until the final confirmation of the sale in the appellate court.

⁹ Where, for instance, the statute required advertising in one paper, but the order of sale directed advertising in two, the confirmation was held to cure the irregularity of the administrator's advertising in only one paper: *Sankey's Appeal*, 55 Pa. St. 491. To same effect: *Furth v. U. S. M. Co.*, 13 Wash. 73, *per Scott, J.*, p. 75. But the approval of the

If the administrator neglect or refuse to report the sale for confirmation, he may be compelled to do so by order of the probate court,¹ or there may be application to a court of chancery for confirmation.² Where several tracts or parcels of ground have been sold and are returned [*1060] in one *report, the sale may be confirmed as to one or more parcels or tracts, and vacated as to others.³ The sale may be approved at a subsequent term of the probate court,⁴ but not by a probate judge after the expiration of his term of office,⁵ nor after final settlement by the administrator of the estate of which the property was sold.⁶ In Missouri the statute requires the sale to be reported to the term next after the sale was had, and it is there now held that the confirmation of the sale during the existence of the term at which it was made is irregular and voidable,⁷ while formerly such approval was held to render the sale absolutely void;⁸ but a sale subsequently again approved was held valid, because, the previous confirmation having been a nullity, the report was not thereby disposed of, but kept in abeyance.⁹

Administrator may be compelled to report.

Report may be approved in part and rejected in part, at a subsequent term.

Although an administrator's sale of real estate under order of the proper court is not valid unless reported to and confirmed by the court, and such confirmation should be shown by its record, yet the confirmation may be presumed from the acts of parties, from great lapse of time, from the payment of the purchase-money, long-continued possession under the purchase, the informal deed by the administrator, or other circumstances showing the probability of the confirmation, although it does not appear of record.¹⁰ So a confirmation will be presumed, if the court, by subsequent acts appearing of record, recognized the sale as valid,¹¹ as, for instance, if it direct the administrator to make a deed to the purchaser.¹²

Confirmation may be presumed.

Much discretion is necessarily vested in the judge in passing upon

sale cannot validate a void sale: *Hutchinson v. Shelley*, 133 Mo. 400, 412; and see cases *supra*, note 6.

¹ *Stow v. Kimball*, 28 Ill. 93, 108; *Mason v. Osgood*, 64 N. C. 467.

² *Rea v. McEachron*, 13 Wend. 465.

³ *Delaplaine v. Lawrence*, 3 N. Y. 301; *Bacon v. Morrison*, 57 Mo. 68.

⁴ *Sankey's Appeal*, *supra*; *Baker v. Henry*, 63 Mo. 517, 520.

⁵ *Bradford v. Cook*, 4 La. An. 229.

⁶ *Garner v. Tucker*, 61 Mo. 427, 434; *Melton v. Field*, 125 Mo. 281, 289.

⁷ *Sims v. Gray*, 66 Mo. 613, 616; *Wilkinson v. Allen*, 67 Mo. 502, 508; *Henry v. McKerlie*, 78 Mo. 416, 428.

⁸ *Speck v. Wohlien*, 22 Mo. 310; *Strouse v. Drennan*, 41 Mo. 289.

⁹ *McVey v. McVey*, 51 Mo. 406, 424.

¹⁰ *Smith v. Wert*, 64 Ala. 34, 38; *Santana v. Pendleton*, 81 Fed. (C. C. A.) 784; *Lloyd v. Walker*, 41 U. S. App. 381; *Neill v. Cody*, 26 Tex. 286, 290; *Moody v. Butler*, 63 Tex. 210, 212; *Agan v. Shannon*, 103 Mo. 661, 668.

¹¹ *Grayson v. Weddle*, 63 Mo. 523, 538; *Jones v. Manly*, 58 Mo. 559, 564; *Simmons v. Blanchard*, 46 Tex. 266, 270. See *Camden v. Plain*, 91 Mo. 117, 130; *Carey v. West*, 139 Mo. 146, 178.

¹² *Livingston v. Cochran*, 33 Ark. 294, 298.

the report of sale. It is his duty to inquire into the circumstances connected with the transaction, examining the administrator, purchaser, or other witnesses, if necessary; and if he reach the conclusion that the sale was not fairly made, or not in conformity with

* law,¹ or that the land was erroneously described,² the sale [* 1061] should be vacated or disapproved, and a new sale ordered if necessary. On the report of the sale by the administrator, the heirs

Parties interested may be heard on the question of approval. or other parties in interest may appear, and show that there are sufficient personal assets to pay all the debts of the estate, or that the assets have been squandered by the administrator, or by a former administrator, or that there are no debts, or any other fact tending to show that the order of sale should not have been made; and if such be the case, it will be the duty of the court to set aside or vacate the sale made in pursuance of an order obtained under such circumstances and refuse a new order.³ It is on this ground that a court of equity will decline to vacate a sale approved by the probate court, in the absence of proof that the probate decree is inequitable, and that the party complaining could not have availed himself of it in the probate court.⁴

Mere inadequacy of the price obtained is not sufficient to authorize a vacation of the sale, unless the court be satisfied that upon a resale

Inadequacy of price is not *per se* sufficient to work a rejection of the sale. a better price will be secured.⁵ The reasonable probability of realizing an advance of ten per cent upon the amount reported as bid has been held to justify an order for a new sale.⁶ It is so enacted by statute in some of the States.⁷ In California,⁸ a new bid of ten per cent

New bids may in some States be received. in excess of the bidder at the sale had may be accepted by the court and approved without ordering a new sale; or the new sale may be ordered, in the discretion of the court. But in Alabama it is held error to allow the purchaser to increase his bid, if the sale is vacated on account of the inadequacy of the price; a new sale should be ordered.⁹ In Pennsylvania the court may, before the * confirmation of a private sale, receive a [* 1062]

¹ Davis v. Stewart, 4 Tex. 223; Cruikshank v. Luttrell, 67 Ala. 318.

² Estate of Campbell, Tuck. 240; Duvall v. Bank, 10 Ala. 636, 653.

³ Fenix v. Fenix, 80 Mo. 27, 30.

⁴ See cases cited next page; also Lowe v. Guice, 69 Ala. 80, 83, and Murphy v. De France, 105 Mo. 53, 64; but in Meadows v. Meadows, 81 Ala. 451, it is held that the court is confined by the statute of Alabama to the issues, 1st, that the sale was fairly conducted; 2d, that the price is not greatly under the real

value; and, 3d, that the purchase-money is sufficiently secured.

⁵ Horton v. Horton, 2 Bradf. 200; Allen v. Shepard, 87 Ill. 314.

⁶ Kain v. Masterson, 16 N. Y. 174, 177; Campbell's Estate, Tuck. 240; Delaplaine v. Lawrence, 3 N. Y. 301; Wright v. McNatt, 49 Tex. 425; Griffin v. Warner, 48 Cal. 383; Perkins v. Gridley, 50 Cal. 97, 100.

⁷ Williams v. Perrin, 73 Ind. 57, 60.

⁸ See Griffin v. Warner, and Perkins v. Gridley, *supra*.

⁹ Field v. Gamble, 47 Ala. 443, 447.

more favorable bid;¹ and if the highest bidder refuses to comply with the terms of the sale, the property may be confirmed to the next bidder;² and the court may substitute one person as purchaser for another, if both consent.³

The power to review or set aside a judgment or decree confirming a sale after the expiration of the term at which it was rendered does not, in the absence of statutory enactment to that effect, reside in probate courts;⁴ it is, however, so provided in some of the States.⁵ Of course, a sale which has not been affirmed may be set aside at a term subsequent to the filing of the report.⁶ Sales will be set aside in equity where there has been fraud,⁷ or where the purchase was made by an appraiser;⁸ or for great and manifest inadequacy of price, from which fraud may be presumed;⁹ or where the property was bought by the executor or administrator himself, or by one of his relatives.¹⁰ But in such cases application for the vacation of the sale must be made within a reasonable time,¹¹ and all the heirs must be made parties;¹² nor will the sale be set aside if the rights of a stranger or innocent purchaser have attached.¹³ In New York irregularities in administrator's sales under order of the surrogate will be cured in equity.¹⁴

There is no power to set aside or review a judgment approving or disapproving the sale, unless given by statute.

Power to set aside sales in equity.

Executors selling under power in the will are not required to report the sale for confirmation,¹⁵ [*1063] unless *they sell under order of the court, in which case they must report like an administrator selling.¹⁶

Sales under power in a will need not be reported for confirmation.

¹ Brown's Appeal, 68 Pa. St. 53.

² Stiver's Appeal, 56 Pa. St. 9, 13.

³ Estate of Fritz, 14 Phila. 260; Davis v. Touchstone, 45 Tex. 490, 497.

⁴ Evans v. Singletary, 63 N. C. 205; Thompson v. Cox, 8 Jones L. 311; Davis v. Stewart, 4 Tex. 223; Carter v. Waugh, 42 Ala. 452, 455; State v. Probate Court, 33 Minn. 94; Succession of Anger, 38 La. An. 492.

⁵ So in Mississippi, when the rights of innocent strangers are not affected: Leonard v. Cameron, 39 Miss. 419, 422; and in North Carolina, when the confirmation was without notice to the parties in interest: Stradley v. King, 84 N. C. 635; Hyman v. Jarnigan, 65 N. C. 96. In Alabama the court may correct a misdescription of the lands in the petition, order, or other proceeding at the instance of the purchaser: Lee v. Williams, 85 Ala. 189; Brown v. Williams, 87 Ala. 353.

⁶ McSwean v. Faulks, 46 Ala. 610.

⁷ Van Horn v. Ford, 16 Iowa, 578, 583;

Smith v. Chew, 35 Miss. 153; Tillman v. Thomas, 87 Ala. 321, 324.

⁸ Armstrong v. Huston, 8 Ohio, 552.

⁹ Haynes v. Swann, 6 Heisk. 560.

¹⁰ See on the subject of purchase by the executor or administrator, *post*, § 487.

¹¹ Haynes v. Swann, *supra*; Murphy v. De France, 105 Mo. 53. In Mississippi the statute requires all actions to recover property on the ground of the invalidity of an administrator's sale to be brought within one year: Clay v. Field, 115 U. S. 260, 261.

¹² Hoe v. Wilson, 9 Wall. 501, 503.

¹³ Sively v. Summers, 57 Miss. 712, 730; Adams v. Toomer, 44 Ark. 271; Jones v. French, 92 Ind. 138; Adams v. Thomas, 44 Ark. 267.

¹⁴ *In re Hemiup*, 2 Pai. 316; s. c. 3 Pai. 305; Bostwick v. Atkins, 3 N. Y. 53.

¹⁵ *Ante*, § 464, p. *1023, note 7. One or two States making statutory exceptions to the general rule are also there referred to.

¹⁶ As to the necessity of proceeding in

The confirmation does not of itself complete or constitute the sale; the title of the heirs is not divested until the purchase-money is paid, and a deed delivered by the administrator.¹ Nor can the court, in passing upon the report of sale, go behind or revise the original order of sale.²

Confirmation does not of itself vest title in the purchaser.

§ 479. **Payment of the Purchase-Money.** — It is the duty of the administrator to collect the purchase-money for the land sold before making a deed to the purchaser, at least so much of it as was, by the terms of sale, to be paid in cash. This means, as already stated,³ money in the legal currency of the country,⁴ or, as has been said in Alabama, legal tender currency or its equivalent.⁵ He has no power to make a valid agreement with a partial number of the heirs to deduct a part of the purchase-money for an alleged deficiency in the quantity of the land sold; nor can an heir retain the purchase-money until his share to which he may be entitled out of the estate be ascertained, if the money is needed for purposes of administration.⁷ The same is true of a creditor purchasing: he cannot retain out of the purchase-money a sum equal to his demand against the estate, because all creditors have an interest in the estate, and the share to which each is entitled must be first determined by the court.⁸ Yet an administrator may agree with a creditor, that if he become the purchaser his claim may be deducted from the purchase-money to the extent of the dividend to which it may be entitled;⁹ but such agreement must be clearly proved and entered into in perfect good faith, or * it will [* 1064]

Purchase-money must be paid before deed is given.

No deduction from the price bid can be allowed by the administrator.

the probate court when power to sell is conferred by will, see *ante*, § 464.

¹ See also *post*, § 480, p. *1067; *Overdeer v. Updegraff*, 69 Pa. St. 110; *Leshey v. Gardner*, 3 Watts & Serg. 314; *Lapene v. Badeaux*, 36 La. An. 194; *Comer v. Hart*, 79 Ala. 389, 394. Hence the intermediate rents belong to the heirs: *Strange v. Austin*, 134 Pa. St. 96; *Pearson v. Gilenwaters*, 99 Tenn. 446, 457.

² *Allen v. Shepard*, 87 Ill. 314.

³ *Ante*, § 333.

⁴ *Woerner on Guardianship*, § 90.

⁵ Hence Confederate treasury notes were held to be good only for their market, not their nominal value: *Hudgens v. Cameron*, 50 Ala. 379; *Kitchell v. Jackson*, 44 Ala. 302.

⁶ *Dees v. Tildon*, 2 La. An. 412, 414.

⁷ *Succession of Cordeviolle*, 24 La. An. 319. On the other hand, if the purchasers be legatees who pay part cash, securing the balance by mortgage on the land, and

it appears that the cash payment is enough to discharge all the debts, other legacies, and expenses, so that the mortgage notes when collected would only be applied to the legacies of the purchasing legatees, and such legatees are willing and demand that the mortgage notes be distributed to them as so much cash, the administrator will not be allowed to insist on foreclosing the mortgage, especially when he does so merely to make profit for himself: *Raugh v. Weis*, 138 Ind. 42. See also *Smith's Estate*, 179 Pa. St. 208, as to agreement between the executor and purchaser concerning the method of payment, the estate being solvent.

⁸ *Schwallenberg v. Jennings*, 43 Md. 552, 559; *Eldredge v. Bell*, 64 Iowa, 125; *Brandon v. Allison*, 66 N. C. 532; *Rindge v. Oliphint*, 62 Tex. 682, 685.

⁹ *Norton v. Edwards*, 66 N. C. 367; *Ellett v. Reid*, 25 W. Va. 550

not constitute a defence in an action for the purchase-money.¹ In Louisiana the creditor of an insolvent succession, holding a first mortgage from the decedent on the property sold, or on a portion of it, may, on buying the property at administrator's sale, retain the amount of his mortgage on giving bond to indemnify a superior lien; but if creditors with inferior or concurrent mortgages become purchasers, they must pay the whole amount of their bids to the administrator, and receive from him their *pro rata* share, if any, of the proceeds.²

If the purchaser fail to pay the price bid by him, the administrator should resell the property;³ but it seems wise, if not absolutely necessary, that he should report the fact of non-payment, and obtain an order of court to resell.⁴ The court does not lose its jurisdiction to order a resale, even after confirmation, until a sale has actually been consummated.⁵ Such an order is conclusive upon the former purchaser, if he have notice that a motion to that effect will be made.⁶ The purchaser refusing to comply with the terms of the sale may be compelled to do so;⁷ or he may be held liable for any difference between his bid and any lower price which may be realized on the second sale.⁸ But the administrator must proceed to resell within a reasonable time; if he delay, his right to recover for the difference will be lost,⁹ unless the delay is caused by the request or agreement of the bidder.¹⁰

If payment of the purchase-money, or any part of it, be deferred by the terms of the sale, it is the administrator's duty to obtain security therefor,¹¹ in default of which he becomes personally liable for the amount due.¹² If the security which he takes turn out to be worthless, he is *prima facie* liable;¹³ and if he takes security by reason whereof the vendor's lien is waived, he becomes

Purchaser refusing to pay, there should be a resale.

And such purchaser is liable for any loss or expense growing out of the resale.

Deferred payments of purchase-money must be secured at the peril of the administrator.

¹ Floyd v. Rust, 58 Tex. 503, 507.

² Succession of Triche, 29 La. An. 384.

³ Duncan v. Armant, 3 La. An. 84; Wanzer v. Eldridge, 33 N. J. Eq. 511, 514.

⁴ Greenwalt v. McClure, 7 Ill. App. 152; Peirson v. Fisk, 99 Mich. 43. In Pennsylvania the order of resale must be preceded by a revocation of the confirmation: Banes v. Gordon, 9 Pa. St. 426.

⁵ Greffet v. Willman, 114 Mo. 106, 120. See also Schmidt's Estate, 182 Pa. St. 267.

⁶ Brumagim v. Ambrose, 48 Cal. 366.

⁷ Maul v. Hellman, 39 Neb. 322.

⁸ Mount v. Brown, 33 Miss. 566; Daniel v. Jackson, 53 Ga. 87; Alexander v. Hening, 54 Ga. 200; Smith v. Kinney, 30 La. An. 332; Wylly v. Gazan, 69 Ga. 506.

Unless there be fraud in the second sale: Clay v. Kegelmacher, 98 Ga. 149. In Rhode Island the measure of damages is held to be the loss caused by the vendee's default: McGuinness v. Whalen, 16 R. I. 558.

⁹ Saunders v. Bell, 56 Ga. 442.

¹⁰ Sproull v. Seay, 74 Ga. 676. See McClure v. Williams, 58 Ga. 494.

¹¹ The surety on the purchaser's bond is liable, although the sale was irregular, if it was not void: Succession of Quinn, 34 La. An. 878.

¹² King v. King, 3 John. Ch. 552; Davis v. Yerby, 1 Sm. & M. Ch. 508, 516; Cruikshank v. Luttrell, 67 Ala. 318, 322.

¹³ Curry v. The People, 54 Ill. 263, 265.

* personally liable, whether the security he took was origi- [* 1065]
 Claim for the purchase-money constitutes a vendor's lien, as in other cases of sale,² and he may retain his statutory lien and also take additional security,³ and proceed against the sureties, or exhaust his remedy against the land.⁴

Where an administrator took other real estate in lieu of that which he sold, in discharge of a debt owing him from the estate, it was held that he might protect his title in equity to the extent in which his purchase benefited the estate;⁵ and so, if he take land in payment of a debt due to the estate, the rights of heirs and devisees at once attach, of which they can be divested only by their consent, or by some judicial proceeding to which they are parties.⁶

§ 480. **The Deed of Conveyance.** — Statutes authorizing the sale of decedents' lands for the payment of their debts contemplate, and can contemplate, nothing more than the transfer, by means of such sale, of the interest or estate of the decedent to the purchaser. Executors and administrators are the agents or instruments of the law to accomplish this purpose. The legitimate office of the words of conveyance in an executor's or administrator's deed is to effect this object, and must be construed with an eye thereto. Nowhere is the principle, that general words of a releasor or grantor are to be

restrained to the occasion, more fully applicable than to such deeds.

Hence covenants of warranty contained therein, if binding at all, bind only the estate; the words "grant, bargain, and sell" imply no personal undertaking, for they are used by the executor or administrator in the execution of a trust, and are to be understood as limited to the occasion.⁷

Such covenants, whether express or implied, are a part of their official * acts, and devolve no personal liability [* 1066] upon them.⁸ So far, then, as covenants and words of warranty in an administrator's deed are fairly referable to their official capacity or duty, their effect is limited to the estate alone, and they in no manner affect the personal right or liability of the administrator.⁹ Thus, where a widow, administratrix, in executing specifi-

¹ Palmer, Appellant, 1 Dougl. (Mich.) 422.

² See Wallace v. Nichols, 56 Ala. 321, 323, as to the effect of a sale where the purchase-money has not been paid.

³ Haggatt v. Wade, 10 Sm. & M. 143, 148.

⁴ Geddis v. Hawk, 1 Watts, 280, 286, overruling Hawk v. Geddis, 16 Serg. & R. 23, 29, in which it had been held that the administrator could not proceed against

the land before exhausting his remedy against the surety.

⁵ Nosworthy v. Blizzard, 53 Ga. 668.

⁶ Cruikshank v. Luttrell, 67 Ala. 318, 324.

⁷ Per Woodward, J., in Shontz v. Brown, 27 Pa. St. 123, 133, *et seq.*

⁸ "Although they signed the deed without designating themselves as administrators": Shontz v. Brown, *supra*.

⁹ Wright v. De Groff, 14 Mich. 164,

cally articles of sale by her deceased husband, under order of the Orphan's Court, conveyed all her husband's estate and her own, in law and equity, she was held not barred of her dower, which was the only interest she had in the land.¹ For the same reason, the executor or administrator is not personally responsible for the truth of the recitals in the deed.²

But the executor or administrator may bind himself by an express and voluntary covenant collateral with his official act;³ and where he chooses to add to the ordinary obligations of an administrator's deed a personal covenant of his own, the better to insure the conveyance, he will be held personally to respond to the full scope of the covenant.⁴ Such a covenant is not within the scope of his official

But he may bind himself personally by a collateral voluntary covenant.

duty or authority, which he cannot change by any act of his own; hence the estate in such case is not bound, but only himself personally.⁵ Thus, the administrator cannot, under an order to sell describing the lands to be sold, bind the estate by a covenant for the quiet enjoyment of an easement in other lands of the deceased not ordered to be sold, unless such easement was in law already an appurtenant to the land sold.⁶ So it has been held, that where an administratrix inserted a covenant in her deed of sale, in which she was not named *as* administratrix, although so named in the fore part of the deed, and her title affixed to her signature, it was *prima facie* her personal covenant.⁷

In which case the estate is not bound.

[* 1067] * The deed of an executor or administrator should show upon its face the authority under which it was given, with sufficient certainty to enable the act done to be traced to the authority vested in him;⁸ for such a deed conveys no title unless executed pursuant to the decree or order of some court of competent jurisdiction.⁹ But it is not necessary that the grounds or reasons upon which the court proceeded in making the order of sale be specified, if the legal necessity to sell appear.¹⁰ Deeds have been held sufficient, not reciting the authority by which given, but referring to the same, and the

Deed should show on its face the authority under which it is made.

168; *Day v. Brown*, 2 Ohio, 345 (443 of 2d edit.); *Grantland v. Wite*, 5 Munf. 295.

¹ *Schurtz v. Thomas*, 8 Pa. St. 359.

² *Doe v. Cassidy*, 9 Ind. 63, 66.

³ *Kauffelt v. Leber*, 9 W. & S. 93, 97.

⁴ *Coe v. Talcott*, 5 Day, 88, 94.

⁵ *Brown v. Van Duzee*, 44 Vt. 529, 533; *Prouty v. Mather*, 49 Vt. 415, 425; *Mason v. Ham*, 36 Me. 573; *Dunlap v. Robinson*, 12 Oh. St. 530, 533; *Godley v. Taylor*, 3 Dev. 178; *Sumner v. Williams*, 8 Mass. 162, 220, *et seq.*; *Hale v. Marquette*, 69 Iowa, 376. As to the consequences of the administrator's representations made at

the sale, see § 477; and as to the extra-official covenants of a guardian selling his ward's real estate, applicable equally to executors and administrators, *mutatis mutandis*, *Woerner on Guardianship*, § 85, p. 281.

⁶ *Mabie v. Matteson*, 17 Wis. 1, 7.

⁷ *Lockwood v. Gilson*, 12 Oh. St. 526, 529.

⁸ In the absence of such recital the authority cannot be supplied: *Lockwood v. Sturdevant*, 6 Conn. 373, 386.

⁹ *Dawson v. Parham*, 47 Ark. 215.

¹⁰ *Watson v. Watson*, 10 Conn. 77, 87.

administrator describing himself as such;¹ and even without being signed by the administrator, but the capacity in which he acted appearing in some part of it.² Recitals in a deed are said to be not of the essence, but only of the form of the conveyance; a purchaser is entitled to the recitals required by the statute, but their omission does not vitiate the deed;³ and erroneous recitals may be corrected by the record.⁴ So, an administrator's deed will be presumed to be regular, where the probate records have been destroyed by fire, and the purchaser has been in possession many years.⁵

Omission of recitals does not necessarily vitiate the deed.

No title passes until deed is delivered; but delivery of deed may be compelled in equity, or by order of probate court.

An administrator's sale passes no title until a deed is executed⁶ and delivered;⁷ but where the sale is otherwise complete, equity will compel the delivery of a deed and the payment of the purchase-money,⁸ or the probate court may compel its execution in conformity with a sale made under its order, and duly confirmed.⁹

Delay in the delivery of the deed beyond the time specified in the terms of sale, in consequence of objection made to the confirmation of the sale, does not release the purchaser,¹⁰ and when made and delivered, it relates back to the confirmation of

* the sale, and confers the same title as if it had been exe- [* 1068]

And may be made to assignee of purchaser.

cuted immediately.¹¹ It may be made to an assignee of the original purchaser, or to another person with his consent.¹²

¹ Langdon v. Strong, 2 Vt. 234, 262.

² Kingsbury v. Wild, 3 N. H. 30. So where the representative deeded as administrator, instead of executor, it was held to be a mere irregularity, which did not affect the purchaser's title: Norman v. Olney, 64 Mich. 553, 564.

³ Stryker v. Vanderbilt, 27 N. J. L. 68, 71; Thomas v. Le Baron, 8 Met. (Mass.) 355, 361; Jones v. Taylor, 7 Tex. 240; Allison v. Kurtz, 2 Watts, 185, 189. In Missouri the recitals in the deed are evidence of the facts therein recited: Bray v. Adams, 114 Mo. 486.

⁴ McGhee v. Hoyt, 106 Pa. St. 516; Price v. Springfield Co., 101 Mo. 107, 119. But the land sold must be the same described in the order: Blackwell v. Townsend, 91 Ky. 609.

⁵ Starr v. Brewer, 58 Vt. 24. See Woerner on Guardianship, § 85, for cases holding deeds of guardians sufficient, though defective.

⁶ Wohlien v. Speck, 18 Mo. 561. But the confirmation of the sale passes an equitable title to the purchaser: Henry v.

McKerlie, 78 Mo. 416; Sherwood v. Baker, 105 Mo. 472; Ryan v. Ferguson, 3 Wash. 356.

⁷ Jelks v. Barrett, 52 Miss. 315; Greenough v. Small, 137 Pa. St. 132, 136; Schmidt's Estate, 182 Pa. St. 267, holding that until delivery of the deed, though after confirmation of the sale, the title of the heir is not divested.

⁸ Jelks v. Barrett, *supra*. Neither the probate court nor the administrator can impose any condition upon the delivery of the deed to the purchaser other than that of the payment of the purchase-money: Cockins v. McCurdy, 40 Kans. 758, 762.

⁹ Estate of Lewis, 39 Cal. 306, 309; Anderson v. Bradley, 66 Ala. 263.

¹⁰ Robb v. Mann, 11 Pa. St. 300, 306.

¹¹ Bellows v. McGinnis, 17 Ind. 64, 66.

¹² Ewing v. Higbee, 7 Ohio, 198, 204; Halleck v. Guy, 9 Cal. 181, 196; Cockins v. McCurdy, 40 Kans. 758, 762. But not against his objection, when the sub-purchaser has failed to comply with the Statute of Frauds: Webb v. Ballard, 90 Ala. 357.

Where there are several executors or administrators, the deed should be made by them all;¹ but if a trust is executed by one of several joint executors, with the consent of the others, or which is subsequently ratified by the others, the act of the single executor is binding in equity.² But since co-administrators are regarded in law as one individual, one co-administrator cannot convey to his associate.³ An executor cannot make a deed by attorney;⁴ and whether an administrator *de bonis non* can make a deed to land sold by his predecessor is held differently in different States, depending on the authority ascribed to administrators *de bonis non*.⁵

Deed should be signed by all, if the sale was made by more than one.

Joint executors cannot deed to each other.

¹ Ridgway v. Ridgway, 84 Ga. 25, 33. See also in connection herewith, *ante*, § 464, cases cited on p. * 1024.

² Giddings v. Butler, 47 Tex. 535, 544.

³ Greene v. Holt, 76 Mo. 677, 680. In Georgia such conveyance is held to be only voidable and capable of ratification by the heirs: Newton v. Beckam, 33 Ga. 163.

⁴ Gridley v. Phillips, 5 Kans. 349, 353.

⁵ This question has been affirmed in Illinois: Baker v. Bradsby, 23 Ill. 632; and Texas: Adams v. Richardson, 5 Tex. Civ. App. 439; negatived in Mississippi: Davis v. Brandon, 1 How. (Miss.) 154; and doubted in Missouri: Long v. Joplin Co., 68 Mo. 422, 427; Grayson v. Weddle, 63 Mo. 523, 539.

* CHAPTER LII.

[* 1069]

OF THE CONSEQUENCES ATTENDING THE SALE.

§ 481. **Application of the Proceeds.** — In England, and in those of the American States in which the English doctrine has not been modified by statute, real estate devised to be sold for the payment of debts, and money raised by the sale of property so devised, are equitable assets, differing from legal assets in being applicable to the payment of debts without regard to their dignity or grade.¹

General doctrine in America is that proceeds of sale of real estate are legal assets,

and are distributable as personal property.

But the general doctrine in America is, even in equity, that all assets coming to the executor or administrator by virtue of his office, are legal assets, to be disposed of in the course of administration, in the manner pointed out by statute.² Hence the proceeds of the sale of real estate, if necessary for the payment of debts, are distributable, like personal property, under order of the probate court;³ and if the executor has made sale under

a power in the will, there may nevertheless be an order to sell by the probate court, if necessary, and a sale under such order will oust the title derived under the execution of the power, and the executor

Realty converted "out and out" goes to the executor, and he is liable for its proceeds.

must account for the proceeds in the probate court.⁴

We have seen that, where the will directs an "out and out conversion" of the realty, the conversion takes place at the testator's death,⁵ and the money arising from the sale becomes assets for which the executor is bound to account as for personal estate;⁶ and the sureties on his bond are liable for any misapplication of such proceeds, or of rents and profits of the land.⁷

* By the sale the real estate is converted into money. [* 1070]
But the conversion is complete and effectual only to the

¹ *Monroe v. Wilson*, 6 T. B. Mon. 122, 125; *Henderson v. Burton*, 3 Ired. Eq. 259; *Cloudas v. Adams*, 4 Dana, 603. See, as to distinction between legal and equitable assets, *ante*, § 313.

² *Ante*, § 313.

³ *Robinson's Appeal*, 62 Pa. St. 213, 217; *Stillman v. Young*, 16 Ill. 318, 326; *Tappen v. Kain*, 12 John. 120.

⁴ *Bloodgood v. Bruen*, 2 Bradf. 8, 11.

But where power to sell for *payment of debts* is conferred by will, see § 464

⁵ See as to equitable conversion, § 342.

⁶ *Bloodgood v. Bruen*, *supra*; *Stagg v. Jackson*, 2 Barb. Ch. 86, 93; *Clark v. Clark*, 8 Pai. 152, 157.

⁷ *Hood v. Hood*, 85 N. Y. 561, 571. In the District of Columbia it is held that the Orphan's Court has no jurisdiction to apply the doctrine of equitable conversion: *In re Thompson*, 6 Mackey, 536.

extent and for the purposes for which the sale was authorized, whether by the will, or by the order of the court. So far as these purposes do not extend, and in so far as any of them do not take effect in fact or in law, the property retains its former character in respect of the rights of its owner, and passes accordingly. The surplus of the proceeds of a sale ordered for the payment of debts remaining after the debts and expenses of administration have been discharged retains the character of real estate for the purpose of determining who is entitled to receive it, and goes to the persons to whom the real estate would have gone but for the conversion.¹ This principle applies as fully to sales by the executor under the will, as to sales under order of the probate court.² But such surplus goes *as money* nevertheless, and therefore passes to the personal representative of the heir or devisee, even though the land may not have been sold during his lifetime.³ So, proceeds of the sale of lands, which the testator directed to be divided to his children upon his wife's death, go to the administrator *de bonis non*, and not to the wife's executor.⁴

Conversion extends only to the purposes for which the sale is authorized.

Hence the proceeds not needed for such purpose retain the character of real estate,

but go to the executor nevertheless.

Where the administrator sells land which had been fraudulently conveyed, the surplus remaining after the payment of debts goes to the fraudulent grantees, because as to them the original grant remains valid.⁵ In an early case in Massachusetts, it was held that such surplus became assets in the administrator's hands, as an incident to his right to recover, and was distributed to the heirs.⁶ There is no doubt, however, that money advanced by the heirs for the purpose of paying debts, with the view of avoiding the necessity of a sale of the real estate, constitutes assets.⁷

Surplus proceeds of land recovered from a fraudulent grantee go to the fraudulent grantee.

[* 1071] * Proceeds of sale of real estate under a decree in equity are liable first for taxes on the land sold; and where the mortgagee has paid the taxes, he will be substituted to the rights of the State, and has a preference for their repayment in the administration of the estate.⁸ So the purchaser at an unauthorized sale by the executor will, if the pro-

Proceeds liable to pay taxes due.

¹ Parker v. Allen, 4 Atl. 300; Williams v. Mason, 23 Ala. 488, 503; Griswold v. Frink, 22 Oh. St. 79, 88; Read v. Bostick, 6 Humph. 321, 323; Garner v. Wood, 71 Md. 37, 42; Hovey v. Dary, 154 Mass. 7.

² Holland v. Cruft, 3 Gray, 162, 180, *et seq.*; Bogert v. Hertell, 4 Hill (N. Y.), 492, 495.

³ Cronise v. Hardt, 47 Md. 433, 438; Pennell's Appeal, 20 Pa. St. 515.

⁴ Buttrick v. King, 7 Met. 20.

⁵ Allen v. Ashley, 102 Mass. 262, 266; McLean v. Weeks, 61 Me. 277, 280; Bank of the United States v. Burke, 4 Blackf. 141, 143; Rochelle v. Harrison, 8 Port. 351; Abbott v. Tenney, 18 N. H. 109.

⁶ Martin v. Root, 17 Mass. 222, 228.

⁷ Fay v. Taylor, 2 Gray, 154, 159; Littlefield v. Eaton, 74 Me. 516, 522.

⁸ Fulton v. Nicholson, 7 Md. 104, 107.

Parties having paid are entitled to subrogation. Proceeds were applied to the payment of debts of the estate, be subrogated to the rights of the original creditors, but not to a prior lien therefor over other creditors.¹

And the purchaser of an heir's interest, who paid off a debt of the estate, to protect the realty from sale, is subrogated to the lien such creditor had because of his claim against the estate; and such lien is prior to a mortgage executed by another heir before such payment.²

Proceeds due to an heir may be reached by his creditor in equity. The creditor of an heir may reach the proceeds of the sale of real estate due to him, in chancery;³ but it is error to decree the sale of an heir's share in his ancestor's lands for the payment of his debts, before ascertaining the amount of such share.⁴

Executor's right to deduct from the proceeds the amount of devisee's debt to the testator is paramount to the right of the devisee's assignee. The right of an executor to deduct from the proceeds of the sale of land the amount of a devisee's indebtedness to the testator is paramount to that of an assignee of the devisee, or to the rights acquired under a sheriff's sale of the devisee's interest.⁵ A conveyance by the devisee of his interest in lands devised, with an absolute direction to the executor to sell for distribution, passes the devisee's interest in the land when sold.⁶

In the absence of any evidence of insolvency, or any reason why money should not be paid to judgment creditors, the oldest judgment creditor is entitled to be first paid in a contest between judgment creditors having obtained judgment after the debtor's death.⁷

The expenses of a sale of real estate ought to be paid out of the proceeds.⁸

§ 482. **Purchaser's Liability for Encumbrances.** — It is evident that the purchaser at an administrator's sale can acquire only that interest in the property sold which the deceased owned at the time of his death. The rights of others, holding by a title superior or equal to that of the deceased debtor, cannot be affected by the proceedings in the probate court. Where such rights are unclear, and serve to cast a cloud upon the title of the land sold,

* the sale will be made under disadvantage to the estate; [* 1072]

¹ *Duncan v. Gainey*, 108 Ind. 579; *Pool v. Ellis*, 64 Miss. 555; *Hull v. Hull*, 35 W. V. 155; *Bond v. Montgomery*, 56 Ark. 563; and see *post*, § 485, as to the purchaser's rights against the heirs. But in Illinois it seems to be held that "a purchaser of land at a void administrator's sale is not entitled to be subrogated to the claims of creditors which have been paid by the purchase-money": *per Magruder, J.*, in *Lagger v. Association*, 146 Ill. 283, 300; *Barders v. Hodges*, 154 Ill. 498, 507; both these cases citing *Bishop v. O'Connor*, 69 Ill. 431, as so holding.

² See on this and cognate points, *post*, § 496.

³ *Hays v. Miles*, 9 Gill & J. 193, 197.

⁴ *Hoge v. Junkin*, 79 Va. 220, 231.

⁵ *Smith v. Smith*, 13 N. J. Eq. 164. But see *post*, § 564, p. * 1237, as to the conflicting decisions on the representative's right to retain for the devisee's debt, out of the proceeds of realty.

⁶ *Costen's Appeal*, 13 Pa. St. 292, 298.

⁷ *Dupree v. Adkins*, 43 Ga. 475.

⁸ *Justices v. Lee*, 1 T. B. Mon. 247, 250.

hence, as already indicated,¹ it is safer to defer a sale, if it can be done consistently with the rights of creditors and others in interest, until the cloud is removed by an action at law or in equity. From the nature of the proceedings, it follows that, without some statutory provision or special order of the court to the contrary, the purchaser takes at the administrator's sale subject to all liens, mortgages, dower interests, claims to homestead, or titles of whatever nature which are superior to the title of the deceased debtor. In many instances the existence of such encumbrances will operate to deter bidders by the uncertainty of their extent, and the possibility of their implicating the purchaser in litigation concerning the same, and thus seriously to depress the prices, because prudent persons will either abstain from buying altogether, or bid so low as to leave a sufficient margin to protect themselves against loss. Such a margin must necessarily operate to the injury of the estate, and it is often, therefore, a question of policy, whether to sell as the administrator finds the title, or to disencumber it and offer a clear, undisputed title for sale, which may be done either by discharging the liens and encumbrances, or by making them payable out of the purchase-money. In many States the statutes do not allow such an alternative, but require the sale of the right, title, and interest of the deceased in the land, leaving it subject to all the encumbrances that may exist against it; which are, if the sale be subject to encumbrances, to be paid by the purchaser.² In these States, if the administrator is compelled to pay off the mortgage debt out of the general assets of the estate obtained by a sale of the equity, he will have a clear equity against the purchaser for reimbursement, and this, too, out of the land itself.³ But in others it is made optional with probate courts to order the property to be sold subject to existing liens, or for the discharge of liens.⁴ If land is sold by order of the pro-

In the absence of a statute or order of court to the contrary, purchaser takes subject to all encumbrances.

This rule sometimes operates to the disadvantage of estates.

In some States it is optional to order the sale subject to encumbrances.

¹ *Ante*, § 467.

² "As a general rule, subject, it may be, to some exceptions, a purchaser at an administrator's sale acquires it (the land bought) with all the encumbrances to which it is liable": *McConnel v. Smith*, 39 Ill. 279, 289; *Maul v. Hellman*, 39 Neb. 322; *Pryor v. Davis*, 109 Ala. 117; *Greenwell v. Heritage*, 71 Mo. 459; *Griffith v. Townley*, 69 Mo. 13; *Kenley v. Bryan*, 110 Ill. 652, 658; *Butler v. Emmett*, 8 Pa. 12, 20; *Estate of Terry*, 13 Phila. 298.

³ See cases cited *ante*, § 408, p. *859.

⁴ *Foltz v. Peters*, 16 Ind. 244, 246;

West v. Townsend, 12 Ind. 434; *Sims v. Ferrill*, 45 Ga. 585, 595; *Carhart v. Vann*, 46 Ga. 389, 392; *Stallings v. Ivey*, 49 Ga. 274, 277; *Newsom v. Carlton*, 59 Ga. 516; *Succession of Tureaud v. Gex*, 21 La. An. 253; *Succession of Ynogoso*, 13 La. An. 559; *Succession of Escarraguell*, 36 La. An. 156; *Massey v. Jerauld*, 101 Ind. 270; *Culver v. Hardenburgh*, 37 Minn. 225, 238. See *Keith v. Molineaux*, 160 Mass. 499. In Indiana, to divest the lien of a mortgage, the mortgagee must be made a party and the court must order the sale to discharge the lien: *Crum v. Meeks*, 128 Ind. 360. But if the holder

Lienor's demand first satisfied out of proceeds of sale. Probate court which is bound by the lien of a judgment or attachment, the holder of the [*1073] lien, if the estate be insolvent, is entitled to have it first satisfied out of the proceeds of the sale,¹ if the purchaser takes it free from the liens, as he must if the lien is transferred to the proceeds;² but the vendor's lien cannot, in the absence of statutory authority, be enforced in the probate court, nor ordered to be first paid out of the proceeds of the land sold,³ and the right of the mortgagee to foreclose or subject the land to the satisfaction of the debt secured by it is not affected by the death of the mortgagor or grantor in the deed of trust.⁴ In Ohio,⁵ as well as in Pennsylvania,⁶ the sale by an administrator is held to discharge all liens and encumbrances except those expressly secured by statute.⁷

of the lien be made a party to the proceedings to sell and neglects to enforce his right, he will be subsequently barred: *Vail v. Rinehart*, 105 Ind. 6, 13; and the real estate will be free from the lien, which is transferred to the proceeds: *Hall v. Price*, 141 Ind. 576.

¹ *Bassett v. Elliott*, 78 Mo. 525; *Bassett v. Slater*, 81 Mo. 75; *Tureaud v. Gex*, *supra*. In Indiana, in case the administrator is ordered to sell discharged of liens, it is held that the mortgagee is entitled to have the entire proceeds applied to his debt, to the exclusion of claims for administration costs and funeral expenses: *Ryker v. Vawter*, 117 Ind. 425.

² *Rhett v. Cotton Co.*, 64 Ga. 521. In Missouri, the statute makes special provisions for the sale, if there be a judgment or attachment lien; in Georgia, until the administrator has sold, the lienor may levy on and sell the property under his execution: *Carlton v. Davant*, 58 Ga. 451, and numerous Georgia cases cited by Jackson, J.

³ *Ross v. Julian*, 70 Mo. 209. See also *Tiner v. Christian*, 27 Ark. 306.

⁴ See on this point, *ante*, §§ 408, 409. In case a mortgagee, however, subjects himself to the jurisdiction of the probate court, and consents, together with the heirs, that his debt shall be paid out of the proceeds, and this arrangement is carried out and a deed made to the purchaser, such mortgagee cannot thereafter in an ejectment suit by the purchaser make objection to the regularity of the sale: *Dooly v. Russell*, 10 Wash. 195. In Missouri, a mortgage or deed of trust securing

the payment of a debt cannot be enforced within nine months after the debtor's death: *Ayres v. Shannon*, 5 Mo. 282.

⁵ *Miller v. Greenham*, 11 Oh. St. 486, 488; *Muskingum v. Carpenter*, 7 Oh. 21. But since the law of April 12, 1858, requiring mortgagees and other lien-holders to be made parties to a petition for the sale of lands, a mortgagee who was not made such party retains his rights unaffected by the administrator's sale, and the purchaser is liable therefor, having purchased, according to the maxim of *caveat emptor*, with constructive notice of the existence of the lien: *Holloway v. Stuart*, 19 Oh. St. 472, 474. In this State all persons claiming any interest in the land may be made parties, the court may adjudicate all questions relating to the title, priority of liens and order distribution of the proceeds according to the equities as found by the court, in order that purchasers may buy with safety and the land bring its fair value: and the court may award a trial by jury whenever the nature of the proceedings require it: *Doan v. Bitely*, 49 Oh. St. 588.

⁶ *Cadmus v. Jackson*, 52 Pa. St. 295, 303.

⁷ But it does not lie in the mouth of one who purchased with the understanding that he bought subject to an existing lien, and retained out of the amount bid a sufficient sum to satisfy such lien, to say that he took the land discharged of the mortgage, under the general rule referred to: *Gibson v. Lyon*, 115 U. S. 439, 447.

Taxes due to the State or to municipal corporations constitute an encumbrance which, in the absence of statutory provision, or direction contained in the order of sale to the contrary, the purchaser must pay. But taxes accruing while the real estate is in the possession of the heirs are payable by them, because they are entitled to the rents;¹ and such as accrue on real estate which goes to the executor or administrator are payable by him, and the purchaser

Taxes accruing on real estate while under administration are payable by executor.

[*1074] * has the right to have them discharged out of the purchase-money.²

§ 483. **Purchaser's Liability to Dowress and Homestead Tenants.**

—The widow's dower being a right beyond the control of the husband during his lifetime, is equally out of the reach of his executors, administrators, and creditors. It is no part of the decedent's estate, and the probate court has no jurisdiction over the same, except, under the statutes of some of the States, to segregate it from the property belonging to the estate. Hence, a sale of real property is, in nearly all the States,³ always subject to the widow's dower,⁴ unless the widow, by her voluntary act, join in the sale and convey her dower interest in the land, in which case she is entitled to the value of her dower out of the proceeds of the sale,⁵ free from the claim of any set-off which the purchaser may have

Sale of real estate to pay debts is subject to widow's right of dower, unless the widow voluntarily join in the sale.

¹ Fessenden, Appellant, 77 Me. 98; *Le Moyne v. Harding*, 132 Ill. 23, 30.

² In Louisiana the purchaser may retain out of the purchase-money sufficient to pay all taxes recorded against the land: *Moore v. Moore*, 22 La. An. 226. So in Maryland: *Fulton v. Nicholson*, 7 Md. 104, 107. And in Kansas it is by statute made the duty of administrators to pay all taxes against real estate sold by them, whether they accrued before or after the death: *Brown v. Evans*, 15 Kan. 88, 92. In Georgia the estate is liable for taxes assessed before the sale, but not after: *Rudolph v. Underwood*, 88 Ga. 664. But in Indiana the administrator pays only such taxes as accrued prior to the death, and upon a sale of the real estate by him the purchase-money cannot be used for the payment of taxes: *Henderson v. Whittinger*, 56 Ind. 131. Such is also the law in Missouri.

³ New Jersey is to be excepted. It is there provided by statute that the Orphan's Court may order the sale of a decedent's land free from the widow's dower, which

is then transferred from the land to the proceeds of the sale thereof: *Schmitt v. Willis*, 40 N. J. Eq. 515. In Pennsylvania, also, where the sale under a judgment against the husband divests the wife of dower, it is said that a sale by order of the court to pay a decedent's debts divests the widow of her dower under the intestate laws: *per Trunkey, J.*, in *Bryar's Appeal*, 111 Pa. St. 81, 90.

⁴ *Simonton v. Brown*, 72 N. C. 46; *Needham v. Belote*, 39 Mich. 487; *Clancy v. Stephens*, 92 Ala. 577; *House v. Fowle*, 22 Oreg. 303; *Shope v. Shaffner*, 140 Ill. 470; *Duke v. Brandt*, 51 Mo. 221. This applies equally to her interest in the husband's lands, where the statute has abolished dower: *Hutchinson v. Lemcke*, 107 Ind. 121, 132; *contra* in Minnesota: *Scott v. Wells*, 55 Minn. 274, where she takes subject to debts. And she is entitled even though the probate court (having no statutory authority so to do) orders the sale free of dower: *Webb v. Smith*, 40 Ark. 17, 25.

⁵ *Hart v. Dunbar*, 4 Sm. & M. 273.

against her.¹ The value of such dower may be ascertained by computing the value of the annuity to which she will be entitled for the duration of her life, according to the mortality tables.² To effect the conveyance of her dower to the purchaser, the deed must contain full and explicit words of release; and all the requisites necessary to pass the title must be complied with.³ The widow is not bound by a parol agreement, without *con- [*1075] sideration, not to assert title;⁴ and where she sells as administratrix under order of the court, without reserving her dower or excepting it in the deed of conveyance, it is not affected by such sale.⁵ Her right to claim dower is not affected by her acts as guardian for her children in a proceeding to sell the land for the payment of debts.⁶ But the widow may, by her representations inducing a purchaser to buy, estop herself from claiming dower in the land bought by him.⁷ The administrator, who has sold land free of dower and taken a mortgage to secure to the widow its value, cannot give priority to a second mortgage for money loaned, by agreeing to cancel the first.⁸ So, where an administrator has paid to the widow a sum of money in consideration of the release of her dower right, he cannot, as matter of law, recover the amount so paid from the estate.⁹

Lands assigned to a widow as her dower may be sold for the payment of debts, subject to her life tenancy as dowress,¹⁰ and upon her death the title and right of possession vest in the purchaser.¹¹ The sale of land under a mortgage, jointly executed by the deceased husband and his wife, she having relinquished her dower, conveys a title to the purchaser free of dower; but the widow has her right of dower in the surplus, if any, after discharging the mortgage.¹²

The homestead of a deceased person descending to his widow or minor children is likewise free from liability for debts,

¹ *Rainey v. Biggart*, 4 Lea, 501.

² *Graves v. Cochran*, 68 Mo. 74, 77.

³ *Giles v. Moore*, 4 Gray, 600.

⁴ *Switzer v. Hauk*, 89 Ind. 73, 75.

⁵ *Sip v. Lawback*, 17 N. J. L. 442; *Phinney v. Johnson*, 13 S. C. 25.

⁶ *Helms v. Love*, 41 Ind. 210; *Toledo P. & W. R. Co. v. Cortenius*, 65 Ill. 120.

⁷ *Wire v. Wyman*, 93 Ind. 392; *Peper v. Zahnsinger*, 94 Ind. 88, 90. But merely receiving part of the proceeds, on account of her distributive share, will not estop her: *Compton v. Pruitt*, 88 Ind.

171; and where she has done nothing to deceive or mislead the purchaser, her mere silence does not affect her right: *Whiteacre v. Belt*, 25 Oreg. 490.

⁸ *Fine v. King*, 33 N. J. Eq. 108.

⁹ *Needham v. Belote*, 39 Mich. 487.

¹⁰ *Maples v. Howe*, 3 Barb. Ch. 611.

¹¹ *Costly v. Tarver*, 38 Ala. 107.

¹² *St. Clair v. Morris*, 9 Oh. 15, 17. See *Affleck v. Snodgrass*, 8 Oh. St. 234, as to the effect of an order of sale distinguishing between the lands that were and those that were not subject to dower.

and therefore not subject to administration; hence the only authority of probate courts in respect thereto is, in most of the States, to set it out from the general estate.¹ Since the very nature of the homestead exemption consists in its immunity from sale for debts, it is self-evident that no order of a probate court to sell the estate

[*1076] *of a deceased person for the payment of his debts can in any manner affect the rights of the widow or children, or both, as the case may be to the homestead, unless the debts represent or constitute a title superior to that of the decedent.² But a debt existing before the adoption of the Constitution, or law exempting homesteads, is superior thereto, and the minor heirs of such debtor are not, after his decease, entitled to the exemption of the homestead.³ So the homestead is liable for the payment of the purchase-money.⁴

Homestead tenant is not affected by sale under order of probate court for payment of debts,

except for debts existing before exemption,

and purchase-money.

It has been stated in an earlier chapter,⁵ that in two or three of the States the homestead descending to the widow confers upon her an absolute estate in fee simple; but that generally its purpose was to furnish an asylum and home to the widow during her life, and to the children during their minority, whereupon it passes to the heirs, subject to sale for the payment of debts, in the same manner as if no homestead right had intervened.⁶ If the intervention of the homestead right had prevented a creditor from recovering his debt, the usual rule against delay in subjecting real estate to the payment of debts does not apply.⁷ Whether lands may be sold for the payment of debts, subject to the right of the homestead tenants to occupy the same until the expiration of their term, has been fully discussed in connection

[*1077] with the exemption of the homestead.⁸ *In Iowa, the homestead is not liable for the debts of the ancestor if he leaves a spouse or heirs.⁹

Right to sell subject to homestead tenant's rights.

§ 484. **How Purchasers are affected by the Rule of Caveat Emptor.** — The sale of real estate by an executor or administrator, whether under a power conferred upon him by will, or by order of the probate court for the payment of debts, is strictly governed by the extent of the power. What he does in conformity with the will,

¹ *Ante*, § 102; *Estate of Tomkins*, 12 Cal. 114, 118, 125; *Carter v. Randolph*, 47 Tex. 376, 379; *Estate of James*, 23 Cal. 415, 418; *Showers v. Robinson*, 43 Mich. 502, 507. And a sale of it will be enjoined: *Ward v. Callahan*, 49 Kans. 149.

² *Ante*, § 100.

³ *Edwards v. Kearzey*, 96 U. S. 595; see authorities cited § 95, p. *201, on this point.

⁴ *Fudge v. Fudge*, 23 Kans. 416, 419; *Gamble v. Watterson*, 83 N. C. 573, 574.

⁵ *Ante*, §§ 94 *et seq.*

⁶ See authorities *ante*, § 102, p. *214.

⁷ *Bursen v. Goodspeed*, 60 Ill. 277, 281; *ante*, § 102, p. *214.

⁸ *Ante*, p. *214, § 102, and authorities there cited.

⁹ *Johnson v. Gaylord*, 41 Iowa, 362, 366.

or with the order of the court, in so far as the same is authorized by statute, is binding upon the estate, the heirs, and devisees; what he does in excess of such power or order is either void, or can bind him only personally.¹ The principle of *caveat emptor* is, therefore, strictly applicable.² The obligation it imposes upon the purchaser is, that he must exercise his own judgment upon whatever he can reasonably exercise it pertaining to the thing sold; hence, in sales by executors or administrators, there is no warranty, either express or implied.³ The administrator is not, in general, bound, in selling the property of an estate, to make known defects of title within his knowledge⁴ and where there is neither warranty nor fraud by the administrator in selling, and the sale is regular, the purchaser is bound to pay the amount of his bid, although there be a defect in the title.⁵ Nor can the purchaser defend against an action at law for the purchase-money, on the ground of an irregularity * in the sale,⁶ if he has been let into [* 1078] possession of the land bought;⁷ nor where he obtained a good legal title;⁸ nor if, in the absence of fraud or warranty by the administrator, he was dispossessed by the holder of a paramount title of which he had notice at the time of sale.⁹ An agreement by the administratrix and adult heirs to deduct from the purchase-price in proportion to an alleged deficiency in the quantity of the land sold is void, and constitutes no defence to the payment of the purchase-money;¹⁰ nor can the purchaser refuse to pay because the administrator, or the notary acting for him, refused to furnish

¹ *Ante*, §§ 477, 480.

² "Because they have no right to sell except under special authority"; *Brock v. Philips*, 2 Wash. 68, 70; *Bingham v. Maxey*, 15 Ill. 295; *Hawpe v. Smith*, *25 Tex. Supp. 448; *Walden v. Gridley*, 36 Ill. 523; *Hutchins v. Brooks*, 31 Miss. 430; *Thompson v. Munger*, 15 Tex. 523, 527; *Headrick v. Yount*, 22 Kan. 344, 349; *Bond v. Ramsey*, 89 Ill. 29, 33; *Riley v. Kepler*, 94 Ind. 308, 311; *Hale v. Marquette*, 69 Iowa, 376; *Arnold v. Donaldson*, 46 Oh. St. 73. And see *Woerner on Guardianship*, § 88.

³ *Williams v. McDonald*, 13 Tex. 322; *Walton v. Reager*, 20 Tex. 103, 108; *Jones v. Warnock*, 67 Ga. 484; *Tilley v. Bridges*, 105 Ill. 336, 339; *Bolling v. Jones*, 67 Ala. 508, 516; *Brush v. Wear*, 15 Pet. 93, 103, 111.

⁴ *Thompson v. Munger*, 15 Tex. 523, 527; *Hawpe v. Smith*, * 25 Tex. Supp. 448.

But it was held that if the lien-holder be himself also the administrator selling the land, and knows that the purchaser is buying in ignorance of the defect, the former will be estopped from afterward asserting such lien against the purchaser, if he stood by in silence: *Lindsay v. Cooper*, 94 Ala. 170; *Cooper v. Lindsay*, 109 Ala. 338.

⁵ *Mellen v. Boorman*, 13 Sm. & M. 100; *Burns v. Hamilton*, 33 Ala. 210; *Bishop v. O'Conner*, 69 Ill. 431; *Jones v. Head*, 1 La. An. 200; *Corbitt v. Dawkins*, 54 Ala. 282; *Cummings v. Johnson*, 65 Miss. 342.

⁶ *Otis's Estate*, Myr. 222.

⁷ *Worthington v. McRoberts*, 9 Ala. 297, 300; *Mitchell v. McMullen*, 59 Mo. 252, 256; *Conner v. Eddy*, 25 Mo. 72, 75.

⁸ *Lee v. White*, 4 Stew. & P. 178.

⁹ *Pool v. Hodnett*, 18 Ala. 752.

¹⁰ *Dees v. Tildon*, 2 La. An. 412.

the title for examination, or because the widow (holding in community with the decedent) refuses to sign the act of sale.¹

But although the rule of *caveat emptor* requires the purchaser to inform himself as to all the facts which he can ascertain by the exercise of reasonable diligence, it does not charge him with notice of that which cannot be learned from an inspection of the records. Secret defects are to him no defects at all.² He is not affected by a secret trust of which he had no notice; if the legal title was in the intestate he takes it discharged of such trust.³ So the purchaser's title has priority over an unrecorded deed from the intestate.⁴ Nor does the rule require the purchaser to look beyond the judgment of a court having jurisdiction;⁵ he is protected unless the record disclose that the court transcended its authority in making the order.⁶

Purchaser is not bound to know what cannot be known from record;
and is not affected by a secret trust;
nor by an unrecorded deed;
nor by the want of jurisdiction not apparent on the record of a court having jurisdiction.

§ 485. **The Purchaser's Rights in Equity.**—*Caveat emptor* is the rule at law. In equity the purchaser will be protected against the consequences of having been misled by the fraud or mistake of the executor or administrator in so far as he had a right to rely on his representations.⁷ Thus, where the executor sold under a will which [*1079] *gave him no power to do so, received the purchase-money, and with the knowledge and consent of the heirs, who informed the purchaser that the executor was the proper person to sell, conveyed by deed, the heirs were estopped from disputing the purchaser's title; and upon his making valuable improvements on the property, with the knowledge of the heirs, they were compelled upon his action to make him a good title of record.⁸ So the purchaser, although he cannot appeal

Equity will protect a purchaser against the fraud of an executor in so far as the former has a right to rely on the representations of the latter.

¹ Merrick v. North, 28 La. An. 878.

proper case: Cooper v. Lindsay, 109 Ala.

² Banks v. Ammon, 27 Pa. St. 172, 175.

338.

³ Love v. Berry, 22 Tex. 371, 377. But in Alabama the court "does not subscribe to the limitation suggested; but, on the contrary, adhere to the broad distinction announced in the authorities cited [in the opinion] that the purchaser gets only such right, interest, or estate as resided in the intestate, the apparent title being qualified and limited by every fact or circumstance *in pais* or of record, which would have constituted an outstanding equity against the decedent in his lifetime": Lindsay v. Cooper, 94 Ala. 170, 179; but the doctrine so laid down does not operate to prevent the purchaser from invoking the doctrine of estoppel in a

⁴ Barto v. Tomkins, 15 Hun, 11; Emerson v. Ross, 17 Fla. 122, 133; White v. Frank, 91 Tex. 66.

⁵ Alexander v. Maverick, 18 Tex. 179, 196; Fowler v. Poor, 93 N. C. 466; Linman v. Riggins, 40 La. An. 761, 765.

⁶ McNally v. Haynes, 59 Tex. 583. The purchaser is chargeable with notice of defects appearing on the face of the proceedings: Austin v. Willis, 90 Ala. 421.

⁷ Ives v. Pierson, 1 Freem. Ch. 220; Fore v. McKenzie, 58 Ala. 115; Folsom v. Howell, 94 Ga. 112; Kingsbury v. Love, 95 Ga. 543; Clay v. Kagelmacher, 98 Ga. 149. See also Woerner on Guardianship, § 88.

⁸ Favill v. Roberts, 50 N. Y. 222.

from the order confirming the sale, may have relief in equity against liability under a purchase from an administrator who was ordered to give a new bond and failed to do so, on the ground that the validity of such a sale is at least doubtful, and therefore voidable in a direct proceeding.¹

It is well recognized by authorities, and obvious on principle, that an irregular sale may be confirmed by adult heirs, who will not thereafter be permitted to question the purchaser's title;² but the administrator's consent to the sale of land by the heirs cannot deprive the creditor's right to subject it to the payment of his debt.³ Where, however, the administrator solemnly admits of record, that the personal property is sufficient for the payment of all of the debts of an estate, and officially consents to a sale of the land in a partition suit, neither he nor the heirs will be permitted to question the validity of such sale; and if the personalty prove insufficient to pay the debts, the heirs will be liable for the value of the land, each for his share.⁴ So where one who is the administrator has the title to property and procures a sale of it as property of the deceased without disclosing his interest therein, he will be estopped from questioning the jurisdiction of the court to make the order, especially when the purchase-money is applied to the discharge of a valid lien for which the administrator was personally liable.⁵

An administrator's sale cannot be avoided by proof that he procured the license by fraud or misrepresentation,⁶ unless the purchaser at the sale participated in or had notice of the fraud;⁷ and if the purchaser, although he acted in collusion with the administrator, sell to an innocent third party, the latter, buying for value and in good *faith, takes an unimpeachable title.⁸ [*1080]

The administrator's fraud does not avoid the sale, unless the purchaser had notice.

¹ *Levy v. Riley*, 4 Oreg. 392.

² *Longworth v. Goforth*, Wright, 192; *Beckham v. Newton*, 21 Ga. 187; *Lee v. Gardiner*, 26 Miss. 521, 548; *Johnson v. Perkins*, 1 Baxt. 367; *Randle v. Carter*, 62 Ala. 95, 107. As where minors on arriving of age accept the benefits of a sale, they are estopped from afterwards attacking it: *Lewis v. Lichty*, 3 Wash. 213, 223; and see *Woerner on Guardianship*, § 88. Or the heirs may be estopped by their laches from questioning the sale: *Bacon v. Chase*, 83 Iowa, 521; or by receiving and retaining the proceeds: *Odin v. Dupuy*, 99 Ala. 36; *Myers v. Boyd*, 144 Ind. 496. Even where the court had no authority to order the sale: *Jacoby v. McMahon*, 174 Pa. St. 133; *Horr v. French*, 99 Iowa, 73. As to what action by the heirs will

be sufficient to ratify a sale, voidable because the administrator buys for himself, see *post*, § 487.

³ *Moncrief v. Moncrief*, 73 Ind. 587, 591, overruling *Pell v. Farquar*, 3 Blackf. 331.

⁴ *Livingston v. Noe*, 1 Lea, 55, 65.

⁵ *Ions v. Harbison*, 112 Cal. 260. See to similar effect, *Davis v. Ford*, 15 Wash. 107, 117; *Duryea v. Mackey*, 151 N. Y. 204.

⁶ *Adams v. Thomas*, 44 Ark. 267, 271; *McCown v. Foster*, 33 Tex. 241, 246.

⁷ *Adams v. Toomer*, 44 Ark. 271; *McCown v. Foster*, 33 Tex. 241; *Filmore v. Reithman*, 6 Col. 120, 129; *Baldrige v. Scott*, 48 Tex. 178.

⁸ *Gwinn v. Williams*, 30 Ind. 374; *Robbins v. Bates*, 4 Cush. 104; *Blood v.*

Where the sale is without authority, the purchaser may set up failure of consideration in bar of recovery of the purchase-money,¹ and may have the sale vacated, the cash he has paid refunded to him, and his notes for the payment of the purchase-money cancelled.² A void sale will not be specifically enforced at the instance of the administrator.³ The purchaser may enjoin a sale induced by the fraudulent representations of the administrator, upon proof of the fraud;⁴ but in such case the facts constituting the fraud must be clearly established;⁵ mere silence on the part of the administrator, although he may have known the title to be defective, is not such fraud as will vitiate the sale.⁶ Nor is there relief in equity for a purchaser against whom an irresponsible person, knowing the purchaser's desire to obtain the property, ran it up beyond its value.⁷

Purchaser may defeat recovery of the price bid at a sale unauthorized,

and enjoin a sale upon proof of fraud.

A purchaser may recover from the heirs the purchase-money, the value of the improvements put upon the land in good faith, if the sale is void,⁸ as well as for the taxes paid on the land,⁹ if the purchase-money has been applied in the payment of debts.¹⁰ But he must in all such cases, before he can

Purchaser may recover from the heirs the

Hayman, 13 Met. 231, 236; Adams v. Toomer, *supra*.

¹ Campbell v. Brown, 6 How. (Miss.) 230, 235; Laughman v. Thompson, 6 Sm. & M. 259, 269; Wilson v. White, 109 N. Y. 59.

² Shields v. Allen, 77 N. C. 375. It has been held that the amount paid as earnest-money may be recovered from the administrator where there was a mutual mistake of fact as to the condition of the property, as it was erroneously supposed that a building stood entirely on the land sold, but was in fact partially on adjoining land: McKay v. Coleman, 85 Mich. 60.

³ Kertchem v. George, 78 Cal. 597.

⁴ Coombs v. Lane, 17 Tex. 280.

⁵ Ward v. Williams, 45 Tex. 617.

⁶ *Ante*, § 484; Wilson v. White, 2 Dev. Eq. 29.

⁷ Williams v. Bradley, 7 Heisk. 54, 60; East v. Wood, 62 Ala. 313.

⁸ Burdett v. Silsbee, 15 Tex. 604, 620; Houston v. Killough, 80 Tex. 296, 308 (allowing interest); Cunningham v. Anderson, 107 Mo. 371, 377; Carey v. West, 139 Mo. 146, 175; Longworth v. Wolfington, 6 Ohio, 9; Scott v. Dunn, 1 Dev. & B. Eq. 425; Bennett v. Coldwell, 8 Baxt. 483. But he cannot recover for improvements made after notice to set aside the

sale: Snider v. Snider, 3 W. Va. 200, 208. And the rule does not apply where the purchaser claims by title paramount to the deceased: Throckmorton v. Pente, 121 Mo. 50.

⁹ Schafer v. Causey, 76 Mo. 365.

¹⁰ Jayne v. Boisgerard, 39 Miss. 796, 799; Schaefer v. Causey, 8 Mo. App. 142; Mobley v. Nave, 67 Mo. 546; Jones v. French, 92 Ind. 138; Robertson v. Bradford, 73 Ala. 116; Sharkey v. Bankston, 30 La. An. 891; Smith v. Knoebel, 82 Ill. 392, 400; Wehrle v. Wehrle, 39 Oh. St. 365, 368; Mayes v. Blanton, 67 Tex. 245, 248 (allowing interest on the purchase-money): "The heirs are estopped to deny the validity of the sale, and at the same time enjoy the benefit of the appropriation of the purchase-money": Woodstock v. Fallenwider, 87 Ala. 584, 586; Dawkins v. Dunkin, 104 N. C. 301; and see Jacoby v. McMahon, 174 Pa. St. 133. As to the administrator's right to be subrogated to the rights of creditors, when he has paid debts in excess of the personalty, see *ante*, § 469, p. *1039; and as to the rights of purchasers at unauthorized sales, to be subrogated or substituted to the rights of creditors whose debts are paid off with such purchase-money, see *ante*, § 482, p. *1071.

purchase-money, value of improvements made in good faith, taxes, etc., if sale is void, on restoring the property;

but not unless the purchase-money has been used in payment of debts.

claim to be reimbursed, restore the property;¹ if he obtain a judgment for the purchase-money *nil dicit*, it will be enjoined, even after the expiration of several years, and if the purchaser was in possession, the court will restore the property *to the [*1081] heirs, and require accounting for the rents and profits.² Where the purchase-money paid to the administrator has not been used in the payment of debts, it cannot be recovered from the heirs; yet taxes paid by the purchaser constitute a charge upon the land, and ought in equity to be refunded.³

A purchaser acquires an equitable interest in the land, as soon as he has paid the purchase-money, sufficient to constitute an equitable defence to the action of ejectment by the grantee of the heirs, who bought from them with actual or constructive notice of the facts.⁴ On the other hand, the purchaser has no right to a conveyance until he has paid the purchase-money; and although the administrator has falsely reported that the purchaser has made the required cash payment, and otherwise complied with the terms, and the sale is confirmed by the court and a conveyance executed, the title of the heirs is not divested, and the land remains bound for the purchase-money.⁵

Purchaser on paying purchase-money has an equitable defence against ejectment.
Title of the heirs is not divested until purchase-money has been paid.
Purchaser may compel conveyance; and the administrator cannot defend on the ground of irregularity in the sale.

By the sale under order of the probate court, the purchaser acquires whatever title or estate the deceased owned at the time of his death,⁶ and he may enforce conveyance thereof to himself by action against the administrator.⁷ Where he has gone into possession, and complied with the terms of sale by making the required cash payment, and giving his notes for the balance of the price, the administrator cannot sue to rescind the sale, on the ground that there is a defect in the title of the purchaser.⁸ So the

¹ Claiborne v. Yoeman, 15 Tex. 44; Young v. Twigg, 27 Md. 620, 642; Winslow v. Crowell, 32 Wis. 639, 662; Blodgett v. Hitt, 29 Wis. 169.

² Miller v. Palmer, 55 Miss. 323, 338, *et seq.*

³ Nowler v. Coit, 1 Ohio, 236 (2d ed.).

⁴ Long v. Joplin Co., 68 Mo. 422, 427; Snider v. Coleman, 72 Mo. 568.

⁵ Nor can the vendee of the purchaser in such case protect his title by the plea that he is a purchaser for valuable consideration without notice: Wallace v. Nichols, 56 Ala. 321, 326; see *ante*, § 479, as to the payment of the purchase-money.

⁶ *Ante*, § 480. Whether the purchaser acquires title to crops sown by the heirs

after the decedent's death, and before the filing of the application to sell, which may be growing on the land at the time of the sale is held both ways: see *ante*, § 282, p. *599. It is self-evident that the rights of a purchaser, after confirmation of the sale, payment of the purchase-money, and execution and delivery of the deed, cannot be affected by a subsequent sale under order of the same court: Lindsay v. Jaffray, 55 Tex. 626, 635; Brockenborough v. Melton, 55 Tex. 493, 506.

⁷ Nesbitt v. Richardson, 14 Tex. 656.

⁸ McCulloch v. Weaver, 14 La. An. 33.

purchaser at an administrator's sale of an insolvent dis-
[*1082] seisor, who died before the expiration of * the time which
would complete his title by adverse possession, is entitled
to hold the land against the devisee of the disseisor, although she
entered and remained in possession until the expiration of such
time, and although the sale was made subsequently.¹

§ 486. **The Purchaser as affected by the Statute of Frauds.**—
It was questioned, at one time, whether a purchaser at a public sale
by an executor or administrator could relieve himself of his bid
under the Statute of Frauds; but now all doubt upon this point is
put to rest by the general doctrine governing auction sales, which makes the auctioneer the common agent
of both vendor and vendee, whose memorandum of the
sale is held sufficient to satisfy the requirement of the
statute. The decision of Lord Ellenborough to this
effect² was rendered in 1806, and is said to have never since been
questioned in England or America.³ The statute was
also held to be complied with, when both the adminis-
trator and purchaser immediately after the sale pro-
ceeded to a scrivener, who executed a deed, the pur-
chaser signing a note for the purchase-money, promising
to procure the required security, and leaving deed and note with the
scrivener.⁴ It was held in Tennessee, that, upon the rescission
of a parol contract for the purchase of land, the parties should be
put where they were when the agreement was made; hence what-
ever purchase-price was paid must be returned with interest,
together with reimbursement for improvements made in good faith
and without objection from the vendor;⁵ and such a sale may be
avoided, subject to the usual account upon the election of either
party.⁶

§ 487. **Executors and Administrators as Purchasers.**— The equi-
table rule making sales by executors and administrators voidable at
the option of heirs, distributees, or others beneficially interested,
if they themselves purchase at their own sales, has been exten-
sively discussed in an earlier chapter, in connection with the general
subject of administrator's sales of personal property.⁷ The broad
distinction between real and personal property growing
[*1083] out of the right of the * heir or devisee to the one, and
of the administrator or executor to the other, is not
generally recognized in the application of this equitable rule, but
executors and administrators are mostly treated as trustees of the

Memorandum
of sale by the
executor
sufficient com-
pliance with
the Statute of
Frauds.

So the ex-
ecution of a
deed by a
scrivener at
the joint re-
quest of buyer
and seller.

¹ *Peele v. Chever*, 8 Allen, 89, 92.

² In *Hinde v. Whitehouse*, 7 East, 558.

³ *Per Chalmers, J.*, in *Jelks v. Barrett*,
52 Miss. 315, 322.

⁴ *Work v. Cowhick*, 81 Ill. 317.

⁵ *Winters v. Elliott*, 1 Lea, 676.

⁶ *Hays v. Worsham*, 9 Lea, 591, 594.

⁷ *Ante*, § 334; *Woerner on Guardianship*, § 89.

real as well as of the personal property,¹ so that what is there said, and most of the cases there cited, apply as well here.

Exceptions to the general rule, as stated, are met with in some of the States. It was early held in Alabama, that an executor might become a purchaser at his own sale, which if fairly made could not be set aside;² but this doctrine was regretted by the Supreme Court in a number of cases, and the exception limited to property in which the executor or administrator had a beneficial interest.³ This distinction is also recognized in Louisiana, where the surviving spouse or owner in community, or the heir or legatee, interested in the property administered by him or her, may buy at his own sale,⁴ and in Florida.⁵ So in North Carolina, if the devise or descent is to the personal representative alone.⁶ An early case in Virginia asserts the right of executors and administrators to buy at their own sales;⁷ but in later decisions the judges speak of the general rule as existing there.⁸ In North Carolina⁹ and Pennsylvania, executors and administrators are protected in their title if the purchase has been with the knowledge and consent or acquiescence of the beneficiaries, and in good faith.¹⁰ That in South Carolina executors and administrators may buy at sales of the estates of their decedents, and are liable to the parties interested for the actual value of the property at the time of the sale if sold at an under price, has already been mentioned.¹¹

The rule prohibits not only the purchase by the executor or administrator, but is applicable if he become beneficially interested in

¹ In Texas, if the executor becomes the purchaser, either directly or indirectly, at a probate sale, it may be set aside by the probate court: *Fisher v. Wood*, 65 Tex. 199.

² See Alabama cases cited, *ante*, § 334.

³ *Calloway v. Gilmer*, 36 Ala. 354; *James v. James*, 55 Ala. 525, 530; *Daniel v. Stough*, 73 Ala. 379; *McMillan v. Rushing*, 80 Ala. 402; *Penny v. Jackson*, 85 Ala. 67. When at a sale for equitable division among the heirs the administrator buys and so reports, and the sale is confirmed and a deed given him by a commissioner, the sale is invalid on collateral attack unless the heirs are shown to have had notice of the confirmation of the sale and the appointment of a commissioner: *Bolling v. Smith*, 108 Ala. 411; and the administrator must show that the purchase-money was paid by him: *Bogart v. Bell*, 112 Ala. 412.

⁴ *Fristoe v. Burke*, 5 La. An. 657; *Aicard v. Daly*, 7 La. An. 612; *Davidson*

v. Davidson, 28 La. An. 269, 271; *Linman v. Riggins*, 40 La. An. 761, 764; but a creditor administering has not such right: *Succession of Stanbrough*, 37 La. An. 275.

⁵ Rev. St. Fla. 1892, § 1930.

⁶ *Howell v. Tyler*, 91 N. C. 207, 214. Otherwise the sale may be set aside, no matter how fair it may have been: *Shute v. Shute*, 120 N. C. 440.

⁷ *Toler v. Toler*, 2 Patt. & H. 71.

⁸ *Staples v. Staples*, 24 Gratt. 225, 236; *Wayland v. Crank*, 79 Va. 602, 608; *Morgan v. Fisher*, 82 Va. 417.

⁹ *Pitt v. Petway*, 12 Ired. L. 69; *Roberts v. Roberts*, 65 N. C. 27.

¹⁰ *Grim's Appeal*, 105 Pa. St. 375, 383. When the administrator, having received permission from the court to bid at his own sale, and he does so, he will be held to his bid: *Meyer's Estate*, 177 Pa. St. 450.

¹¹ *Ante*, § 334, p. *701; see Rev. St. S. C. 1893, § 2103.

the property sold before the confirmation of the sale, although after it had been struck off, and al-
[* 1084] though * the confirmation was *ex parte*, and notwithstanding the agreement by which he became interested is void under the Statute of Frauds.¹

Rule extends to any beneficial interest acquired before final consummation of the sale;

An agreement, by an executor selling, with the purchaser to share in future profits and losses, is a constructive fraud, and he can obtain a voidable title only; but in the absence of anything done to prevent competition in bidding, and if the property produce all it is worth, such agreement is not an actual fraud, so as to make the sale void collaterally.² But where the administrator got the benefit of land sold to another who paid no purchase-money, the court, in setting aside the sale, will refuse to allow the claims of the administrator for debts of the estate paid by him, and his own claim allowed by the probate court, and will hold him liable for rents and profits.³ So it has been held that equity will not permit property sold by executors to be reconveyed to them by the purchaser for the same consideration, before the executor's duties are ended, except for the benefit of the *cestui que trustent*, or parties beneficially interested.⁴

The administrator is prohibited alike from purchasing for himself through an agent,⁵ and from purchasing as an agent for another.⁶ A sale to a relative for less than could have been obtained from a stranger is fraudulent; nor can the son of an executrix, having bought land with the understanding that he is to hold it for her use, hold it against creditors; and a purchaser of land from an executrix, which she had paid for out of the assets of the estate, will, if he had notice, hold in trust for the creditors.⁷

and to purchases as agent for another, or through an agent.

The rule applies not only to the executors and administrators themselves, but extends to all persons intrusted with the management and direction of the sales in such manner as to impose upon them the duty of taking care that the

Rule includes all persons intrusted with

¹ Terwilliger v. Brown, 44 N. Y. 237; O'Conner v. Flynn, 57 Cal. 293; and see Gibson v. Herriott, 55 Ark. 85.

² Williams v. Rhodes, 81 Ill. 571.

³ Coat v. Coat, 63 Ill. 73, 76. But usually the administrator is allowed for payments for taxes, repairs, debts paid by him, and other proper charges: see *infra*, p. *1088.

⁴ Boynton v. Brastow, 53 Me. 362.

⁵ Decker v. Decker, 74 Me. 465; Kruse v. Steffens, 47 Ill. 112.

⁶ Neda v. Fontenot, 2 La. An. 782; State v. Jones, 53 Mo. App. 207 (this was a case of an executor's purchase of a legatee's share in the estate from the lega-

tee, and was reversed in the Supreme Court on the ground that the rule prohibiting an executor's buying at his own sale did not apply at all); the sale by the executor to a firm of which he is a member is void, although the sale was nominally to the partner: Carroll v. Cockerham, 38 La. An. 813, 822.

⁷ Buckingham v. Wesson, 54 Miss. 526; Carmichael v. Foster, 69 Ga. 372, 382; Inman v. Foster, 69 Ga. 385. The law will not, of course, conclusively infer fraud from the fact that the purchaser was the administrator's son: Cain v. McGeenty, 41 Min. 194.

authority or discretion touching the sale.

property may be sold to the best advantage. Such persons "cannot purchase at all, however fair their intentions. As purchasers their interest would

* conflict with their duties; and courts of equity, regarding [* 1085] the weakness of ordinary men, take from them all temptation of purchasing at all."¹ Hence attorneys of executors or administrators cannot be permitted to buy at sales by their clients,² nor a probate judge at a sale ordered by himself.³ In Missouri, however, it was intimated that, where the probate judge becomes purchaser at a sale decreed by him, he may have it approved in the circuit court.⁴ There seems to be no reason why one of several co-heirs cannot purchase for himself at the sale.⁵

The principle of the rule includes sales made by trustees under deeds of trust given to secure payment of debts, or by sheriffs under execution, if the executor or administrator have control thereof. He will not be permitted, if he become purchaser in such case to hold the title as against the estate, if obtained for less than its value.⁶ Thus, where the widow and the administrator fraudulently schemed to buy in property at a sheriff's sale, by giving out that he was buying for the widow, thus dissuading others from bidding, and the administrator agreed to convey to the widow at the price which he paid, it was held that the widow could maintain no action to recover such property, being a party to the fraud; but as to the minor heir, he held in trust for her.⁷ The rule also applies to a sale under power in the will.⁸ But a sale by the sheriff of the property of a purchaser at the administrator's sale, to satisfy a judgment against him for the unpaid purchase-money, is not a sale at which the administrator is forbidden to purchase.⁹ And the rule has evidently no application in sales not ordered by or under the direction or control of the executor or administrator; the sale in such case is not that of the administrator in his representative capacity, he is not the trustee of the heir or devisee therein, and hence he has an undoubted right to become the purchaser.¹⁰ Nor does the rule apply to one nominated by the testator

but not if he has no control over it.

¹ *West v. Waddill*, 33 Ark. 575, 588.

² *Hall v. Hallett*, 1 Cox Ch. C. 134, 140 (quoted with approbation in *West v. Waddill*, *supra*); *O'Dell v. Rogers*, 44 Wis. 136, 178; *Succession of Hoss*, 42 La. An. 1022; and see *Fisher v. Bush*, 133 Ind. 315.

³ *Livingston v. Cochran*, 33 Ark. 294, 301, adopting views expressed by Lord Campbell in *Dines v. Grand Junction Canal*, 3 H. L. Cas. 759, 793.

⁴ *Bacon v. Morrisson*, 57 Mo. 68.

⁵ *Aubuchon v. Aubuchon*, 133 Mo. 260.

⁶ *Clark v. Drake*, 63 Mo. 354, 358; *Allen v. Gillett*, 21 Fed. R. 273. Such a sale is not void, but voidable at the option of the beneficiary: *Murphy v. Teter*, 56 Ind. 545; *Hoover v. Malen*, 83 Ind. 195; *Lewis v. Welch*, 47 Minn. 193, 205.

⁷ *Johns v. Norris*, 27 N. J. Eq. 485.

⁸ *Shute v. Austin*, 120 N. C. 440.

⁹ *Shakely v. Taylor*, 1 Bond, 142.

¹⁰ *Dillinger v. Kelley*, 84 Mo. 561, 564; *Briant v. Jackson*, 99 Mo. 585; *Johns v. Norris*, 22 N. J. Eq. 102, 110; *Wilson v. Miller*, 30 Md. 82, 90. Since the admin-

as executor, who does not qualify as such.¹ The rule is, that the executor cannot perform the double function of buyer and seller, and does not prohibit him from purchasing a legatee's or distributee's interest in the estate, though the burden is on him to show such bargain to have been made on a full, open, and fair disclosure of all the facts in the executor's possession.² We have seen that realty, purchased by an executor for the benefit of the estate, at a sale foreclosing a mortgage due the estate, or under a judgment in favor of the estate, is treated as assets in his hands.³

[*1086] * The administrator is not, subsequent to the sale, precluded from dealing with the purchaser, and may acquire

from him a valid title to the property sold, if there was no understanding, express or implied, at the time of the administrator's sale, that he should have an interest in the purchase. It is held in Maine that equity will not permit property sold by executors to be reconveyed to one of them for the same consideration; ⁴ and such dealings are always admissible as tending to prove fraud, although not conclusive, nor, standing alone, sufficient.⁵ That the deed to the purchaser and his reconveyance to the administrator were executed on the same day, or simultaneously acknowledged, that no price was actually paid or secured to be paid, that no possession was delivered or agreed to be delivered, the inadequacy of price, and the inability of the purchaser to pay, are all circumstances which may lead to the conclusion that the sale is in fact a sale to the administrator himself.⁶ So a deed for a nominal consideration to an administrator by the purchaser is voidable, if timely steps are taken to set the same aside; ⁷ or void upon assertion of title by the heirs.⁸ And a purchaser at a subsequent sale by the administrator is chargeable with notice, not only when the evidence raises a presumption that he knew, but where there is just ground for inferring that reasonable diligence would have led him to a discovery of the truth; collateral circumstances sufficient to put one on inquiry is in general regarded as good notice of the ultimate fact to be established.⁹ But where a third person buys from the executor

Administrator may acquire property sold from the purchaser, if there was no understanding at the sale.

Instances of such sales.

istrator as such has no control over the realty he may foreclose a mortgage held by him and become a purchaser at the sale: *Matter of Monroe*, 142 N. Y. 484.

¹ *Valentine v. Duryea*, 37 Hun. 427; *Bowden v. Pierce*, 73 Cal. 459, 463.

² *State v. Jones*, 131 Mo. 194, 209.

³ *Ante*, § 307, and cases cited on p. *647; see also § 279.

⁴ *Boynton v. Brastow*, 53 Me. 362; see *supra*.

⁵ *West v. Waddill*, 33 Ark. 575, 585; *Painter v. Henderson*, 7 Pa. St. 48; *Welch*

v. McGrath, 59 Iowa, 519, 529; *Silverthorn v. McKinster*, 12 Pa. St. 67, 71; *Larzelere v. Starkweather*, 38 Mich. 96, 102.

⁶ *Obert v. Obert*, 12 N. J. Eq. 423, 427; *Carmichael v. Foster*, 69 Ga. 372.

⁷ *Mitchell v. McMullen*, 59 Mo. 252, 256; *Morgan v. Wattles*, 69 Ind. 260, 263; *Caldwell v. Caldwell*, 45 Oh. St. 512.

⁸ *Latham v. Barney*, 14 Fed. R. 433, 442.

⁹ *Filmore v. Reithman*, 6 Col. 120, 129, and authorities cited: *Laggar v. Associa-*

both real and personal property, which the latter had bought at his own sale, with notice of the fraud, the purchaser is liable only for the realty.¹ A *bona fide* purchaser from an administrator who indirectly buys at his own sale, such purchaser having no notice thereof, is of course protected in his purchase.²

There is some little diversity in the decisions on the effect of a sale by the executor or administrator to himself, either directly or indirectly, some courts holding, and some *States enacting,³ such sales to be void,⁴ [*1087] while the strong current of authorities holds the legal title to pass to the purchaser, subject to be divested by the heirs or devisees within a reasonable time,⁵ and he is liable to them as a trustee.⁶ A bidder will not be allowed to defend an action for the purchase-money on the ground that he bought for the administrator.⁷ Creditors who have reduced their claims to judgments against the estate can file a bill to set aside the sale by the executor or administrator to himself;⁸ and if he has resold the land he must account for the proceeds.⁹ What is a reasonable time within which the application to set aside such sale may be made, depends upon the circumstances of each case.¹⁰ Courts of equity will refuse relief in cases of *laches* or unreasonable delay by the heirs, in analogy with the Statute of Limitations:¹¹ thirteen

The general rule is that sales by executors or administrators to themselves are voidable within a reasonable time.

Instances of what is held a reasonable time.

tion, 146 Ill. 283, 296; *Fisher v. Bush*, 133 Ind. 315, 321. Such vendee is not protected as an innocent purchaser if he acquires notice at any time before paying the purchase-price: *Mackey v. Bowles*, 98 Ga. 730. The mere fact that the purchaser conveys to the executor after an interval of one month, for an increased consideration, is insufficient to prove fraud: *Otis v. Kennedy*, 107 Mich. 312.

¹ *Willis v. Foster*, 65 Ga. 82.

² *Otis v. Kennedy*, 107 Mich. 312; *London v. Martindale*, 109 Mich. 235 (holding a sale by an administratrix to her husband sufficient to support the title of an innocent purchaser from the latter, one of the five judges dissenting); *Sanders v. Sorrell*, 65 Miss. 288; see authorities *ante*, p. *1080, note 1.

³ For instance, New York, where such a sale was held absolutely void in *Forbes v. Halsey*, 26 N. Y. 53, 65, and *Terwilliger v. Brown*, 44 N. Y. 237, 241, but intimated to be only voidable in *People v. Open B. Co.*, 92 N. Y. 98, 103. But in several other States the courts squarely rule that, though the statute declare such

sales made through third persons void, they are not void, but only voidable: *Melons v. Pabst Co.*, 93 Wis. 153, 164; *White v. Iselin*, 26 Minn. 487; *Otis v. Kennedy*, 107 Mich. 312.

⁴ *Latham v. Barney*, 14 Fed. R. 433, 442.

⁵ *Murphy v. Teter*, 56 Ind. 545; *Anderson v. Green*, 46 Ga. 361, 379; *Mock v. Pleasants*, 34 Ark. 63, 72; *Ebelmessenger v. Ebelmessenger*, 99 Ill. 541, 548; *Borders v. Murphy*, 125 Ill. 577; other bidders cannot raise the objection and have the sale set aside on this ground: *Rigg v. Schweitzer*, 170 Pa. St. 549; ejectment cannot be maintained by the heirs until the sale is vacated: *Temples v. Cain*, 60 Miss. 478, 485.

⁶ *Rafferty v. Mallory*, 3 Biss. 362, 367.

⁷ *McAnulty v. Hodges*, 33 Miss. 579.

⁸ *Elting v. F. N. B.*, 173 Ill. 368, 383.

⁹ *Elting v. F. N. B.*, *supra*.

¹⁰ *Obert v. Obert*, 12 N. J. Eq. 423, 430.

¹¹ *Froneberger v. Lewis*, 70 N. C. 456; *Morgan v. Wattles*, 69 Ind. 260, 263. In Missouri it was held that the administrator's trusteeship terminates with his final

years,¹ and in one case a little less than five years, after knowledge of the circumstances, were held unreasonable delay, on account of which the relief applied for was refused;² while in another case seventeen years after the eldest, and five years after the youngest heir arrived at majority, were held not unreasonable,³ as the minority of the youngest heir protected them against the Statute of Limitations, and saved the rights of all.⁴ A guardian cannot bind her minor wards by acquiescence or *laches*.⁵ Each heir, however, may avoid the sale as to his own share.⁶ The ratification of a sale in ignorance of the facts under which it took place does not estop a devisee from exercising his election to avoid a sale of the executor to himself; a party cannot be charged with *laches* until after knowledge of the facts, or of circumstances sufficient to put him on the inquiry.⁷ But if the party entitled to have the sale set aside stand by without making objection thereto, and see the purchaser make valuable improvements on the property, it may be good ground in equity for reimbursement,⁸ or estop him from asserting his claim.⁹ So if he receive the proceeds, with full knowledge of the facts, he cannot thereafter avoid the sale,¹⁰ and it has been held that where the heirs could not possibly be benefited by setting aside the sale, as where the proceeds would obviously be insufficient

Ratification of a sale in ignorance of facts does not estop.

to pay the debts for which the land was sold, they have no [* 1088] standing in equity.¹¹ If, however, the administrator * purchase under a sale based upon a fraudulent judgment obtained by him, and where he had assets to pay the debts,¹² or where, for any reason, the sale is held void *ab initio*, neither *laches* nor failure to rescind or tender back the purchase-money affects the right of the heirs.¹³

An executor or administrator, having purchased at his own sale, is treated in equity as a trustee for the heirs or devisees; hence,

settlement and discharge, and, being in adverse possession, the Statute of Limitations begins to run in his favor: Hardy v. Donahue, 97 Mo. 141, 145; so in Arkansas from the time when the parties interested are apprised of the fact that the sale at which he bought has been confirmed: Bland v. Fleeman, 58 Ark. 84.

¹ Fuller v. Little, 59 Ga. 338, 341.

² Williams v. Rhodes, 81 Ill. 571.

³ Smith v. Drake, 23 N. J. Eq. 302. But where time has commenced to run against the ancestor it continues against his infant heir: Gibson v. Herriott, 55 Ark. 85.

⁴ Riddle v. Roll, 24 Oh. St. 572, 580.

⁵ Denholm v. McKay, 148 Mass. 434, 441.

⁶ Remick v. Butterfield, 31 N. H. 70, 89; Hoitt v. Webb, 36 N. H. 158; Beeson v. Beeson, 9 Pa. St. 279.

⁷ Williams v. Rhodes, 81 Ill. 571.

⁸ Potter v. Smith, 36 Ind. 231.

⁹ Evans v. Snyder, 64 Mo. 516; Gibson v. Herriott, 55 Ark. 85.

¹⁰ Axton v. Carter, 141 Ind. 672, and cases cited.

¹¹ Highsmith v. Whitehurst, 120 N. C. 123.

¹² Riddle v. Murphy, 7 S. & R. 230, 236. See also Bryan v. Kales, 134 U. S. 126.

¹³ Latham v. Barney, 14 Fed. R. 433, 443.

Purchaser at his own sale is entitled to an account for improvements, etc.

if such sale is set aside on their suit, he will be entitled to account, being chargeable for rents and profits received from the property, or, if converted into money, then for the money, with interest, and to be credited with payments for the purchase, if applied in the administration of the estate, for taxes, necessary repairs, and reasonable improvements, also with interest.¹ So, where an administrator, having bought lands at his own sale, agreed, on objections made by adult heirs, to convey to them and minor heirs each a moiety, on their payment of the proportionate share of the claim discharged with the purchase-money, such agreement enures to the benefit of the minor heirs, who may enforce the contract on payment of their share of the debt.²

§ 488. **Validity of the Sale in Collateral Actions.**—To what extent and in what States the judgments of probate courts are conclusive, and unassailable except by direct proceeding, and where they are impeachable collaterally, has been fully discussed in connection with the subject of probate courts in America.³ The question most frequently arises in connection with the sale of real estate by order of the probate court, and it may prove of utility to recapitulate, in this connection, the later decisions of the various States in which such sales are, and of those in which they are not, allowed to be attacked collaterally.

In the federal courts the doctrine first announced in *Grignon v. Astor*⁴ is adhered to in later cases. "In making the order of sale,"

Sales held collaterally unimpeachable in federal courts.

says Grier, J., in *Florentine v. Barton*,⁵ "the court are presumed to have adjudged every question necessary to justify such order or decree; viz., the death of the owner; that the petitioners were his

* administrators; that the personal estate was insufficient [*1089] to pay the debts of the deceased; that the private act of Assembly, as to the manner of sale, was within the constitutional power of the legislature; and that all the provisions of the law, as to notices which are directory to the administrators, have been complied with." An order so made, by a court having power to make

¹ *Lagger v. Association*, 146 Ill. 283, 297; *Miles v. Wheeler*, 43 Ill. 123, 128; *Ebelmesser v. Ebelmesser*, 99 Ill. 541, 548; *O'Conner v. Flynn*, 57 Cal. 293. See also *Fisher v. Bush*, 133 Ind. 315, 322. In determining the right of a complaining heir to share in the profits, the situation of the estate and parties, and the motives, conduct, and equities of the purchaser should be considered: *Benedict v. Beurmann*, 90 Mich. 396. Where the administrator in purchasing the property at his own sale

pays for it by crediting the amount on a claim he has against the estate, the heirs in avoiding the sale need only refund the *pro rata* that the claim was entitled to, this being the actual price paid by him: *Levis v. Welch*, 47 Minn. 193.

² *Williams v. Williams*, 85 N. C. 313.

³ *Ante*, ch. xv., § 145.

⁴ 2 How. (U. S.) 319.

⁵ 2 Wall. 210, 216.

it, cannot be reviewed by another court, in another case, but only by appeal in a direct proceeding,¹ or on the allegation and proof of fraud, in a court of chancery.

This doctrine is substantially indorsed and followed, qualified to the extent of requiring notice to the heirs or other persons having an interest in the real estate sold to appear affirmatively upon the record, in Alabama,² Arkansas,³ California,⁴ Georgia,⁵ Illinois,⁶ Indiana,⁷ Iowa,⁸ Kansas,⁹ Louisiana,¹⁰ Maine,¹¹ Massachusetts,¹² Michigan,¹³ Minnesota,¹⁴ Missouri,¹⁵ Nebraska,¹⁶ New Hampshire,¹⁷ New Jersey,¹⁸ New York,¹⁹ North Carolina,²⁰

¹ *Cornett v. Williams*, 20 Wall. 226, 249; *McNitt v. Turner*, 16 Wall. 352, 366; *Manson v. Duncanson*, 166 U. S. 533; *Simmons v. Saul*, 138 U. S. 440.

² *Moore v. Cottingham*, 113 Ala. 148; *Farley v. Dunklin*, 76 Ala. 530; *Landford v. Dunklin*, 71 Ala. 594, 604; *Kent v. Mancel*, 101 Ala. 334; *Cobb v. Garner*, 105 Ala. 467.

³ *Montgomery v. Johnson*, 31 Ark. 74, 83; *Apel v. Kelsey*, 52 Ark. 341, in which Judge Sanders urgently appeals to the legislature to limit the powers of probate courts, as construed in that State, where "but little further aggression is necessary to make that court in legal contemplation infallible."

⁴ *Burris v. Kennedy*, 108 Cal. 331, showing the changes from the former law in this State; substantial compliance is sufficient on collateral attack: *Silverman v. Gundelfinger*, 82 Cal. 548; *Burris v. Adams*, 96 Cal. 664; if the record show the jurisdictional facts, its judgment cannot be assailed collaterally: *Dennis v. Winter*, 63 Cal. 16.

⁵ *Roberts v. Martin*, 70 Ga. 196; *Patterson v. Lemon*, 50 Ga. 231, 237; *Cogins v. Griswold*, 64 Ga. 323, 324.

⁶ *Andrews v. Bernhardt*, 87 Ill. 365; *Goodbody v. Goodbody*, 95 Ill. 456, 461; *McCormack v. Kimmel*, 4 Ill. App. 121, 124, citing numerous authorities.

⁷ *Lantz v. Moffett*, 102 Ind. 23, 28, citing numerous Indiana cases: *Dequindre v. Williams*, 31 Ind. 444, 454. It has been held that if the record is silent, notice to the heirs will be presumed: *Doe v. Harvey*, 3 Ind. 104, cited with approbation in *Clark v. Hillis*, 134 Ind. 421, 426.

⁸ *Stanley v. Noble*, 59 Iowa, 666; *Read v. Howe*, 39 Iowa, 553, 559. It seems that

want of notice will not avoid the sale on a collateral attack: *Spurgin v. Bowers*, 82 Iowa, 187.

⁹ *Bryan v. Bauder*, 23 Kan. 95, 97; *Higgins v. Reed*, 48 Kans. 272.

¹⁰ *Grevemberg v. Bradford*, 44 La. An. 400, 418, 422; *Webb v. Keller*, 39 La. An. 55, 67; *Succession of Macias*, 36 La. An. 444; *Wisdom v. Buckner*, 31 La. An. 52.

¹¹ *Record v. Howard*, 58 Me. 225, 228; *Decker v. Decker*, 74 Me. 465, 467.

¹² *Record v. Howard*, *supra*.

¹³ *Woods v. Monroe*, 17 Mich. 238, 241; *Osman v. Traphagen*, 23 Mich. 80, 84.

¹⁴ *Curran v. Kuby*, 37 Minn. 330.

¹⁵ *Johnson v. Beazley*, 65 Mo. 250, 254; *Henry v. McKerlie*, 78 Mo. 416, 429; *Sherwood v. Baker*, 105 Mo. 472; *Macey v. Stark*, 116 Mo. 481.

¹⁶ *Saxon v. Cain*, 10 Neb. 488, 491. It seems that if the order confirming the sale recites that notice was published in the wrong newspaper, yet it may be shown by other competent evidence that as a matter of fact it was published in the right paper: *Schroeder v. Wilcox*, 39 Neb. 136.

¹⁷ *Merrill v. Harris*, 26 N. H. 142, 147; *Kimball v. Fisk*, 39 N. H. 110; *Gordon v. Gordon*, 55 N. H. 399, 401 (denying the right to set aside such sale in a proceeding in chancery for fraud); *Blanchard v. Webster*, 62 N. H. 467.

¹⁸ *Clark v. Costello*, 59 N. J. L. 234.

¹⁹ *Richmond v. Foote*, 3 Lans. 244, 253; *Wood v. McChesney*, 40 Barb. 417, 421; *Forbes v. Halsey*, 26 N. Y. 53, 65.

²⁰ *Overton v. Cranford*, 7 Jones L. 415.

Ohio,¹ Pennsylvania,² Texas,³ Vermont,⁴ Virginia,⁵ and Wisconsin.⁶

* In those States in which probate courts are held to be [*1090] inferior tribunals of special and limited jurisdiction, the principle that every naked power, properly so called, must be strictly executed, every prescribed formula observed, and that such must appear affirmatively on the face of the proceedings to give them validity, is more or less rigorously applied to sales of real estate by probate courts. No presumptions are allowed in favor of such courts; nothing is intended to be within their jurisdiction which does not affirmatively appear; the record must show the existence of every fact which was necessary to authorize the judgment, or it is void when questioned either directly or collaterally.

States allowing collateral impeachments.

Cases so holding are found in California,⁷ Colorado,⁸ Connecticut,⁹ Florida,¹⁰ Mississippi,¹¹ Oregon,¹² and Tennessee.¹³ In several States, statutes have been enacted to avoid the disastrous consequences growing out of the doctrine held by the courts, according to which the title to real estate purchased at administrator's sales might be impeached in collateral proceedings.¹⁴ These statutes provide that sales by order of the probate court shall

¹ *Per Okey, J.*, in *Wehrle v. Wehrle*, 39 Oh. St. 365, 366; *Shroyer v. Richmond*, 16 Oh. St. 455, 465; *Sheldon v. Newton*, 3 Oh. St. 494, 500, citing numerous Ohio cases.

² *McPherson v. Cunliff*, 11 Serg. & R. 422, 432, quoted from with approval in *Grignon v. Astor*, *supra*; *Appeal of Morgan*, 4 Atl. R. 506, 509. But see *Smith v. Wildman*, 178 Pa. St. 245.

³ *Crawford v. McDonald*, 88 Tex. 626; *Gillenwaters v. Scott*, 62 Tex. 670, 673; *Willis v. Ferguson*, 59 Tex. 172, 175; *Guilford v. Love*, 49 Tex. 715, 739, citing earlier Texas cases. Even a sale without notice is not void: *Lyne v. Sandford*, 82 Tex. 58.

⁴ *Tryon v. Tryon*, 16 Vt. 318, 317; *Doolittle v. Halton*, 28 Vt. 819, 823.

⁵ *Fisher v. Bassett*, 9 Leigh, 119, 131.

⁶ *Chase v. Whiting*, 30 Wis. 544, 547; *Hoffman v. Wheelock*, 62 Wis. 434, 438.

⁷ Such was formerly the law in this State: *Haynes v. Meeks*, 20 Cal. 288, 314; *Estate of Boland*, 55 Cal. 310, 315; *Estate of Rose*, 63 Cal. 346. But the sale of more real estate than was necessary does not avoid it collaterally: *Boyd v. Blankman*, 29 Cal. 19, 41. But the law is now changed in this State: see *supra*, p. *1089.

⁸ *Vance v. Maroney*, 4 Col. 47. See, however, *Bateman v. Reitler*, 19 Col. 547.

⁹ *Lockwood v. Sturdevant*, 6 Conn. 373: *per Hinman, J.*, in *Seymour v. Seymour*, 22 Conn. 272, 276.

¹⁰ At least prior to 1870: *Sloan v. Sloan*, 25 Fla. 53.

¹¹ *Learned v. Matthews*, 40 Miss. 210. But by statute in this State the purchase-money applied to the payment of debts will be a charge on the land, if the heirs avoid the sale: *Gaines v. Kennedy*, 53 Miss. 103, 108; *Hill v. Billingsly*, 53 Miss. 111, 116.

¹² *Wright v. Edwards*, 10 Oreg. 298.

¹³ *Linnville v. Darby*, 1 Baxt. 306, 310; *Hopper v. Fisher*, 2 Head, 253, 257; *Whitmore v. Johnson*, 10 Humph. 610. Where the sale is ordered by a court of general jurisdiction, its approval is conclusive in collateral proceedings: *Ridgely v. Bennett*, 13 Lea, 210, 218; *Griffith v. Philips*, 9 Lea, 417.

¹⁴ "It seems to have been quite contrary to the principles both of law and equity to disturb the title of a *bona fide* purchaser under such a decree and sale, who has reason to rely upon its validity. Such decisions are attended with the most mischievous consequences": Editor's note to *Thompson v. Brown*, 16 Mass. 172, 181.

be held as valid as if sold under order of a court of general jurisdiction, unimpeachable collaterally for any irregularity or want of jurisdiction for which they could not be impeached if the sale had been under the order of such court.¹ In Maine and Massachusetts the statute provides * that judgments of probate courts shall be unassailable collaterally, except for want of jurisdiction apparent upon the face of the record.² In other States the time is limited within which probate sales may be attacked by the heirs, for omissions or defects in the proceedings.³

¹ So in Wisconsin: Laws of 1861, ch. 127, § 1. In 1869 it was further enacted in this State (Laws, ch. 40, § 1), that deeds purporting to be made in pursuance of a judgment, order, or decree of any court of record in Wisconsin should be received as *prima facie* proof of title. A similar law exists in Minnesota: Gary's Prob. L. § 538. The statute in Minnesota points out five grounds on which the sale can be avoided and that otherwise the sale is collaterally good. This statute should be liberally construed: Buntin v. Root, 66 Minn. 454. See also as to statutes pro-

viding for the collateral unimpeachability of probate sales: Woerner on Guardianship, § 87. As to the curative statute of Oregon, and the constitutionality thereof, see Mitchell v. Campbell, 19 Oreg. 198, 203, *et seq.*

² Record v. Howard, 58 Me. 225, 228; Decker v. Decker, 74 Me. 465, 467.

³ It is entirely competent for the legislature to attach a reasonable limit, if the court had jurisdiction: Rice v. Dickerman, 47 Minn. 527; and see Mitchell v. Campbell, *supra*.

* PART SECOND.

[* 1092]

OF THE RELATIVE LIABILITY OF ASSETS TO
CREDITORS AND LEGATEES.

HAVING treated, in preceding chapters, of the liability of a deceased debtor's general estate to creditors,¹ including the priority assigned by statute to the several classes of claimants, and of the procedure of subjecting the real estate to their satisfaction,² it remains to consider the effect of testamentary directions for the payment of debts, and in connection therewith the marshalling of the assets, in cases where the estate is insufficient to satisfy all the demands upon it of creditors, devisees, and legatees, — a subject which, at the common law, is of purely equitable cognizance, but under the American system of administration enters largely into the scope of jurisdiction of courts intrusted with the control of testamentary matters.³

¹ *Ante*, ch. xxxviii.

³ See *post*, § 495.

² *Ante*, ch. 1.

[*1093]

* CHAPTER LIII.

OF MARSHALLING ASSETS FOR THE PAYMENT OF DEBTS AND
LEGACIES.

§ 489. **Order of the Application of Funds Liable to the Payment of Debts.**—I. It is a rule universally admitted, that the personal estate is the natural primary fund for the payment of debts contracted by the deceased himself, which will be first applied until exhausted, unless the testator expressly or by implication direct otherwise,¹ not extending, however, to the creditors themselves, who may obviously, at their discretion, pursue any of the property, whether personalty in the hands of the executor or administrator, or in the hands of a legatee,² or realty devised or descended, which the law subjects to the satisfaction of their claims.³ Nor does the rule, as announced, apply to the purchaser or devisee of land with an encumbrance thereon, for in such case he becomes a debtor only in respect of the land; and if he promise to pay the debt, the land will still, as between the real and personal representatives, be the primary fund for its payment.⁴

Personal property is the primary fund for the payment of debts, unless otherwise directed by a testator;

but creditors may pursue any property made liable for their debts by law.

Land is the primary fund for the payment of encumbrance thereon assumed by a purchaser or devisee.

II. Lands expressly or specially devised and set apart for the payment of debts are resorted to primarily, if the testator, in charging such lands, intended thereby to exonerate the personalty;⁵ but unless such shall be found to be his intention, the direction to sell or mortgage real estate to pay debts amounts only to an expression of the testator's honest desire to have his debts

[*1094] * paid in the manner pointed out by law, leaving the personalty as the fund to be first resorted to, and

Land may be made the primary fund for payment of debts by provision in a will showing such intention.

¹ As to the exoneration of personalty, see *post*, § 493.

² *Dunn v. Amey*, 1 Leigh, 465, 472.

³ *Quarles v. Capell*, 2 Dyer, 204 b; *Galton v. Hancock*, 2 Atk. 424, 426; *Hewes v. Dehon*, 3 Gray, 205, 207.

⁴ *Cumberland v. Codrington*, 3 John. Ch. 229, 257; *Pleasants v. Flood*, 89 Va. 96, 104. Where realty inherited or de-

vised is subject to a mortgage created by the decedent, the heir or devisee may call upon the personalty to pay the encumbrance: *post*, § 494, p. *1105; but not otherwise: *ib.*

⁵ As to the mode of expression necessary to indicate the testator's intention to exonerate the personalty from liability for debts, see *post*, § 493.

the real estate auxiliary thereto, in the event that the personalty shall prove insufficient.¹

III. Next in the order of liability for debts are lands descended to the heir, whether acquired before or after the making of the will.² Then, —

Lands descended to the heir.

Property devised or bequeathed.

IV. Estate devised or bequeathed, subject to a charge for debts.³

It is noticeable, that a devise to the heir, though formerly inoperative to break the descent, was held to have the effect of placing the heir on an equal footing with the devisees proper in this respect.⁴

General legacies *pro rata*.

V. General legacies, which abate *pro rata*. This subject is discussed elsewhere.⁵

VI. Specific legacies and real estate devised,⁶ whether in terms specific or residuary, which also abate *pro rata*. There was formerly much controversy whether real estate specifically devised was liable to contribution before the residuary real estate was exhausted; it is now held in England that a residuary devise of real estate is specific, notwithstanding the Wills Act,⁷ and the specific devisee must contribute ratably with the residuary devisee, if the personalty is insufficient to pay the testator's debts.⁸ But it has been heretofore shown that the common-law rule declaring all devises specific in their effect, though residuary in terms, has been greatly modified in this country⁹ by statutory provision and changed conditions.

Property passing by power of appointment.

VII. Property, real or personal, appointed by the testator under a general power.¹⁰

* § 490. Charge of Debts on Real Estate. — The real [* 1095]

¹ See cases cited *post*, § 493, p. * 1103, note. The rule is, that, in order to exonerate the personal estate, it is necessary not only to *charge* the real estate, but to *discharge* the personalty: *Samwell v. Wake*, 1 Bro. Ch. R. 144; *Robards v. Wortham*, 2 Dev. Eq. 173, 177.

² *Hope v. Wilkinson*, 14 Lea, 21, 27; *Alexander v. Waller*, 6 Bush, 330, 341; *Commonwealth v. Shelby*, 13 Serg. & R. 348, 355; *Verdier v. Verdier*, 12 Rich. Eq. 138, 140; *Livingston v. Newkirk*, 3 John. Ch. 312, 319.

³ *Hall v. Hall*, 2 McCord Ch. 269, 303. See *Bate v. Bate*, L. R. 43 Ch. D. 600.

⁴ *Biederman v. Seymour*, 3 Beav. 368; and *a fortiori* since the statute of 3 & 4 Wm. IV. c. 106, § 3: *Strickland v. Strickland*, 10 Sim. 374; *Mitchell v. Mitchell*, 21 Md. 244, 253.

⁵ *Ante*, § 452. Where all the legacies

are charged upon one entire fund, the direction to pay the interest of a certain sum to two of the legatees, the principal to remain a charge upon the real estate, does not distinguish these legatees from ordinary general legatees, but they must abate ratably with the others: *Rambo v. Rumer*, 4 Del. Ch. 9, 14.

⁶ For authorities holding that specific legacies and specific devises abate equally, see *ante*, § 452, p. * 987, note.

⁷ 1 Vict. c. 26, § 24.

⁸ *Lancefield v. Iggulden*, 10 Ch. App. Cas. 136, 139; *Cranmer v. McSwords*, 24 W. Va. 594, 599; *Elliott v. Carter*, 9 Gratt. 541, 549.

⁹ *Ante*, § 444, pp. * 967, * 968. See also p. * 989.

¹⁰ See *ante*, as to such property being assets, § 312, p. * 656.

estate of a deceased debtor is not liable, at the common law, for any simple contract debts, unless they are charged thereon by the deceased owner.¹ And we have seen that even in equity it is well established that the personal estate is the natural primary fund for the payment of debts and legacies,² even where they are expressly charged upon the real estate descended or devised.³ It was obviously of great importance to determine whether the debt of a testator had been charged upon his real estate, since in the absence of sufficient personalty the payment thereof could not otherwise be coerced. In the anxiety of courts of equity to secure justice to creditors, they have endeavored to give effect to general directions by a testator for the payment of all his debts, by construing such a direction into a trust for their discharge out of his real estate in case of deficiency of the personalty.⁴ Very slight words in the will were held to imply a charge of debts upon lands,⁵ and it was established as a general rule, that a direction by a testator that his debts shall be paid charges them by implication on his real estate, either as against his heir at law or devisee.⁶

Lands not liable at common law, if not charged by the owner.

Rule in equity to charge lands.

But the enactment of statutes making real estate of deceased debtors liable for their debts of every grade or dignity⁷ has greatly diminished the importance of this question, which rarely arises now as to creditors;⁸ and the rule just mentioned, which has met with much doubt from an

Change in the rule wrought by statutes.

early period,⁹ must be understood to express no more than [*1096] *the cardinal doctrine, that the intention of the testator inferable from the words of the will must be carried into effect.¹⁰ For although the general rule requires, in the absence of

¹ 2 Jarm. on Wills, *522; Harris v. Douglas, 64 Ill. 466, 472.

² Ante, § 489; Lupton v. Lupton, 2 John. Ch. 614, 628; Risk's Appeal, 110 Pa. St. 171.

³ Stevens v. Gregg, 10 Gill & J. 143, 147.

⁴ Scott, J., in Harris v. Douglas, 64 Ill. 466, 472.

⁵ Gaw v. Huffman, 12 Gratt. 628, 633; per Moncure, J.; Price v. North, 1 Phillips, (Eng.) 85; Downman v. Rust, 6 Rand. 587.

⁶ Gaw v. Huffman, supra; Darrington v. Borland, 3 Port. 9, 32.

⁷ Ante, § 463.

⁸ 2 Jarm. on Wills, *584; Matter of City of Rochester, 46 Hun, 651, 655; s. c. 110 N. Y. 159.

⁹ In an anonymous case in Freeman's Ch. Cas. 192, the distinction is drawn, that

where lands are devised and the testator desires the devisee to pay his debts, or the devise is that the devisee pay his debts, or if immediately after the devise he desires that his debts should be paid, or if he use any expression indicating his intention to charge his lands with his debts, the lands will stand so charged; but where the testator begins his will by desiring his just debts to be paid, and afterwards gives legacies and devises lands, such devise is not charged with the payment of the debts. So Eyles v. Cary, 1 Vern. 457; Harris v. Douglas, 64 Ill. 466, 472; Re Rochester, 110 N. Y. 159; Harmon v. Smith, 38 Fed. R. 482. In Cliff v. Moses, 116 N. Y. 144, the distinction is pointed out between a power of sale to pay debts and one to pay legacies.

¹⁰ Heermans v. Robertson, 64 N. Y. 332, 343; see also Decker v. Decker, 121 Ill.

a testamentary direction to the contrary, the payment of debts and legacies out of the personalty, if it be sufficient, yet the testator may order his debts and the expenses of administration to be paid

Testamentary provisions resulting in a charge of debts on the real estate.

No authority to sell in executors from mere charge of debts on realty.

out of his personal estate, or out of his real estate, or out of both, or out of any particular piece or parcel.¹ Thus a disposition by the testator of his personal property to purposes other than the payment of his debts, with the assent of his creditors, is itself a charge on the real estate, subjecting it to the payment of the debts.² The mere fact that lands are charged with the payment of debts by the will, will not by implication confer a power of sale upon the executors.³

The statutory liability of real estate for the debts of a testator is not, however, wholly identical with the liability of land devised

Distinction between statutory liability of real estate, and charges thereon for payment of debts.

charged with the payment of debts. A distinction is pointed out by Jarman in this, that under the statutes the creditor has no such lien on the estate as he has under an actual charge,⁴ so that creditors cannot pursue the devised property in the hands of an alienee.⁵ It follows, also, that there is a difference in the applica-

tion of the Statute of Limitations, which runs its course against the remedy of the creditor under the statute,⁶ but is suspended in the case of a clear and explicit trust to pay debts.⁷ And it is obvious that a charge of all the debts upon a specific devise will not have the effect of releasing property devised to others from sale to pay

341, 348; *Mitchell's Estate*, 182 Pa. St. 530; *Matter of Powers*, 124 N. Y. 361, in which the court says: "The mere direction for payment of the debts out of her property is in effect nothing more than the direction to pay them; to render a provision in a will effectual to furnish a greater security than that given by the law for the payment of debts in due course of administration by charging them upon the real estate, the purpose must quite clearly appear."

¹ *Per* Kent, J., in *Quimby v. Frost*, 61 Me. 77, 81; *Fenwick v. Chapman*, 9 Pet. 461, 471; *Woonsocket v. Ballou*, 16 R. I. 351.

² *Bank of the United States v. Beverly*, 1 How. (U. S.) 134, 147, *et seq.*; *Fenwick v. Chapman*, *supra*. This latter case was criticised and repudiated by the Supreme Court of Maryland in *Cornish v. Willson*, 6 Gill, 299, 311, on a point collateral to that under consideration here.

³ *Worley v. Taylor*, 21 Oreg. 589, 594; *Fox's Will*, 52 New York, 530, 536; *Owen*

v. Ellis, 64 Mo. 77, 88. But a different rule may prevail with regard to legacies charged on the realty; see next section.

⁴ *Ball v. Harris*, 4 Myl. & Cr. 264, 267; *Meakin v. Duvall*, 43 Md. 372, 378; *Steele v. Steele*, 64 Ala. 438, 458.

⁵ *Spackman v. Timbrell*, 8 Sim. 253, 260. "Though," says Jarman, "the creditor's lien under an actual charge is of no great value to him, since it does not prevail against a *bona fide* purchaser for valuable consideration": 2 Jarm. on Wills, *584; *Grottenkemper v. Bryson*, 79 Ky. 353, 357.

⁶ *Gates v. Shugrue*, 35 Minn. 392.

⁷ *Agnew v. Fetterman*, 4 Pa. St. 56, 61; *Seitzinger's Estate*, 170 Pa. St. 531; *Buehler v. Buffington*, 43 Pa. St. 278, 294; *Alexander v. McMurphy*, 8 Watts, 504, 510; *Baylor v. Dejarrette*, 13 Gratt. 152, 171; *Steele v. Steele*, 64 Ala. 439; *Abbey v. Hill*, 64 Miss. 340; *Re City of Rochester*, 46 Hun, 651; *Woonsocket v. Ballou*, 16 R. I. 351, 357.

the claims of creditors, if that devised shall be insufficient to pay the debts.¹

[* 1097] * § 491. **Charge of Legacies on Real Estate.**—The obligation to pay debts is more imperative than the bounty of the testator in giving legacies; the law, therefore, secures creditors independently of the testator's acts. But in respect of the liability of real estate for charges upon it by the testator, it is obvious that his intention, as expressed in the will, must govern whether the charge be for the payment of debts or for the payment of legacies. It is, in both cases, a question of intention, to be arrived at by the general rules of construction. If the language of the will indicates that the testator intended legacies to be paid, knowing that his personal estate would be insufficient for that purpose, or if it appear that in giving the legacies he had the real estate in mind, they will constitute a charge thereon, although it be devised.² The land is accordingly considered to be charged with legacies, when the devise is upon condition that the devisee pay the legacies;³ or where the duty to pay an annuity is imposed upon the devisee in the same sentence devising the land;⁴ or where he is to "make up the deficiency;"⁵ or when given "subject to the devises and bequests;"⁶ or "after payment of debts and legacies;"⁷ so a residuary devise "after securing the payment" of certain legacies, although these had before been charged upon other real estate;⁸ and where the devise is to the donee, "he to pay" a certain sum,⁹ or furnish certain support for the legatees.¹⁰ In all such cases

Legacies may also be charged on lands,

if so intended by the testator.

Instances creating a charge on land.

¹ *Duncan v. Gainey*, 108 Ind. 579, 583.

² *Ogle v. Tayloe*, 49 Md. 158, 175; *Newman's Appeal*, 35 Pa. St. 339, 347; *Bugbee v. Sargent*, 23 Me. 269, 270; *Budd v. Williams*, 26 Md. 265; *Quick v. Quick*, 1 N. J. Eq. 4; *Le Fevre v. Toole*, 84 N. Y. 95; *Miller v. Cooch*, 5 Del. Ch. 161, 179; *Jandon v. Ducker*, 27 S. C. 295, 299. But it must be shown that there was not sufficient personalty to pay the legacy at the time the will was made, and that the testator was aware of such fact: *Duncan v. Wallace*, 114 Ind. 169; *Morris v. Sickly*, 133 N. Y. 456; *Briggs v. Carroll*, 117 N. Y. 288. And it has been held that, standing alone, such fact was not enough to charge the realty: *Turner v. Gibb*, 48 N. J. Eq. 526, 530 (holding, however, that the fact that the legatees were of the testator's blood, and otherwise unprovided for, indicative of an intention to charge); and see *Duval's Estate*, 146 Pa. St. 176; *Dickerman v. Eddinger*, 168 Pa. St. 240.

³ *Wertz's Appeal*, 69 Pa. St. 173; *Taft*

v. Morse, 4 Met. (Mass.) 523; *Merritt v. Buchanan*, 78 Me. 504.

⁴ *Merrill v. Bickford*, 65 Me. 118. To similar effect, *Le Rougetel v. Mann*, 63 N. H. 472; *Wyckoff v. Wyckoff*, 48 N. J. Eq. 113; s. c. 49 N. J. Eq. 344.

⁵ *Field's Appeal*, 36 Pa. St. 11.

⁶ *Devereux v. Devereux*, 78 N. C. 386, 389; *Brown v. Grimes*, 60 Ala. 647; or "subject to the provisions of this, my will": *Thorp v. Munro*, 47 Hun. 246.

⁷ *Funk v. Eggleston*, 92 Ill. 515, 534; *McCullough v. Copeland*, 40 Oh. St. 329; see *Newsom v. Thornton*, 82 Ala. 402, 405.

⁸ *McCredy's Appeal*, 47 Pa. St. 442, 449; *Harris v. Fly*, 7 Pa. 421, 425.

⁹ *Nellons v. Truax*, 6 Oh. St. 97; *Powers v. Powers*, 28 Wis. 659; *Frampton v. Blume*, 129 Mass. 152; *American, &c. Association v. Lett*, 42 N. J. Eq. 43; *Brooks v. Eskins*, 24 Mo. App. 296.

¹⁰ *Porter v. Jackson*, 95 Ind. 210, 213; *Veazey v. Whitehouse*, 10 N. H. 409; *Leavitt v. Wooster*, 14 N. H. 550, 564;

the devised land is liable to the legatees, * and may be [*1098] followed though the devise has lapsed¹ or the land has descended to the devisees' heirs,² or the devisees have aliened it to others.³ This rule holds good, although the real estate was conveyed by deed absolute on its face, if it be shown that it was part of a testamentary scheme by which the grantees were to be the owners of the property conveyed, and to pay the legacies as a condition thereto.⁴ The acceptance of a devise so charged binds the devisee to carry the legacy into effect without demand by the legatee.⁵ Where by the terms of the will the support of a person named is made a charge against the real estate, one holding a claim for his support and for expenses of his funeral may be subrogated to his rights under the will.⁶

But the lands are not charged by a mere direction of the testator to the devisee to pay a legacy; it must appear from the will that it was his intention to onerate the land, otherwise the direction is merely personal, and must be held to charge the person,⁷ if he accept the devise.⁸ The intention to charge the land may be manifested by express words, or by implication or fair inference from the context; and the extraneous circumstances under which the will was written may be considered in aid of its terms;⁹ hence the realty

Instances of directions not creating a charge on lands.

Charge by implication.

Taylor v. Elder, 39 Oh. St. 535 (holding the devisee to be discharged from the obligation upon the legatee's marriage); *Gray v. West*, 93 N. C. 442 (holding that the words, "A. G. is to have her support out of the land," do not constitute a charge on the corpus, but give the right to support out of the rents and profits only); *Howard v. Wofford*, 16 S. C. 148. But in Massachusetts the "income" in such case was held to mean the gross income of the whole estate: *Smith v. Fellows*, 131 Mass. 20. Rents accruing subsequent to the legatee's death are liable for debts previously contracted by her guardian for her support: *Long v. Read*, 9 Lea, 538; *Bailey v. Bailey*, 115 Ill. 551.

¹ *Cady v. Cady*, 67 Miss. 425.

² *Halstead v. Westervelt*, 41 N. J. Eq. 100.

³ *Moore's Appeal*, 48 Mich. 474. Unless the legatee has divested himself of such right: *Thayer v. Finnegan*, 134 Mass. 62, 66; *Gardenville v. Walker*, 52 Md. 452. Where a part of the land charged has been alienated, the other part, not alienated, will be first applied to the payment of the legacy: *Lovejoy v.*

Raymond, 58 Vt. 509. And if there be several tracts charged with the payment of legacies, and the devisee sells them at various times to different persons, the charge should be enforced by laying it on the tracts in the inverse order of alienation: *Fessenden's Estate*, 170 Pa. St. 631. As to the effect given to the devisee's sale, if he has also a power of sale conferred by the will, see *infra*, p. *1100.

⁴ *Tigner v. McGehee*, 60 Miss. 185, 191.

⁵ *Watt v. Pittman*, 125 Ind. 168, 172; *Clark v. Marlow*, 149 Ind. 41, 44.

⁶ *Clark v. Marlow*, *supra*.

⁷ *Wright v. Denn*, 10 Wheat. 204, 226; *Buchanan's Appeal*, 72 Pa. St. 448; *Haworth's Appeal*, 105 Pa. St. 362; *Penny's Appeal*, 109 Pa. St. 323; *Nudd v. Powers*, 136 Mass. 273, 276; *Owens v. Clayton*, 56 Md. 129; *White v. Kauffmann*, 66 Md. 89; *Wiltzie v. Shaw*, 100 N. Y. 191, 194. See *infra*.

⁸ *Hamilton v. Porter*, 63 Pa. St. 332; *Etter v. Greenawalt*, 98 Pa. St. 422 (holding that the Statute of Limitations runs against the personal action).

⁹ *Hoyt v. Hoyt*, 85 N. Y. 142; *Per Allen, J.*, in *Davenport v. Sargent*, 63 N. H. 538,

is charged where the direction is that the debt or legacy be first paid,¹ or where the personalty is bequeathed to pay debts and the devisee "or his heirs" directed to pay certain legacies;² or where the intention is to equalize children's shares, in which case the share of each will be a charge for the benefit of others.³ So, also, a legacy directed "to be paid out of my estate," is charged upon the land,⁴ unless from the context of the will it appears that [* 1099] *by "estate" the testator referred only to personalty.⁵ But the implication must be plain and natural, as there is no longer occasion to go to the length to which courts formerly have gone in their anxiety to be just to creditors by holding *debts* to be charged by loose and equivocal expressions; nor is there any ground for preferring a pecuniary legacy to a specific devise.⁶

The rule, that a testator is presumed to manifest his intention to charge general legacies upon land by blending the real and personal property in the residuary clause has been discussed in connection with the subject of the abatement of legacies.⁷ Doubtful words in a will are not to have the effect of exempting the testator's personal property from the payment of legacies, or of charging them on the real estate.⁸

Presumption arising from the blending of real and personal property in residuary clause.

Since it is the duty of the executor or administrator with the will annexed to pay a legacy, it would seem to follow, and it has been so held,⁹ that, where the legacy is made a charge upon the real estate, it is his right, and becomes his duty, to make sale of such realty if necessary to obtain funds for the payment

Executor's duty to sell.

543; *Duncan v. Wallace*, 114 Ind. 169; *Stevens v. Flower*, 46 N. J. Eq. 340; but parol evidence is inadmissible in Illinois: *Wentworth v. Read*, 166 Ill. 139; *Helsoph v. Gattton*, 71 Ill. 528.

¹ *Lupton v. Lupton*, 2 John. Ch. 614, 623; *McCorn v. McCorn*, 100 N. Y. 511; *Springer's Appeal*, 111 Pa. St. 274.

² *Kelsey v. Deyo*, 3 Cow. 133, 139; *Yearley v. Long*, 40 Oh. St. 27 (in this case it is held that the legatee's claim is subject to the Statute of Limitations); *Carter v. Worrell*, 96 N. C. 358, 361.

³ *Siron v. Ruleman*, 32 Gratt. 215.

⁴ *Bray v. Lamb*, 2 Dev. Eq. 372; *Biddle v. Carraway*, 6 Jones Eq. 95; see also *Lloyd's Estate*, 174 Pa. St. 184; and *McQueen v. Lily*, 131 Mo. 9.

⁵ *Worth v. Worth*, 95 N. C. 239, 243.

⁶ 2 Jarm. on Wills, *591; *per R. P. Arden* (Master of the Rolls), in *Shallcross v. Finden*, 3 Ves. 738, 739; *Case v. Case*, Kirby, 284; *Hibler v. Hibler*, 104 Mich. 274; *Phillips v. Clark*, 18 R. I. 627; *Lee*

v. Lee, 88 Va. 805, 807; *Van Vliet's Appeal*, 102 Pa. St. 574; *Davenport v. Sargent*, 63 N. H. 538; *Van Winkel v. Van Houten*, 3 N. J. Eq. 172, 186; *Taylor v. Tolen*, 38 N. J. Eq. 91, 97; *Myers v. Eddy*, 47 Barb. 263; *Smith v. Carroll*, 112 Pa. St. 390; *Power v. Davis*, 3 MacArthur, 153, 164; *Hill v. Toms*, 87 N. C. 492.

⁷ *Ante*, § 452, p. *989.

⁸ *Arnold v. Dean*, 61 Tex. 249, 253; *Cooch v. Cooch*, 5 Houst. 540, 563; *Geiger v. Worth*, 17 Oh. St. 564; *Kirkpatrick v. Chestnut*, 5 S. C. 216; *Evans v. Beaumont*, 16 Lea, 713, 718.

⁹ *American Company v. Clemens*, 132 Ind. 163. But in Pennsylvania the executor has nothing to do with the enforcement of legacies expressly charged on the realty; the legatee must proceed in the Orphan's Court, which alone has jurisdiction; *Hartzell's Estate*, 178 Pa. St. 286; *Luckenboch's Estate*, 170 Pa. St. 586 and cases cited; *Brotzman's Appeal*, 119 Pa. St. 645, 655.

of the legacy charged upon it; though, as will appear below, the legatee may himself enforce his claim, if the executor do not. So, also, while an action in equity may be brought to have a legacy declared a charge on realty, yet it cannot be enforced by a sale of the realty until it be shown that the personalty (which is usually the primary fund for its payment) is exhausted in due course of administration and under authority of the statute; hence, where no administration was had, such equitable proceeding is an inappropriate one to ascertain the debts and order their payment.¹

It may not be out of place here to mention the personal liability accruing to devisees by accepting lands charged with the payment of debts, legacies, annuities, etc. It is held that where the payment of a legacy is made a condition of the devise, its acceptance creates, in addition to the liability of the land devised, a personal liability to the legatee, which may be enforced without resorting to the land, the lien still remaining as a security.² In some States it is held, that in such case the land cannot be pursued until the personal remedy is exhausted;³ in others, that he may pursue the one or other remedy first.⁴ The rule is the same where the devisee is the executor, whose liability is then personal, and not official,⁵ and the devisee * is liable, although the land devised to him proves to be [* 1100] less in value than the legacy;⁶ if he desires to avoid responsibility, he must refuse to accept the devise. The legatee may enforce his legacy against the land in the hands of a *bona fide* purchaser from the devisee for full value, if the will charging the legacy

¹ *Hogan v. Kavenaugh*, 138 N. Y. 417.

² *Porter v. Jackson*, 95 Ind. 210, 214; citing numerous earlier Indiana cases; *Case v. Hall*, 52 Oh. St. 24, 31; *Fuller v. McEwen*, 17 Oh. St. 288; *Dunne v. Dunne*, 66 Cal. 157; *Eyre's Appeal*, 106 Pa. St. 184; *Glen v. Fisher*, 6 John. Ch. 33; *Donohue v. Donohue*, 54 Kans. 136; see dissenting opinion of Learned, P. J., in *Quackenbush v. Quackenbush*, 42 Hun, 329, 333; see also *Zimmer v. Sennott*, 134 Ill. 505 (holding that the land may be taken in execution by the creditor of the devisee upon whom was imposed the personal liability to pay the legacy to a third person, since in such case the devisee takes the land as a purchaser and in fee). See also *ante*, § 440, p. * 952. But where it was the testator's evident intention that legacies imposed upon a devise should be paid from the income of the devised estate, the devisee is not personally liable: *Eskridge v. Farrar*, 34 La. An. 709, 725, except to the extent of the income re-

ceived: *Hunkypillor v. Harrison*, 59 Ark. 453. A direction that a widow should "be entitled to a living" off certain land devised to others creates a charge thereon, to the extent of the rents and profits, but no personal liability upon the devisees: *Commons v. Commons*, 115 Ind. 162, and cases there cited; so where the testator "charges his estate" no personal liability arises: *Hayes v. Sykes*, 120 Ind. 180; to same effect: *Funk v. Eggleston*, 92 Ill. 515, 534.

³ *Dodge v. Manning*, 1 N. Y. 298, 303; *Brown v. Knapp*, 79 N. Y. 136, 142.

⁴ *Reynolds v. Bond*, 83 Ind. 36, 40.

⁵ *Brown v. Knapp*, *supra*; *Fuller v. McEwen*, 17 Oh. St. 288; *Williams v. Nichol*, 47 Ark. 254, 263; *Olmstead v. Brush*, 27 Conn. 530; *Watt v. Pittman*, 125 Ind. 168; see also *Evans v. Foster*, 80 Wis. 509.

⁶ *Brown v. Knapp*, *supra*; *Williams v. Nichol*, *supra*. See also *Hodges v. Phelps*, 65 Vt. 303.

on the land has been duly recorded; for the record of the will is constructive notice to the purchaser of the limited title.¹ Nor does the fact, that the executors, as residuary legatees, gave bond for the payment of debts and legacies, operate to vest absolute title in such executors, which he can convey to a *bona fide* purchaser free and clear of legacies charged on land.² And where an annuity is charged on several parcels of real estate devised to one person, the right of the annuitant to enforce the charge against any or all of the property devised can be waived only by the annuitant, and is in no manner affected by transactions to which the annuitant was not a party.³ But land sold by one who was devisee charged with legacies, and also executor, under a power conferred on him by the will to sell in order to obtain money to pay the legacies, or for any purpose he might think advantageous to himself, is not subject in the hands of his vendees to a charge for the legacies.⁴ Where the devise is not upon an express trust to pay the debts or legacies, the devisee is entitled to the surplus remaining after discharging the debts and legacies charged, and if the charge fails, the advantage accruing from such failure will enure to his benefit.⁵ A vested remainder may be sold to pay legacies which are a charge thereon, before the expiration of the precedent estate.⁶

In Rhode Island the English rule, according to which real estate charged with a legacy payable *in futuro* is released or exonerated by the death of the legatee before the time of payment, is criticised and found unsatisfactory, and it is held that the legacy in such case remains a charge on the real estate in favor of the personal representative of the legatee.⁷

§ 492. **Effect of Devise of Rents and Profits.**—It has been a matter of contention whether a direction or power to raise money out of the rents and profits of the testator's lands authorizes their sale or mortgage; in other words, whether the term "rents and profits" means the annual income

Power to raise money out of rents and profits

only, or is used in the more comprehensive sense as [*1101] *designating the proceeds or profit of the estate.⁸ Story

¹ Scott v. Patchin, 54 Vt. 253, 261; Wilson v. Piper, 77 Ind. 437; Brooks v. Eskins, 24 Mo. App. 296; Henry v. Griffis, 89 Iowa, 543. The lien of a legacy on the realty may be established after final settlement: Davidson v. Coon, 125 Ind. 497, 500; but in Indiana is barred by the fifteen-years Statute of Limitation: Witz v. Dole, 129 Ind. 120. In Mississippi the Statute of Limitations does not run pending administration: Peebles v. Acker, 70 Miss. 356.

² Amherst College v. Smith, 134 Mass. 543, 545.

³ Perkins v. Emory, 55 Md. 27, 37.

⁴ Turner v. Turner, 57 Miss. 775, 778; because the purchaser is not bound to see that the purchase-money is properly applied: Drumbheler v. Haff, 23 Mo. App. 161.

⁵ Richardson v. Eveland, 126 Ill. 37, per Shope, J., p. 43.

⁶ Root's Will, 81 Wis. 263, 267.

⁷ Pond v. Allen, 15 R. I. 171, citing the English cases in which the rule is announced.

⁸ 2 Jarm. *610.

confined to annual rents under old rule, but extended to the proceeds of sale or mortgage in modern cases.

points out that the old English cases generally inclined to hold that the power should be restricted to the application of the annual rents and profits; while more recent cases construe it into a power to sell or mortgage the estate, if necessary to accomplish the testator's purpose.¹ The true doctrine seems to turn upon the principle contained in the rules of construction, according to which the general intent of the testator, discernible from the whole of the will, must dominate the particular provisions whenever there is an irreconcilable inconsistency between them, or an impossibility to give complete effect to both.² "The rents and profits are but the means," says Story, "and the question therefore may properly be put, whether the means, if totally inadequate to accomplish the end, are to control the end, or are to yield to it. Now, if the gross sum cannot be raised out of the rents and profits at all, or not so soon as to meet the exigency contemplated by the testator, it would seem but a reasonable interpretation of his intention to presume that he meant to dispense with the means, and at all events to require the sum to be raised."² And Jarman expresses the same view. Having reviewed the English cases on this subject, he says: "These quotations controvert the position advanced by some respectable writers, that annual rents is the primary meaning of rents and profits; they show the rule of construction to be rather the reverse, and that these words are to be taken in their widest sense, namely, as authorizing a sale, unless restrained by the context; but perhaps it more accords with the principle of the authorities to say, that the signification of the phrase is governed wholly by the nature of the purpose for which the money is to be raised, and the general tenor of the will."³

In accordance with this principle, a devise of real estate to a trustee with power to sell, and "out of the proceeds, interest, rents, income, or profits . . . pay over to my brother such sum or sums of money as my brother may need for his support," was held to authorize the trustee to use the *corpus* of such estate, if the income was not, in his opinion, sufficient for the purpose expressed by the testatrix.⁴ The devise * of an annuity out of a piece of land is a charge [*1102] upon the rents and profits thereof, although not so expressed in the will, and is payable by a life tenant, who is bound to keep down such annuity, and after the termination of the life estate by the remainderman, and if the rents and profits are insufficient, the annuity will be a charge on the fee, to be raised by mortgage or

¹ Sto. Eq., §§ 1064, 1064 a.

² See *ante*, p. * 877.

³ Jarman. * 612.

⁴ Haydel v. Hurck, 72 Mo. 253, 257, 258.

reversing 5 Mo. App. 267. To similar effect, *Allen v. Barnes*, 12 Pac. Rep. 912, 915 (Utah); *Longwith v. Riggs*, 123 Ill.

otherwise out of the estate.¹ The annuity to a widow, "to be paid from the income of my property," devised partly to her and partly to her daughter, was held to entitle the widow to the gross income of the whole estate, if the net income was insufficient.² So, where an annuity was charged upon a lease for many years, which was forfeited for non-payment of rent and leased to other parties at reduced rates, but sufficient to pay the annuity, the annuity was held payable out of the new lease, the intention to charge the specific land being inferred.³ Where an annuity was payable to the widow out of the personalty which the executors squandered, and they were the devisees, the annuity was held a charge against the land devised.⁴ A direction to pay an annuity out of the rents and profits can only be enforced against the devisees of the realty so far as they have received the rents, and not against the *corpus* of the estate, unless a contrary intention appear from the will.⁵

It is a well-known rule, that the devise of the rents and profits, or of the income of land, is in legal effect a devise of the land;⁶ but this is only a convenient expression to indicate a rule of construction, that by the gifts of rents, income, profits, use, occupation, improvement, etc., the testator is presumed, in the absence of any expression of a different intention, to have given the land itself.⁷ Any expression in the will inconsistent with such intention will be sufficient to defeat a devise of the land by the gift of the rents and profits only.⁸ The gift of interest, or income, in like manner, as a general rule, carries with it the fund itself, and is governed by analogous principles;⁹ thus, where a

Rule that devise of rents and profits is a devise of the land is but a rule of construction.

Gift of interest has same effect.

¹ *Clason v. Lawrence*, 3 Edw. Ch. 48, 54. To similar effect, *Mitchener v. Atkinson*, 63 N. C. 585; *Parks v. Perry*, 2 Blackf. 74; *Long v. Read*, 9 Lea, 538.

² *Smith v. Fellows*, 131 Mass. 20. See also *In re Cushing's Will*, 58 Vt. 393.

³ *Shupp v. Gaylord*, 103 Pa. St. 319, 330.

⁴ *Bluevelt v. De Noyelles*, 25 Hun, 590.

⁵ *Irwin v. Wollpert*, 128 Ill. 527, 532; *Delaney v. Van Anlen*, 84 N. Y. 16, where the authorities are collated.

⁶ *Sammis v. Sammis*, 14 R. I. 123, 128; *Hatch v. Bassett*, 52 N. Y. 359, 362; *Davis v. Williams*, 85 Tenn. 646; *Ryan v. Allen*, 120 Ill. 648, 653; *Hunt v. Williams*, 126 Ind. 493, 495, applying the rule to a gift of the "proceeds." If the rents and profits be given to a trustee to pay over, the *cestui qui trust* takes an equitable fee: *Greene v. Wilbur*, 15 R. I. 251.

⁷ *Diamant v. Lore*, 31 N. J. L. 220,

222; *Carlyle v. Cannon*, 3 Rawle, 489, 492.

⁸ *France's Estate*, 75 Pa. St. 220, 224; *Bowen v. Payton*, 14 R. I. 257; *Nudd v. Powers*, 136 Mass. 273, 276; *Gray v. West*, 93 N. C. 442; *Eskridge v. Farrar*, 34 La. An. 709, 722; *Phelps v. Phelps*, 143 Mass. 570, 575; *Kline's Appeal*, 117 Pa. St. 139, 147; *University v. Tucker*, 31 W. Va. 621, 631.

⁹ *Bruch's Estate*, 185 Pa. St. 194; *Earl v. Grim*, 1 John. Ch. 494; *Sproul's Appeal*, 105 Pa. St. 438; *Durfee v. Pomeroy*, 154 N. Y. 583; *Lorton v. Woodward*, 5 Del. Ch. 505; *Gulick v. Gulick*, 27 N. J. Eq. 498; *Mason v. Trustees*, 27 N. J. Eq. 47, 51; *Pennsylvania Co.'s Appeal*, 83 Pa. St. 312; *Cannon v. Apperson*, 14 Lea, 553, 570; *Dascomb v. Marston*, 80 Me. 223, 231; *Hopkins v. Keazer*, 89 Me. 347, 355.

* fund is given for life to one, remainder to her children, [* 1103] the interest payable to the first-named legatee, she is not entitled to possession of the fund on giving security to the remaindermen.¹ And, conversely, where legacies are charged upon the proceeds of sale of real estate, the rents and profits of the real estate before sale are liable for the legacies.²

§ 493. **Exoneration of the Personalty.** — It has already been stated, that a general charge of debts upon the real estate is not, without more, sufficient to exonerate the personalty.³

Rule that personalty can be exonerated by express words only, no longer prevalent;

the testator's intention in this respect is to be gathered from the whole will,

even in a nuncupative will.

Instances held to exonerate personalty.

It was at one time held to be law, that the personal estate could not be exempted from the payment of debts and legacies without express words;⁴ but "it may now be taken as the established law, that the personal fund will be exempted if the intention of the testator in its favor can be collected from a sound interpretation put upon the whole will. It is only necessary that, from the whole testamentary disposition taken together, there

should appear on the part of the testator an intention so expressed as to convince a judicial mind that it was meant to charge the real estate so as to exempt the personal, or to make them both abate and contribute ratably."⁵ This principle has been extended to a nuncupative will, by which the testator gave his

personalty, leaving sufficient real estate to pay the debts; and this was held to indicate an intention to exonerate the personalty.⁶

Accordingly, the personalty has been held to be exonerated by a direction to the devisee to pay a certain legacy within a year;⁷ by a devise subject to the payment of a debt not contracted by the testator;⁸ or by a direction to pay debts to the devisee, followed by a precise

* disposition of the personalty otherwise.⁹ So, a provision [* 1104] expressly charging the personalty with debts, upon a certain contingency, with gift of the realty to another, has been held

¹ Because it appears that the testator intended to give only the interest: *Parker v. Moore*, 25 N. J. Eq. 228, 234.

² *Lyon v. Church*, 41 N. J. Eq. 389, 391.

³ *Ante*, § 489; *Hanna's Appeal*, 31 Pa. St. 53; *Chapin v. Waters*, 116 Mass. 140, 146; *Cooch v. Cooch*, 5 Houst. 540, 569; *Kirkpatrick v. Rogers*, 7 Ired. Eq. 44; *Hanson v. Hanson*, 70 Me. 508, 511; *Sweeney v. Warren*, 127 N. Y. 426.

⁴ *Per Bell, J.*, in *Perry v. Hale*, 44 N. H. 363, 366.

⁵ *Per Wagner, J.*, in *Brant's Will*, 40 Mo. 266, 279; *Marsh v. Marsh*, 10 B. Mon. 360; *Hancock v. Minot*, 8 Pick. 29,

37; *Bane v. Wick*, 14 Oh. St. 505, 515; *Whitehead v. Gibbons*, 10 N. J. Eq. 230, 237; *Reid v. Corrigan*, 143 Ill. 402.

⁶ *McCullom v. Chidester*, 63 Ill. 477.

⁷ *Salisbury v. Morse*, 7 Lans. 359.

⁸ *Smith v. Wyckoff*, 11 Pai. 49, 56.

⁹ *Fraser v. Alexander*, 2 Dev. Eq. 348, 352. The refusal of the devisee to take the devise is immaterial, and will not operate to throw the onus of paying debts on the personalty thus exonerated by the testator: *McFait's Appeal*, 8 Pa. St. 290, 292; *Clery's Appeal*, 35 Pa. St. 54. Neither will the circumstance that the will was not so executed as to pass real estate: *Dunlap v. Dunlap*, 4 Desaus. 305.

indicative of an intention to discharge the personality if such contingency did not happen.¹ An absolute gift of all the personality to the widow has been held to exonerate the personality, where the realty was devised by a gift residuary in terms.² So a general charge of the debts upon the real estate amounts to an exoneration of the personal estate specifically bequeathed, until the land so charged is exhausted;³ but a partial disposition of the personality will not have such effect;⁴ nor will a general, but only a specific bequest.⁵ But where the testator gives a part of the personality expressly directing that it shall be liable for the payment of his debts, this will exonerate the general personal estate.⁶

It appears elsewhere that if there be sufficient personality to pay the debts, but it is squandered by the administrator, and hence cannot be applied to that purpose, then the remedy on the bond must be resorted to, to make up the deficiency, instead of selling the realty; and also that the authorities are conflicting whether the realty can be resorted to by creditors when all remedies against sureties have been exhausted in vain.⁷ But it was held in Iowa that where there was a bequest of personality to a daughter, and a devise of realty to a son, and the personal estate was squandered by the executor so that it could not be applied to the legacy, that such loss should be borne *pro rata* between the beneficiaries, the will indicating an intention of equality between them.⁸

Where a sale of the real estate is directed, and the payment of debts and legacies charged upon the proceeds of the sale and the personal estate in one mass, the real and personal estate must contribute ratably to the payment of debts and legacies;⁹ so, as will appear from what has already been said on abatement of legacies,¹⁰ if legacies be given generally, and the residue of real and personal estate is given in one mass, the legacies are a charge upon the residuary property real and personal, in the sense that such legacies must be eliminated from the residue before it can be ascertained what the residue consists of;¹¹ but if in such case there is sufficient

Debts and legacies charged upon real and personal estate as one fund, they must contribute ratably.

¹ *Calder v. Curry*, 17 R. I. 610.

² *Reid v. Corrigan*, 143 Ill. 402.

³ *Alexander v. Miller*, 7 Heisk. 65, 77, *et seq.*; *Lightfoot v. Lightfoot*, 27 Ala. 351, 358; *Lee, Appellant*, 18 Pick. 285, 288; *Spraker v. Van Alstyne*, 18 Wend. 200, 204, *et seq.*; *Wallace v. Wallace*, 23 N. H. 149, 155.

⁴ *Hoes v. Van Hoesen*, 1 N. Y. 120.

⁵ *Scott v. Morrison*, 5 Ind. 551; *Wallace v. Wallace*, 23 N. H. 149, 155.

⁶ *Webb v. De Beauvoisin*, 31 Beav. 573, 577; *Bootle v. Blundell*, 19 Ves. 494, 516, *et seq.*; *Vernon v. Manvers*, 31 Beav.

623; *Hines v. Spruill*, 2 Dev. & B. Eq. 93, 102; *Pinckney v. Pinckney*, 2 Rich. Eq. 218, 234; *Pell v. Ball*, 1 Speers Eq. 518.

⁷ *Ante*, § 470.

⁸ *Henry v. Griffis*, 89 Iowa, 543.

⁹ *Wms. Ex.* [1712]; *Elliott v. Carter*, 9 Gratt. 541, 550; *Witman v. Norton*, 6 Binn. 395; *Cox v. Corkendall*, 13 N. J. Eq. 138.

¹⁰ *Ante*, § 452, p. *989, and cases cited.

¹¹ *Robinson v. McIver*, 63 N. C. 645, 650; *Wilcox v. Wilcox*, 13 Allen, 252, 256; *Lewis v. Darling*, 16 How. (U. S.) 1, 10;

personalty to pay the legacies at the time of the testator's death, a subsequent loss will fall on the legatees alone, on the ground that the personalty is the primary fund for the payment of debts and pecuniary legacies.¹ But this rule is not applicable, although the real and personal estate are given to the same person, unless they are thrown into one mass; if not, both funds will retain their original character and liabilities.

* § 494. **Exoneration of Mortgaged Property.**—At com- [* 1105] mon law, the personalty being the primary fund for the

At common law heir or devisee may demand exoneration of devised lands, mortgaged for testator's debt, unless testator otherwise direct;

but not if the debt was a charge upon the land when acquired by the testator.

payment of debts, the heir or devisee may call upon the executor to exonerate the land by discharging the mortgage debt out of the personal estate, on the ground that the personal estate had the benefit of the money for which the mortgage was given.² But the testator may indicate the fund out of which the mortgage debt shall be paid, or devise the land *cum onere*;³ and the rule does not apply to estates purchased by the testator or intestate while under the encumbrance,⁴ unless he has made it his own debt.⁵ A direction to the executor to pay all debts "on bond and mortgage" is held to exonerate the devisee from the encumbrance on devised land;⁶

so the direction to the executor to pay off the mortgage, although the testator subsequently conveyed by deed "subject to" the mortgage;⁷ and such direction was held to apply equally where the testatrix on the same day devised to one and conveyed by deed to two of her children, taking a lease from the latter for life, the two transactions being looked upon as one testamentary disposition.⁸

Gallagher's Appeal, 48 Pa. St. 121; Moore v. Beckwith, 14 Oh. St. 129, 135.

¹ Johnson v. Farrell, 64 N. C. 266. See on this point, *ante*, § 452, on the abatement of residuary legacies.

² Keene v. Munn, 16 N. J. Eq. 398, 400; Higbie v. Morris, 53 N. J. Eq. 173, 177; Turner v. Laird, 68 Conn. 198; Minter v. Burnett, 90 Tex. 245; Lennig's Estate, 52 Pa. St. 135, 138; Merkel's Estate, 131 Pa. St. 584; Gould v. Winthrop, 5 R. I. 319; Hewes v. Dehon, 3 Gray, 205; Newcomer v. Wallace, 30 Ind. 216; Dandridge v. Minge, 4 Rand. 397; Slack v. Emery, 30 N. J. Eq. 458; Sutherland v. Harrison, 86 Ill. 363. This rule has been changed by statute in England and some of the American States: see *post*, § 497.

³ Gould v. Winthrop, 5 R. I. 319, 321.

⁴ Per Ruffin, J., in Robards v. Wortham, 2 Dev. Eq. 173, 176; Southerland v. Harris, *supra*; Hunt, Petitioner, 19 R. I.

139; Minter v. Burnett, 90 Tex. 245, 248; Creesy v. Willis, 159 Mass. 249; and see *ante*, § 489, in connection herewith.

⁵ Thompson v. Thompson, 4 Oh. St. 333, 350; O'Connor v. O'Connor, 88 Tenn. 76; Lennig's Estate, 52 Pa. St. 135; Minter v. Burnett, *supra*; Hunt, Petitioner, 19 R. I. 139 (citing cases as to what is or is not sufficient to show that intestate assumed the debt).

⁶ Rapalye v. Rapalye, 27 Barb. 610, 620.

⁷ Bradford v. Forbes, 9 Allen, 365.

⁸ Waldron v. Waldron, 4 Bradf. 114. But in Michigan it was held, where the testator had conveyed by deed, reserving a life estate, and on the same day made his will and therein also devised mortgaged premises to the same party, that he in whose favor the deed and devise were made took as grantee, and could not therefore call upon the personal assets of the

But the devisee or heir of a mortgaged estate cannot claim exoneration out of specific,¹ or even, it is held in some States, out of general pecuniary legacies;² and where a legatee is deprived of his legacy by the payment of a debt secured by mortgage, he will be subrogated to the right of the creditor against the land, to the extent of his legacy, or to the value of the personal estate so appropriated.³

[*1106] The devisee takes *the land *cum onere*, unless the residue of the personal estate is sufficient to discharge the mortgage.⁴

Devisee of mortgaged land not entitled to exoneration out of specific or general legacies.

If no intention is inferable from the will indicating a different course, it seems to result from the authorities that, as stated by Jarman,⁵ the devisee of mortgaged estate may subject to the discharge of the encumbrance various funds, in the following order: first, the general personal estate;⁶ next, lands devised for the express purpose of paying debts;⁷ then, lands descended;⁸ and, lastly, lands devised charged with debts;⁹ and if the charge fell upon the last of these classes, the devisee himself, who calls for the exoneration, would be liable to contribute ratably with the other devisees.¹⁰

Order in which devisee may subject the estate to exoneration of the mortgaged devise.

It is evident that the purchaser of an equity of redemption acquires no more than the right to redeem the property mortgaged from the debt for which it stood pledged, and has no right to any other fund in exoneration of his estate.¹¹

Owner of equity of redemption not entitled to exoneration.

The right of a legatee to whom any specific chattel has been bequeathed to have it exonerated from encumbrance thereon is the same as that of a devisee.¹² So the testator's direction to pay his debts will extend to the disencumbrance of a specific bequest.¹³ Personal property pawned by the

Legatee has same right of exoneration of specific legacy from encum-

testator to pay off the mortgage: *Estate of Wisner*, 20 Mich. 442.

¹ *Oneal v. Mead*, 1 P. Wms. 693; *Estate of Woodworth*, 31 Cal. 595, 601; *Dean v. Rounds*, 18 R. I. 436, 447.

² *Lutkins v. Leigh*, Cas. Temp. Talb. 53; *Hoff's Appeal*, 24 Pa. St. 200, 206; *Gould v. Winthrop*, 5 R. I. 319, 323; *Thomas v. Thomas*, 17 N. J. Eq. 356. But see *Brown v. Baron*, 162 Mass. 56, apparently giving a devisee the right of exoneration against general legatees.

³ *Mollan v. Griffith*, 3 Pai. 402; *per Tillinghast, J.*, in *Dean v. Rounds*, 18 R. I. 436, 447.

⁴ *Ruston v. Ruston*, 2 Yeates, 54, 62.

⁵ 2 Jarm. *635.

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⁶ *Phillips v. Phillips*, 2 Bro. C. C. 273; *Gray, J.*, in *Plimpton v. Fuller*, 11 Allen, 139, 140.

⁷ *Serle v. St. Eloy*, 2 P. Wms. 386; *Phillips v. Parry*, 22 Beav. 279, 282.

⁸ *Galton v. Hancock*, 2 Atk. 424, 427; *Phillips v. Parry*, *supra*; *Milnes v. Slater*, 8 Ves. 295, 306.

⁹ *Bartholomew v. May*, 1 Atk. 487; *Middleton v. Middleton*, 15 Beav. 450, 455.

¹⁰ *Carter v. Barnadiston*, 1 P. Wms. 505; *Middleton v. Middleton*, *supra*.

¹¹ *Krueger v. Ferry*, 41 N. J. Eq. 432, 437.

¹² 2 Jarm. *631; *Barry v. Harding*, 1 Jones & Lat. 475, 490.

¹³ *Brainerd v. Cowdrey*, 16 Conn. 1, 7.

brance as devisee.

testator is to be redeemed by the executor in favor of the specific legatee;¹ and if the testator specifically bequeath a legacy to which he is entitled under a will, and afterwards assigns it by way of mortgage, the legatee may have the mortgage debt liquidated in exoneration of the subject of the gift.²

§ 495. **Marshalling Assets in the Course of Administration.** — The equitable doctrine of marshalling assets is not, in the technical sense in which courts of chancery proceed, applicable to probate * courts, because these are limited to the exercise [* 1107] of such powers as are conferred upon them by express statute, or necessarily implied in the powers expressly conferred.

Marshalling assets in equity by means of injunction and subrogation.

Marshalling in equity is generally accomplished by the exercise of powers known only in chancery, chiefly by the remedies of injunction and subrogation. Thus, where, for instance, two claimants are to be satisfied out of two funds, one of whom has recourse, at his election, to either or both, while the other has the right to one of the funds only, it is obvious that, if the former elect to satisfy his claim out of that fund upon which alone the other has claim, the latter must be disappointed.³ In such case equity will enjoin the former from resorting to the fund liable to the claim of the other, until he has exhausted the fund in which the other has no interest.⁴ This remedy by injunction is now, however, rarely resorted to; the more usual and effectual course is to give to the party entitled to the protection of this equity the benefit of another security in lieu of the one of which he has been disappointed, — in other words, to subrogate the latter to the rights of the paramount creditor against the other securities.⁵

Principles applicable in probate courts.

But the principles underlying the rules established in equity are as valid and binding in the administration of estates in probate courts; justice and right cannot be different, because administered in a different tribunal. The rules in equity are based upon the natural and moral principle, that no one ought to be permitted, at his mere will, to derive a benefit from that which must injure another, and that equality is equity, if the court can enforce such equity without depriving either party of a substantial legal right, or impairing the obligation of his contract.⁶ Probate courts cannot ignore these principles; they must be frequently invoked to enable them to do justice in the performance of

¹ 2 Jarm. * 632. Obviously an executor is not required to redeem property, when the estate has no funds available for such purpose: see cases cited *ante*, § 329, p. * 691.

² Knight v. Davis, 3 Myl. & K. 358.

³ Rap. & L. Law Dict., Marshalling.

⁴ Abb. Law Dict., Marshalling Assets.

⁵ Bouv. Law Dict., Marshalling Assets.

⁶ *Per* Bland, Ch., in *Post v. Mackall*, 3 Bland Ch. 486, 516; to similar effect, *Rice v. Harbeson*, 63 N. Y. 493, 498; *Alston v. Munford*, 1 Brock. 266, 279; *Cornish v. Willson*, 6 Gill, 299; *Commonwealth v. Shelby*, 13 Serg. & R. 348, 353.

the functions for which they were created.¹ These functions are thus described by Wagner, J., in *Pearce v. Calhoun*:² "Our probate courts were established with extensive powers and jurisdictions for the purpose of doing everything necessary to the full and [*1108] final administration of an estate. Both * real and personal property are under their control for the payment of debts. They possess about the same powers formerly exercised in England by the ecclesiastical and chancery courts. They are authorized to collect the assets of the deceased, to allow claims, to direct their payment, and to subject the realty to sale where there is a deficiency of personal property to satisfy creditors, and to make distribution to the parties entitled thereto, and, in general, to do everything essential to the final settlement of the affairs of the deceased, and the claims of creditors against the estate. With a tribunal clothed with such ample powers, all parties have a sufficient protection and opportunity for the assertion of their rights."

It will be observed, that in the performance of these functions probate courts accomplish that in a simple and direct manner, to effect which courts of equity employ the cumbrous and costly machinery involved in the doctrine of equitable assets, marshalling assets for the payment of debts and legacies, and bills for the discovery of assets and account. In making orders for the payment of debts or legacies, or for the distribution of a residue, the probate court necessarily applies the law governing the rights of creditors, legatees, and devisees, or of heirs and distributees, and construes the will, all of which must be done in accordance with the rules observed in equity, else injustice must follow. For although the will constitutes the law by which the executor is to be governed, yet the testator's intention is not always ascertainable without recourse to certain rules of construction; and in the absence of an intention expressed or indicated in the will, or even where such intention is apparent, but is in conflict with the rights of creditors, certain rules of applying the assets must be observed,³ and these are necessarily the same in courts of probate and of chancery. This principle is expressed by statute in some of the States, and jurisdiction involving the exercise of equitable principles is directly conferred upon probate courts.

[*1109] *§ 496. **Marshalling Assets among Creditors, Legatees, Devisees, Heirs, and Distributees.** — Since a creditor may subject the real estate to the satisfaction of his claim, as well as the personalty, if his claim be paid out of the personalty to the disappointment of a legatee, the latter

Legatee subrogated to right of creditor dis-

¹ *Per Hough, J.*, in *Titterington v. Hooker*, 58 Mo. 593, 597.

² 59 Mo. 271, 274, commending *Titterington v. Hooker*, *supra*.

³ *Brown v. James*, 3 Strobl. Eq. 24, 29; *Elliott v. Carter*, 9 Gratt. 541, 551; *Hope v. Wilkinson*, 14 Lea, 21, 28; *Walker's Estate*, 3 Rawle, 229, 241.

appointing his claim, against undivided real estate.

So devisee to the right of creditor sub-jecting devised land, against personalty.

Widow subro-gated to right of creditor tak-ing land which she accepts in lieu of dower.

will be subrogated to the right of the creditor against the land to the extent of his legacy, if the land has not been devised.¹ So the devisees of land charged with the payment of debts will be subrogated to the rights of the creditor who subjected the land to sale before exhausting the personalty;² or where the personalty was exhausted, and other personal property came into the executor's hands after sale of the realty;³ or where lands not chargeable were sold to pay debts, the devisee thereof may subject lands devised to pay debts to his reimbursement.⁴ A widow taking a devise in lieu of her dower right will be subro-gated to the rights of a creditor against the land taken by him to the extent to which her dower was thereby diminished.⁵

Application of funds where several funds are designated to satisfy different be-quests.

On the principle that, where there is a fund common to both of two claims, and a fund subject to one only of them, the separate fund must be applied in aid of the common fund, it has been held that, where a testator provided a fund to equalize the distribution of slaves among his children, and another to pay debts and pecuniary legacies, the latter including the former, the former must be first applied.⁶

General creditors, whose funds have been taken to pay unprobated claims secured by mortgage,⁷ will be subrogated to the lien of the debt which the fund discharged.⁸

Legatees who have received legacies from the personalty must account for the whole amount received, if necessary to pay debts, before the real estate is liable; if the executors have advanced the money, they may sustain a bill to compel contribution; and any of the legatees may enforce contribution among themselves, if any have received more than their proportion.⁹ If a legatee has been successful in getting his legacy paid to him when the estate is suffi-

¹ *Hope v. Wilkinson*, 14 Lea, 21, 25; *Warley v. Warley*, Bai. Eq. 397, 403.

² *Morris v. Mowatt*, 2 Pai. 586, 591; *Chase v. Lockerman*, 11 Gill & J. 185, 203.

³ *Graham v. Dickinson*, 3 Barb. Ch. 169, 181.

⁴ *Cranmer v. McSwords*, 24 W. Va. 594, 600.

⁵ *Durham v. Rhodes*, 23 Md. 233, 242; see on the rights of a widow taking a devise in lieu of dower, *ante*, § 452.

⁶ *Graves v. Howard*, 3 Jones Eq. 302.

⁷ Whether creditors holding collateral securities are required to prove up their

claims against the estate, or may rely solely on their liens, independent of the administration, is discussed *ante*, §§ 408, 409.

⁸ *Jefferson v. Edrington*, 53 Ark. 545, 559.

⁹ *McCampbell v. McCampbell*, 5 Litt. 92, 97. See also authorities cited, *post*, § 576. The subject of the liability of legatees, who have been paid in excess of the amount to which they are ultimately entitled, to refund to the executor or administrator, is referred to in connection with the subject of distribution, *post*, § 560, p. *1229.

cient to pay all legacies at the time in full, a subsequent deficiency in the assets arising out of the executor's *devastavit* will not justify an action by the unpaid legatees to compel a refunding.¹ But as between a general and residuary legatee the latter is liable to refund in case of a payment known by him to be premature, where the general legatee is wholly without fault.² So if a specific or demonstrative legacy has been taken to pay debts, the disappointed

[*1110] *legatee is entitled to ratable contribution Contribution.
from all the specific legacies which have not

been so applied; * and where land subject to pay a debt of the testator is devised one-fourth to one, and three-fourths to another devisee, a judgment against them should be separately against each for his *pro rata* share of the debt, with a reservation to the plaintiff to proceed against the interest of either for any deficiency after exhausting the interest of the other.⁴ So, also, where one of several devisees of a tract of land liable to be made assets for the payment of legacies and other liabilities pays them off, even after partition, and thereby relieves the land, the other devisees are liable to contribution, though they protested against the payment.⁵ The same rule applies where one of several heirs pays the debt of his ancestor; ⁶ or where one of several legatees incurs an expense in protecting their joint interest.⁷ And the purchaser of an heir's interest,

Subrogation.
who is compelled to pay off the debt of the decedent to save the realty from sale therefor, is subrogated to the lien such creditor had because of his claim against the estate; and such lien is prior to a mortgage executed by another heir before such payment.⁸ Where an executor who was also a devisee wasted the personalty, thereby disappointing the legatees, it was held that equity would treat his interest under the will as a fund for the compensation of the disappointed beneficiaries.⁹

Where two tracts of land belonging to the same estate are both

¹ *Per* Gray, J., in *Buffalo Co. v. Leonard*, 154 N. Y. 141, 146, citing *Walcott v. Hall*, 2 Brown Ch. 305, as holding that such is the rule even in case of residuary legatees.

² *Buffalo Co. v. Leonard*, 154 N. Y. 141.

³ *Dugan v. Hollins*, 11 Md. 41, 77; *Thomas v. Thomas*, 17 N. J. Eq. 356; *Tomlinson v. Bury*, 145 Mass. 346, holding the rule to hold equally whether the legacy be taken for debts or the widow's claims.

⁴ *Pugh v. Russell*, 27 Gratt. 789, 802.

⁵ *Cook v. Cook*, 92 Ind. 398. See also *Falley v. Gribbling*, 120 Ind. 110; *Harland v. Person*, 93 Ala. 273, 279.

⁶ *Taylor v. Taylor*, 8 B. Mon. 419. See also *Gibson v. McCormick*, 10 Gill & J. 65, 107. While the right is held to pass to the heir of the heir, it does not, it seems, pass to the purchaser from the heir: *Jones v. Bigstaff*, 95 Ky. 395.

⁷ *New Orleans v. Baltimore*, 15 La. An. 625.

⁸ *Chaplin v. Sullavan*, 128 Ind. 50.

⁹ *Armstrong v. Walker*, 150 Pa. St. 585. A somewhat similar view was taken in *Henry v. Griffis*, 89 Iowa, 543, where the share devised to the surety of the defaulting executor was charged with a lien, to make up the loss caused by the executor, in favor of the disappointed legatee.

subject to the same first mortgage, and each subject to different second mortgages, the administrator will not be permitted, by provoking a sale of one of the tracts before the other, to benefit the second mortgagees on the tract unsold to the prejudice of those on that sold, and applying the entire price of the latter to the extinguishment of the first mortgage; but an order will be made to make such distribution of the proceeds of the sale as will leave the respective second mortgage creditors in the same position as if both tracts had been sold, and the proceeds of both marshalled for simultaneous distribution.¹

It seems that, where the party entitled to equitable relief had no legal remedy, *laches* and lapse of time are not deemed important considerations. The statement of Lord Camden, that nothing can

Rights of parties entitled to equitable remedy as affected by *laches* and lapse of time.

demand the assistance of a court of equity but conscience and reasonable diligence, that *laches* and neglect are discountenanced,² and suggesting the adoption of the Parliamentary rule of limitation *(twenty [*1111] years) for equitable remedies, is criticised as

furnishing a vague and unsatisfactory rule; thirteen years were held not long enough a time to bar the right of a devisee for equitable relief, the land devised to him having been sold to pay the testator's debts.³ But where a creditor had originally, as well as other creditors, the right to proceed against the real as well as the personal property, equity will not marshal the assets after the creditor has by his *laches* lost his right to proceed against the realty.⁴

§ 497. **Statutes affecting the Marshalling of Assets.**—By the statute known as Locke King's Act,⁵ and the amendment thereto

English statutes affecting the right of devisee to exoneration.

passed in 1867,⁶ the rule that the devisee of property mortgaged by the testator may call upon the executor to exonerate the devise by the payment of the mortgage debt out of the personalty has been changed, so that,

in the absence of a contrary intention signified by the testator, the property so devised shall be primarily liable to the payment of all mortgage debts or liens for unpaid purchase-money with which it stands charged, each part according to its value bearing a proportionate part of the debt; and the direction of the testator that his debts shall be paid out of the personal estate shall not be deemed a declaration of intention contrary to the rule established by the act, unless he use other and further words declaring and showing such intention. It is held under these statutes, that the devise of a testator to his wife of a freehold house "absolutely, to do with as she

¹ Succession of Anger, 36 La. An. 252.

² Smith v. Clay, Amb. 645.

³ Cranmer v. McSwords, 24 W. Va.

⁴ Groot v. Hitz, 3 Mackey, 247.

⁵ 17 & 18 Vict. c. 113.

⁶ 30 & 31 Vict. c. 69.

thinks proper," with a direction to the executors to sell and convert into money all other property, and to collect all debts due him, and to apply the proceeds in the payment of certain legacies, the widow took the house subject to the mortgage resting upon it.¹ North, J., in deciding this point, dissented from Lord Romilly's decision that the specific devise of part of a mortgaged estate, leaving another part to pass by a general residuary gift, is of itself an expression of intention to exonerate the specific devise,² and pointed out that a gift of real estate by a residuary devise is still specific, and that both devisees must bear the mortgage ratably.³

[* 1112] *A similar statute exists in New York, according to which, whenever any real estate subject to a mortgage executed by an ancestor or testator shall descend to an heir or pass to a devisee, such heir or devisee shall satisfy and discharge such mortgage out of his own property, without resorting to the administrator or executor, unless there be an express direction in the will of such testator to pay such mortgage otherwise.⁴ This statute is held not to apply to any lien but that of a mortgage,⁵ nor to confine the mortgagee for the recovery of his debt to his remedy against the mortgaged premises;⁶ but if the mortgage creditor neglect to prove his claim against the estate, and the executor, having after due notice to creditors sold lands to pay debts, pay over the residue of the proceeds to the devisees, he cannot be made liable to such creditor for the debt not properly proved within the time required by the statute.⁷ The usual direction of a testator to the executor to pay his debts is not sufficient to throw the charge of a mortgage upon the general estate.⁸ The statute is held to apply equally to mortgaged realty which is devised to a widow in lieu of dower, and she is not entitled, on foreclosure, to the value of the real estate from the estate generally.⁹ This statute does not contemplate that the devisee or heir should be liable irrespective of the property descending to him, but rather that his liability to pay the mortgage should be measured by and not exceed the value of such property.¹⁰

In some of the States it is provided that the encumbrance of any land devised shall not be deemed a revocation of the devise, but the devisee shall take the same subject to the encumbrance. These words, on first impression, might seem to imply

Similar statute in New York.
Statutes affecting the rights

¹ Hannington v. True, L. R. 33 Ch. D. 195; to similar effect, Sackville v. Smyth, L. R. 17 Eq. 153.

² Brownson v. Lawrance, L. R. 6 Eq. 1, 6.

³ Gibbins v. Eyden, L. R. 7 Eq. 371.

⁴ 2 Banks & Bros., (9th ed.) p. 1822, § 4.

⁵ Wright v. Holbrook, 2 Rob. 516, 522; s. c. 32 N. Y. 587.

⁶ Wright v. Holbrook, *supra*; Rice v. Harbeson, 2 T. & C. 4, 6, reviewing earlier New York cases.

⁷ Erwin v. Loper, 43 N. Y. 521, 524.

⁸ Taylor v. Wendel, 4 Bradf. 324, 330.

⁹ Meyer v. Cahen, 111 N. Y. 270.

¹⁰ Hanselt v. Patterson, 124 N. Y. 349.

of devisees of
encumbered
lands.

that the onus of discharging the encumbrance is thereby thrown upon the land. No adjudications of the point have come to the knowledge of the writer; but a number of considerations suggest that the legislature meant simply to abrogate the rule existing at common law, whereby an encumbrance of lands previously devised worked a revocation of such devise.¹

In other States slight changes affecting this rule are introduced by statute. The order of liability of assets for the payment of debts, as fixed by statute in many of the States, * is: [* 1113] first, property pointed out for the payment of debts in the will; next, property not disposed of by the will; and, lastly, property given to legatees or devisees. Legacies and devises must contribute in proportion to their value; but if it appear to be the testator's intention to exempt specific devises or legacies, these will not be liable so long as there is other property out of which the debts can be paid. That undevised real estate shall exonerate real estate devised, if the personalty is insufficient to pay the debts, is provided by statute in Idaho,² Indiana,³ Kansas,⁴ Maine,⁵ Massachusetts,⁶ New Hampshire,⁷ and Ohio.⁸ In Oregon heirs and devisees are not liable unless the personalty is insufficient,⁹ but real estate may be sold before a specific legacy to pay funeral expenses and costs of administration.¹⁰

Provision is also made in some of the States for contribution to legatees and devisees disappointed of their legacies or devises by creditors. Thus, it is enacted that, when any estate bequeathed or devised is taken for debts, all other legatees and devisees shall contribute proportionately, in
Statutes regulating contribution.
Arkansas,¹¹ California,¹² Connecticut,¹³ Florida,¹⁴ Idaho,¹⁵ Nebraska,¹⁶ Nevada,¹⁷ Oregon,¹⁸ Utah,¹⁹ Vermont,²⁰ and Washington;²¹ so also, substantially, with the proviso that such contribution shall not be levied upon specific devisees or legatees when it appears that the

¹ Such statutes are found in California, Kansas, and Missouri. A similar statute in Indiana (Ann. Ind. St. 1894, § 2734) is followed by explicit directions out of what funds such mortgage is payable (Ann. Ind. St. 1894, § 2743).

² Rev. St. Idaho, 1887, § 5529.

³ Ann. Ind. St. 1894, § 2739.

⁴ Gen. St. Kans. 1897, ch. 110, §§ 56 et seq.

⁵ Rev. St. 1883, p. 609, § 13.

⁶ Pub. St. 1882, p. 767, § 3.

⁷ Pub. St. N. H. 1891, ch. 196, § 13.

⁸ Bates' Ann. St. 1897, § 5972.

⁹ Code, 1887, § 1145.

¹⁰ Code Oreg. 1887, § 1154.

¹¹ Dig. of St. 1894, §§ 7440, 7441.

¹² Code Civ. Proc. § 1564. The commissioners remark that this provision does away with the case of *Moulton in re*, 48 Cal. 191, as authority.

¹³ Gen. St. 1888, § 556. This statute only applies when the will is silent or its intent uncertain: *Turner v. Laird*, 68 Conn. 198.

¹⁴ Rev. St. 1892, § 1935.

¹⁵ Rev. St. Idaho, 1887, § 5531.

¹⁶ Comp. St. Neb. 1891, p. 419, § 157.

¹⁷ Gen. St. 1885, § 2850.

¹⁸ Code, 1887, § 475.

¹⁹ Rev. St. Utah, 1898, § 2805.

²⁰ Vt. St. 1894, § 2500.

²¹ Code Wash. 1896, § 5325.

testator intended to exempt them, in Indiana,¹ Kansas,² Maine,³ and Massachusetts.⁴ It is held, under these statutes, that the legislature intended no preference to be given to real over personal estate when resort must be had to that specifically devised or bequeathed, but that they must bear the burden of the debts proportionally.⁵ In Colorado a statute providing that where a widow renounces the provisions of a will and takes a share in the estate, in consequence whereof "legacies and bequests" to others are diminished, the court shall equalize the shares, was held to embrace real estate, such being the manifest intention of the legislature.⁶ In Kentucky the statute provides, that as respects the payment of the testator's debts there shall be no distinction between specific and general devises.⁷ The statute of this State, providing that where the "title" to a gift of real or personal property to an heir at law proves "invalid," such devisee shall be entitled to contribution, unless a different intention appear from the will, has been held to apply only to specific, and not general devises, and only in favor of a devisee who would also be an heir at law.⁸ So an heir, legatee, devisee, or dis- [* 1114] tributee who pays more than * his share of a debt shall have contribution from the others similarly liable, in Michigan,⁹ Minnesota, and probably other States. So in Missouri, if chattels or real estate be so taken,¹⁰ and North Carolina if a specific devise be taken for debts.¹¹ Some of the States provide, that when refunding of legacies or distributive shares prematurely paid by the executor or administrator becomes necessary, each shall refund his proportionate share,¹² except, mostly, that specific legacies shall not be refunded unless the general legacies be insufficient.¹³ The Missouri statute, substantially so providing,¹⁴ was construed as applying to proceedings by the probate court before final settlement.¹⁵ Refunding bonds are generally required for the payment of legacies or distributive shares previous to the time fixed for such payment by the statute; or before the time has expired within which credi-

¹ 1 Ann. Ind. St. 1894, § 2738.

² Gen. St. Kans. 1897, ch. 110, §§ 56, 58.

³ Rev. St. 1883, p. 608.

⁴ Pub. St. 1882, p. 751, § 28.

⁵ Farnum v. Bascom, 122 Mass. 282, 287.

⁶ Logan v. Logan, 11 Colo. 44.

⁷ Ky. St. 1894, § 2076, changing, it seems, the law as formerly held: Pusey v. Wathen, 90 Ky. 473, 480.

⁸ Pusey v. Wathen, 90 Ky. 473.

⁹ How. St. 1882, § 5945. This provision is held to be in conformity with the common law: Eberstein v. Camp, 37 Mich. 176, 177. Such contribution, if en-

forced in the probate court, must be by execution. A sale to pay debts is void: Atwood v. Frost, 59 Mich. 409. The decree must be a personal judgment and not attempt to fasten a lien on realty distributed: Frost v. Atwood, 73 Mich. 67.

¹⁰ Rev. St. 1889, §§ 8914, 8915.

¹¹ Gen. St. 1883, § 1535.

¹² So, for instance, in Delaware: Revised Code, 1874, p. 705, § 9; Missouri: Rev. St. 1889, §§ 247, 248; New Jersey: 2 Gen. St. N. J. 1895, p. 2390, pl. 150.

¹³ For instance, in Arkansas, Colorado, Illinois, Missouri, and other States.

¹⁴ Rev. St. 1889, § 247.

¹⁵ Rumsey v. Otis, 133 Mo. 85.

tors may prove their claims.¹ If recovery be had from one or more of the obligors, these may recover against the others their proportionate shares.²

¹ Rev. St. Mo. 1889, §§ 247, 248; Or. Ala. 1896, §§ 259 *et seq.* As to refunding ordinary *v.* White, 43 N. J. L. 22; Code bonds, see *post*, § 560.

² Code Ala. 1896, § 276.

OF ACCOUNTING AND SETTLEMENTS BY EXECUTORS
AND ADMINISTRATORS.

CHAPTER LIV.

OF THE COMMON-LAW AND STATUTORY SYSTEM OF ACCOUNTING.

§ 498. **Of Accounting at Common Law in Courts of Probate.** — It was not the practice in England for executors or administrators to render account of the administration, or even to exhibit an inventory of the estate, unless they were cited for that purpose.¹ The probate court can *ex officio* cite neither an executor nor administrator to account,² although it may, and in some instances does, require *ex officio* that an inventory shall be exhibited.³ But any person having an interest, though only probable or contingent,⁴ may compel the executor or administrator to present an inventory and render an account of his administration of the personal property in the probate court; even a creditor whose debt is barred by the Statute of Limitations was allowed to compel an accounting before the ordinary, because the court cannot take official notice of the Statute of Limitations.⁵ And such accounting is binding and final, if all creditors, legatees, and other parties having an interest in the estate be cited to be present.⁶

English testamentary courts had no power to cite executor or administrator to account, unless some person in interest demanded accounting.

Accounting at the instance of parties binding.

It may be observed, that there was a variance
[* 1116] between the * decisions of the common-law
courts and the practice in the ecclesiastical

In such accounting witnesses could not be heard

¹ Walker on Ex. 150, commenting on the modern and ancient practice in this respect.

² *Greenside v. Benson*, 3 Atk. 248, 253, in which Lord Hardwicke remarked that "an ordinary, after an administrator has exhibited an inventory, cannot compel the administrator to account, but it must be *ad instantiam partis*, and therefore the inven-

tory and account are to the ordinary the same thing."

³ Walk. on Ex. 150.

⁴ *Roberts v. Roberts*, 2 Lee (by Phil. lim.) 399, 400; *Lomax on Ex.* 307.

⁵ *Philipson v. Harvey*, 2 Lee, 344, 345; *Wainford v. Barker*, 1 Ld. Raym. 232.

⁶ 4 Burn's Eccl. L. 609 (9th ed.); *Wms. Ex.* [2058]; *Swinb. on Wills*, pt. 6, § 21.

to falsify the inventory; but accountant held to prove every item of credit, by vouchers for sums exceeding 40s.; and his oath for smaller sums, or for all items, if the accounting was upon citation by a creditor.

courts as to the powers of the latter to falsify inventories; but it is clear that they could not permit witnesses to be examined for that purpose.¹ Where the executor or administrator was cited to account by a legatee or next of kin, who opposed or disproved the account, proof was required of every payment for which credit was taken. Sums under 40s. were provable by the oath of the accountant, unless it appeared that greater sums were fraudulently divided for that purpose; but of greater sums vouchers were required to be exhibited.² But if the citation was by a creditor, he was concluded by the accountant's oath.³

Since the court of probate has no power to order the payment of a debt, nor to entertain a suit for the distributive shares of legatees or next of kin, the only object of a creditor proceeding in the probate court could be, as pointed out by Williams,⁴ to gain an insight into the state of the funds previous to bringing an action at law; and even for this purpose a bill in equity is the more usual, and perhaps more efficient remedy.

§ 499. **Accounting in Common-Law Courts.** — Accounting for the whole administration is the necessary result of every action at law

Upon action at law by a creditor, and plea of *plene administravit*, full accounting is necessarily the only means to sustain the plea.

by a creditor in which issue is joined on the plea of *plene administravit*, or any plea denying sufficient assets. Since the plaintiff may give in evidence, for the purpose of proving assets, the inventory exhibited by the defendant in the court of probate, or show assets existing whether inventoried or not,⁵ it is inevitable that the issue be found against the defendant unless he

fully account for the assets thus shown to have been in his hands.⁶ If on such trial it appear that the executor or administrator has been guilty of *devastavit*, he is held liable to the creditor as if he still had in possession the assets wasted;⁷ nor * can he [* 1117] be permitted to put an account rendered to the ordinary in evidence in support of his plea.⁸

§ 500. **Accounting in Equity.** — The most usual course to compel executors and administrators to account, under the English law, is by bill in equity. They are regarded, in most respects, as trustees, and as such are held liable by courts of equity

¹ Wms. Ex. [983] *et seq.*; Telford v. Morrison, 2 Add. 319, 322.

² Wms. Ex. [2059].

³ Brown v. Atkins, 2 Lee, 1.

⁴ Wms. Ex. [2061].

⁵ Marr v. Rucker, 1 Humph. 348, 353.

⁶ Hoover v. Miller, 6 Jones L. 79, 81; Seighman v. Marshall, 17 Md. 550, 568; Rogers v. Chandler, 3 Munf. 65.

⁷ Wms. Ex. [1966]; Lipse v. Spears, 4 Hughes (U. S. C. C.), 535 (reversed on the ground that there was no *devastavit*, in Glasgow v. Lipse, 117 U. S. 327); Wyckoff v. Van Siclen, 3 Dem. 75.

⁸ Turvies's Case, 2 Rolle Abr. 678, quoted in Bissell v. Axtell, 2 Vern. 47.

to set forth an account of their assets and of the application of them,¹ notwithstanding an account before taken and distribution ordered in the spiritual court.² Before the statute on this subject,³ it was usual for one or more creditors to file a bill, commonly called a creditors' bill, in behalf of themselves and all other creditors who should come in under the decree, for an account of the assets and a due settlement of the estate. Mr. Williams points out, that, in order to prevent inconvenient preference in the administration of assets, as well as to avoid the burden of multiplied suits by creditors, a court of equity always allowed a creditor to sue on behalf of himself and other creditors, and directed a general account to be taken against the executor; or, if assets were admitted, and the debt admitted or proved, made an immediate decree for payment.⁴ But such a sweeping assumption of authority on the part of equity courts is not approved in this country. Chancellor Kent says, "I am not sufficiently informed, or prepared to assume the exclusive and entire jurisdiction of suits against executors and administrators, merely for the purpose of enforcing a ratable distribution of assets."⁵ Some special equitable ground should be shown to exist to give jurisdiction to a court of chancery.⁶

may be called to account in equity

by creditors' bill in behalf of all creditors.

But in America there should be some equitable ground to give jurisdiction.

The executor or administrator making payment in accordance with a decree in equity is fully exonerated; but the decree [* 1118] is not *absolutely binding upon the absent creditors, legatees, or distributees who have had no opportunity of presenting their claims;⁷ although the creditors have no remedy in such case against the executor or administrator, yet they have a right to assert their claim against the creditors, legatees, or distributees who have received the assets.⁸

Under the English statute, above referred to, it is no longer necessary to file a bill for the purpose of enforcing claims against the personal estate, or against real estate devised to trustees to pay debts, or, under a later statute,⁹ against real estate liable for debts; but a party in interest may apply for and obtain as of course, without bill or claim filed, a summons from the Master of the Rolls or any vice-chancellor, upon due service of which the usual order for administration may be made, to have the force and effect of a decree on the hearing between the same parties.¹⁰

¹ It matters not that the testator directed that the executor should not be compelled by law to declare the amount of a residue bequeathed to him: *Gibbons v. Dawley*, 2 Chanc. Cas. 198.

² *Bissell v. Axtell*, 2 Vern. 47.

³ 15 & 16 Vict. c. 86.

⁴ *Wms. Ex.* [2006]; *Sharpe v. Rockwood*, 78 Va. 24, 33.

⁵ *McKay v. Green*, 3 John. Ch. 56, 59.

⁶ See on this point, *post*, § 503.

⁷ *Wms. Ex.* [2007].

⁸ *Stuart v. Kissam*, 2 Barb. 493, 512. See *post*, §§ 575-579, on the liabilities of the heirs and legatees after final settlement.

⁹ 22 & 23 Vict. c. 35, §§ 14 *et seq.*

¹⁰ *De La Salle v. Moorat*, L. R. 11 Eq. Cas. 8, 9; but a creditor cannot have a

§ 501. **Statutes requiring Periodical Accounting.** — There are now few, if any, of the American States in which this system of compelling executors and administrators to account is not greatly changed by statute. The general course of legislation has been to compel accounting in the probate courts as a matter of statutory requirement, without waiting for creditors or distributees to apply for an order to that effect. To this end, executors and administrators are required to present an account of their administration at a given time,¹ generally upon the expiration of one year after appointment, or at the term commencing next * after the expiration of such [* 1119] year.² The failure to comply with this requirement of the law not only constitutes a breach of the administration bond, rendering the principal and his sureties liable for all damages resulting to any party injured, but also subjects the defaulting party to citation, attachment, and imprisonment, as well as to the revocation of his letters, if he persist in refusing to render account. Various penalties are enacted in different States to insure prompt settlement of administration accounts. In Alabama, if the administrator fail, on citation, to render an account, it may be stated for him by the court, and he is made liable on his bond for the amount thereby shown to be in his hands.³ In Arkansas, Missouri, and other States, the court is required to impose a fine for

decree for the administration of the real estate unless he sues in behalf of all the creditors: *Ponsford v. Hartley*, 2 John. & H. 736, 740.

¹ In Wisconsin sixty days, and in Massachusetts, Utah, and Washington six months, after the expiration of the time limited for the presentation of claims against the estate; in Arizona, Idaho, Oklahoma, and Nevada, at the third term of the court after the appointment of the executor or administrator; in California and Wyoming, six months after appointment, and whenever afterward required by the court *sua sponte* or on application of interested persons, and thirty days after the expiration of the time for presenting claims an exhibit of assets and the amount of claims proved; in Colorado six months after appointment, and every two months thereafter; in Oregon six months, and every six months thereafter; in Iowa after six and within seven months; in Ohio eighteen months and annually thereafter; in South Dakota one year after appointment; in Kentucky and Tennessee two

years after appointment, in Tennessee every year thereafter; in Virginia the first year's account six months after the expiration of the year.

² Annual settlements or accountings are required in Alabama, Arkansas, Delaware, Florida, Georgia, Illinois, Kansas, Louisiana, Michigan, Missouri, Mississippi, Rhode Island, and South Carolina; at the end of one year, and every six months thereafter, in Maryland; at the end of one year, and as often thereafter as the court may require, in Indiana, Maine, Minnesota, Nebraska, New Hampshire, New Jersey, and Vermont; whenever required by the court in North Dakota. In New York judicial settlement may be ordered by the surrogate "where one year has expired since letters were issued": Code Civ. Proc. § 2724; but not sooner: *Matthews v. Studley*, 17 App. Div. (N. Y.) 303, 311. Provision is made for "intermediate" accounting under certain circumstances: Code Civ. Pr. § 2723.

³ Code, 1896, § 223.

the failure to make settlement at the appointed time. In Florida, Georgia, New Jersey, Rhode Island, Virginia, and West Virginia, the penalty consists in the forfeiture of his commissions. In Louisiana and Maryland the administrator in default subjects himself to liability for interest on the funds in his hands at the highest legal rate, and also to revocation of his authority,¹ as well as to imprisonment until he complies.² In Tennessee the failure to settle for thirty days after citation was made an indictable offence.³ In Maine the statute provides that no action can be maintained on the bond until citation by the probate court to render an account; but this is held not to apply to insolvent estates, in which he must settle his account within six months after the report on claims is made.⁴ The liability for damages resulting to any party injured by reason of the failure is enacted by statute in Alabama, Maryland, Massachusetts, Michigan, Nebraska, and Vermont; but the liability generally follows, although there be no statute to such effect,

because the neglect to comply with the duty of accounting [* 1120] is usually a breach of the *administration bond.⁵ It is also held that an executor or administrator omitting to make annual returns is held to strict proof that he has done his duty.⁶

The liability to account is not, however, limited to the periodical returns required by the statutes, but the probate court may, *sua sponte*,⁷ or on motion of any person interested in the estate,⁸ require such accounting at any time. And it

But court may order such ac-

¹ Collins v. Hollier, 13 La. An. 585.

² Lobit v. Castille, 14 La. An. 779.

³ Acts, 1837, ch. 125, §§ 2, 3; State v. Parrish, 4 Humph. 285.

⁴ It was formerly the law in this State that such failure subjected him to the penalty of paying creditors' claims in full, but now the latter can only recover nominal damages where no injury results: Webb v. Gross, 79 Me. 224.

⁵ Scarborough v. State, 24 Ark. 20; Clark v. Cress, 20 Iowa, 50; Choate v. Arrington, 116 Mass. 552; Golder v. Littlejohn, 30 Wis. 344, 348; Johannes v. Youngs, 45 Wis. 445.

⁶ Wellborn v. Rogers, 24 Ga. 558; Kee v. Kee, 2 Gratt. 116.

⁷ Higgins' Estate, 15 Mont. 474, 503; Reynolds v. The People, 55 Ill. 328, 332; In re Campbell, 12 Wis. 369.

⁸ In Pennsylvania, even by an attaching creditor of a legatee or distributee: Estate of Manigle, 11 Phila. 39, citing other Pennsylvania cases; but not by one who has no valuable interest in the estate:

Beeber's Appeal, 8 Atl. R. 191. The proper practice where one who falsely claims to be a creditor obtains a citation to settle is to file an answer denying his claim, and if he then fails to make out a *prima facie* claim, the petition should be dismissed: Lightner's Estate, 144 Pa. St. 273. A mere appearance of interest is sufficient in New York: Reilley v. Duffy, 4 Dem. 366. See also In re Prout, 52 Hun, 109. But it is not compulsory on the surrogate to grant the petition simply because the petitioner swears he is interested: Wagner's Estate, 119 N. Y. 28; and if it appear that the petitioner on the face of the proceedings is not entitled to the order, the surrogate should not permit the executor to be uselessly harassed: Ib.; as, for instance, when there has been an express release of the applicant's interest: Matter of Pruyn, 141 N. Y. 544.

⁹ Sweetser's Estate, 109 Mich. 198. An averment of interest is sufficiently verified by the oath of the applicant's attorney: Estate of Robinson, 6 Mich. 137, 143.

counting at other times, *sua sponte*, or on motion.

is no excuse that the administratrix has appealed from an order of distribution, and instituted proceedings in equity to obtain the protection of a decree in chancery;¹ nor that a settlement had been filed nearly seven years before, which had not been disposed of by the court;² nor that the legatees have agreed in writing that the executor shall hold the estate until the debts are paid.³ A settlement with the heirs out of court is not conclusive,⁴ and the receipt "in full" by a legatee, or her conveyance to the executor of all her estate upon a passive trust under an antenuptial settlement, is no bar to the executor's liability to account.⁵ So the agreement of all surviving children of full age, including one who is administrator, to distribute the property among themselves, does not operate as a final settlement or discharge against the administrator of a deceased distributee.⁶

§ 502. **Rendering the Account and Passing upon it.** — Upon the rendering of the account by the executor or administrator, thus

The account rendered is open to objections by parties interested,

enforced in nearly all the States, it is open to objections by parties interested therein, who may allege and show that the accountant has not charged himself with all the assets belonging to the estate, and

* dispute the truth or validity of payments for which he [* 1121] takes credit. It is the province of the probate court to pass upon the account, determining judicially what assets the executor or administrator is chargeable with, and to what credits he is entitled; and it results from this authority that the decision of any question upon which there was an issue between the parties becomes an adjudication thereof, which cannot be impeached except in a direct proceeding by appeal or for fraud.⁷

and the court must pass on their validity.

¹ Jones v. Jones, 41 Md. 354, 360.

² Ex parte Pearce, 44 Ark. 509, 515.

An administrator will be cited to account, although those entitled thereto have been guilty of great delay: Main v. Brown, 72 Tex. 505; Landis's Estate, 13 Phila. 305. See as to the Statute of Limitations against actions for legacies and distributive shares, *post*, § 568, p. * 1247; and within what time final settlement may be compelled, see *post*, § 538, p. * 1185.

³ George v. Goldsby, 23 Ala. 326, 334.

⁴ Clarke v. Clay, 31 N. H. 393, 402.

⁵ Harris v. Ely, 25 N. Y. 138.

⁶ Smilie v. Siler, 35 Ala. 88, 94. But see *In re Wagner*, 52 Hun, 23. See on the effect of voluntary distribution, *post*, § 566.

⁷ In many States it is provided by statute that an account examined and confirmed by the court of probate upon per-

sonal notice to, or after appearance by, the parties in interest, shall not thereafter be subject to investigation, except upon the allegation of fraud in chancery. So in Arkansas: Dig. 1894, § 140; Jefferson v. Edrington, 53 Ark. 545, 561; California: Code Civ. Proc. § 1637; in Kansas if the matter has been disputed and determined by the court: Gen. St. Kans. 1897, ch. 107, § 160; in Nevada, settlements are conclusive except as to persons under legal disability: Gen. St. 1885, § 2906; in Ohio, errors may be corrected in subsequent settlements, but no point once adjudicated between the parties can again be questioned: Bates' Ann. St. 1897, § 6187; Watts v. Watts, 38 Ohio St. 480, 492; conclusive in Rhode Island: Gen. L. 1896, p. 748, § 10; and Wisconsin: Schinz v. Schinz, 90 Wis. 236, 238.

It is apparent that the mere *rendering* of the account, even if approved by the court in an *ex parte* proceeding, can have no validity to bind a party interested; hence a distinction is sometimes taken between the rendering of an account and its *settlement*, the former being the act of the executor or administrator constituting the basis of the settlement, the latter the act of the court, judicially determining — *settling* — the questions involved.¹ This distinction is strongly emphasized in the statutes of some of the States, which require the account to be filed in court, and there remain for the inspection of all persons interested, who must be notified of its filing, and of the time when they may appear and object;² in others, no special provision is made for notice, except for the final accounting.³

Without such judgment the account rendered is conclusive of nothing.

[*1122] * § 503. **Exclusive and Concurrent Jurisdiction over**

Administration Accounts. — The requirement to render

annual or other periodical accountings works a distinction between them and final settlements, which, in most of the States, perform distinct offices and are governed by appreciably different principles. There is, for instance, a much greater diversity among the several States as to the legal effect of the partial or periodical accounting, than exists concerning the conclusiveness of final settlements, arising chiefly out of the different statutory provisions requiring notice to parties in interest. For it is apparent that parties who were present, or had actual or legal notice to be present, at the settlement of the administration account, and made no objection thereto, or whose objections were heard and adjudicated by the court having jurisdiction, ought not again to be heard to object; while it would be unjust and unreasonable to conclude a party interested who was

Distinction between annual and final accounting.

¹ See *Hall v. Grovier*, 25 Mich. 428, 435, *et seq.*; *Coleman v. Farrar*, 112 Mo. 54, 68; *Remington v. Walker*, 21 Hun, 322; *Roberts v. Spencer*, 112 Ind. 85, 88.

² So in Alabama, Arkansas, California, Connecticut, Florida, Indiana, Michigan, Mississippi, Nebraska, Nevada, North Carolina, Oregon, Pennsylvania, Tennessee, Texas, Vermont, and Wisconsin. And see farther on this subject Woerner on Guardianship, § 101, discussing this subject in connection with the settlements of guardians which are in most respects governed by the same principles and rules.

³ In Alabama the notice for a final accounting is made by publication in a newspaper for three weeks, and for annual settlements by posting; in California and

Nevada notice is given by the clerk of the court by posting (or in Nevada by publication) as the court may direct; in Connecticut, by citation of parties in interest; in Illinois and Oregon, as the court may direct; in Indiana, the parties are to be personally summoned if deemed necessary; in Kansas, Missouri, and Pennsylvania, by publication in some newspaper; in Michigan, Minnesota, Mississippi, and Nebraska, by personal service or publication, as the court may direct; in North Carolina (on proceeding by creditors) and Tennessee, the clerk is required to state the account, and to notify parties interested, which may in Tennessee be given to non-residents by publication or posting; in Iowa no notice is required: *Arnold v. Spates*, 65 Iowa, 570.

not present, and had no notice to be present at the settlement, and therefore had no opportunity to be heard.¹

The legal effect of the settlements is also influenced to some extent by the nature of the jurisdiction conferred upon probate courts in different States. They have exclusive original jurisdiction over the settlement of administration accounts in Arkansas,² Connecticut,³ Illinois,⁴ Indiana,⁵ Iowa,⁶ Louisiana,⁷ Maine,⁸ Massachusetts,⁹ * Mississippi,¹⁰ Missouri,¹¹ North Carolina,¹² Oregon,¹³ Ohio,¹⁴ [* 1123] Pennsylvania,¹⁵ Vermont,¹⁶ and, it would seem, in New Hampshire,¹⁷ Texas,¹⁸ and Wisconsin;¹⁹ and in such States equity will not interfere in the settlement of estates, so long as there is an adequate remedy in the probate court.²⁰ Their jurisdiction is held to be concurrent with that of chancery courts in Alabama,²¹ Arkansas,²² California,²³

¹ Musick v. Beebe, 17 Kan. 47, 53; Picot v. Biddle, 35 Mo. 29. See *post*, on the effect of partial settlements, § 504.

² McLeod v. Griffiths, 45 Ark. 505, 511; Hankins v. Layne, 48 Ark. 544.

³ Pitkin v. Pitkin, 7 Conn. 315, 318; Bailey v. Strong, 8 Conn. 278, 281; Beach v. Norton, 9 Conn. 182, 196; Brush v. Button, 36 Conn. 292, 294; see Clement's Appeal, 49 Conn. 519, 531.

⁴ Heustis v. Johnson, 84 Ill. 61. But if a court of equity obtain jurisdiction on the ground of inadequacy of the probate court to grant the relief sought, it will complete the administration: Freeland v. Dazey, 25 Ill. 294.

⁵ Courts of chancery will not interfere with the settlement in probate courts except in clear cases of fraud and mistake: State v. Brutch, 12 Ind. 381, 382, and Indiana cases there cited.

⁶ Same as in Indiana: Patterson v. Bell, 25 Iowa, 149; Cowins v. Tool, 36 Iowa, 82, 84.

⁷ Dupey v. Greffin, 1 Mart. (n. s.) 198, citing earlier cases; Boyce v. Davis, 13 La. An. 554.

⁸ Sturtevant v. Tallman, 27 Me. 78, 83.

⁹ Jenison v. Hapgood, 7 Pick. 1; Wilson v. Leishman, 12 Met. (Mass.) 316, 321; Morgan v. Rotch, 97 Mass. 396, 400; Cummings v. Cummings, 143 Mass. 340, 343.

¹⁰ Steen v. Steen, 25 Miss. 513, 533, citing earlier Mississippi cases.

¹¹ Miller v. Woodward, 8 Mo. 169, 171; Powers v. Blaké, 16 Mo. 437, 440, commenting on earlier cases.

¹² Hunt v. Sneed, 64 N. C. 176; Sprinkle v. Hutchinson, 66 N. C. 450; Hutchinson v. Roberts, 67 N. C. 223.

¹³ Winkle v. Winkle, 8 Ore. 193, 195.

¹⁴ McDonald v. Aten, 1 Oh. St. 293.

¹⁵ Whiteside v. Whiteside, 20 Pa. St. 473; Miller v. Commonwealth, 2 Cent. Rep. 830.

¹⁶ Adams v. Adams, 22 Vt. 50, 57.

¹⁷ Hurlbut v. Wheeler, 40 N. H. 73.

¹⁸ Fisher v. Wood, 65 Tex. 199; Sayles' Civ. St. 1897, § 1840.

¹⁹ Tryon v. Farnsworth, 30 Wis. 577, 581.

²⁰ Davis v. Eastman, 66 Vt. 651; Davis v. Flint, 67 Vt. 485.

²¹ Hooper v. Smith, 57 Ala. 557, 559; Millsap v. Stanley, 50 Ala. 319, 324. Any person interested as legatee, devisee, or heir may, before proceedings for final settlement and distribution in the probate court, have the administration removed to the chancery court for settlement without showing any special equity: Bromwell v. Bates, 98 Ala. 621, and numerous cases cited.

²² Formerly: Freeman v. Reagan, 26 Ark. 373, 378; Haag v. Sparks, 27 Ark. 594, 598. But the later cases announce the exclusive right to make settlements to be in the probate court, which, when confirmed, can never be reinvestigated

²³ Deck v. Gerke, 12 Cal. 433.

Florida,¹ Georgia,² Kansas,³ Kentucky,⁴ Maryland,⁵ Mississippi,⁶ Nebraska,⁷ Nevada,⁸ New Jersey,⁹ New York,¹⁰ Rhode Island,¹¹ South Carolina,¹² Tennessee,¹³ and formerly in Texas.¹⁴ But it must be remembered that courts of equity will afford relief in all cases where the powers [*1124] of probate courts *are inadequate to accomplish justice, being regarded, in this respect, like ordinary courts of law, and that hence accounting by executors and administrators may be enforced by courts of equity, although the original jurisdiction be vested exclusively in probate courts.¹⁵ And, on the other hand, a court of equity will not arrest proceedings commenced in a court of probate, although their jurisdiction be concurrent, unless some fact is shown which renders the court of probate inadequate to a full settlement.¹⁶

But courts of equity obtain jurisdiction in all cases where the accounting in the probate court is not adequate to secure the relief to which parties are entitled.

Court of equity will not interfere with probate court, unless some fact is shown

¹ Sanderson v. Sanderson, 17 Fla. 820, 830.

² Ewing v. Moses, 50 Ga. 264.

³ Shoemaker v. Brown, 10 Kans. 383, 390; Carter v. Christie, 57 Kans. 492.

⁴ Saunders v. Saunders, 2 Lit. 314, 316; Blackerby v. Holton, 5 Dana, 520, 529.

⁵ State v. Dilley, 64 Md. 314; Hammond v. Hammond, 2 Bland, 306.

⁶ Since 1871, before which time the jurisdiction was exclusively in the courts of probate: Buie v. Pollock, 55 Miss. 309, 313; Clopton v. Haughton, 57 Miss. 787, 789.

⁷ Blake v. Chambers, 4 Neb. 90, 94.

⁸ Corbett v. Rice, 2 Nev. 330, 334.

⁹ Salter v. Williamson, 2 N. J. Eq. 480, 489; Merselis v. Merselis, 7 N. J. Eq. 557, 572; Frey v. Demarest, 16 N. J. Eq. 236, 239.

¹⁰ Seymour v. Seymour, 4 John. Ch. 409; Whitney v. Munro, 4 Edw. Ch. 5; Gerould v. Wilson, 81 N. Y. 573, 579; Wager v. Wager, 89 N. Y. 161, 168; Sanders v. Soutter, 126 N. Y. 193.

¹¹ Mallett v. Dexter, 1 Curt. 178, 179; Daboll v. Field, 9 R. L. 266, 285.

¹² Elliott v. Drayton, 3 Des. 29; Trescot v. Trescot, 1 McC. Ch. 417, 433.

¹³ In Tennessee insolvent estates may be administered in chancery if they ex-

ceed \$1000 in value: Code, 1884, §§ 3207 et seq.; and if it become necessary, in any estate, to sell real estate to pay debts, the proceeding is also in chancery, and in such case involves the necessity of accounting: Dulles v. Reed, 6 Yerg. 53, 65. Otherwise, it seems, the accounting must be in the courts of probate. See, as to insolvent estates, Rankin v. Anderson, 8 Baxt. 240, and Lunsford v. Jarrett, 2 Lea, 579.

¹⁴ Little v. Birdwell, 21 Tex. 597, 606. But seems now to be originally in the county court: Rev. St. 1888, § 1789; Fisher v. Wood, 65 Tex. 199.

¹⁵ Freeland v. Dazy, 25 Ill. 294; State v. Brutch, 12 Ind. 381; Patterson v. Bell, 25 Iowa, 149; Cowins v. Tool, 36 Iowa, 82; Cram v. Green, 6 Ohio, 429; McDonald v. Aten, 1 Oh. St. 293.

¹⁶ Whorton v. Moragne, 59 Ala. 641, 645; Weakley v. Gurley, 60 Ala. 399, 404; Carter v. Christie, 57 Kans. 492; Rutherford v. Alyea, 54 N. J. Eq. 411; Clarke v. Johnston, 10 N. J. Eq. 287; Search v. Search, 27 N. J. Eq. 137, 140; Mallett v. Dexter, 1 Curt. 178, 179; Young v. Brown, 75 Ga. 1; Wager v. Wager, 89 N. Y. 161, 168, per Rapallo, J. "That court," says Ramsey, J., in Matthews v. Studley, 17 N. Y. App. Div.

except in chancery for fraud: and in such case chancery will take jurisdiction, not to supersede the probate court, but to prevent fraudulent abuse, set aside the fraudulent settlement, and remand further proceed-

ings to the probate court according to the decree in chancery: Shegogg v. Perkins, 34 Ark. 117, 127; McLeod v. Griffis, 45 Ark. 505, 511; Hankins v. Layne, 48 Ark. 544.

rendering it necessary. And it is error to allow an administration account settled before another tribunal, pending a suit against the administrator, without notice to or knowledge by the complainant.¹ So, too, the accounting may be compellable in the ordinary courts of law in all of those States in which assets can be reached in the administrator's hands without an order of the probate court, whenever the administrator pleads want of assets.² It is obvious that the conclusiveness of the settlements in probate courts is largely influenced by this difference in the power of courts over executors and administrators.

§ 504. **Conclusiveness of Partial Settlements.** — Where the proper parties are before the court having exclusive jurisdiction, pursuant

Judgment rendered on issues arising out of a contest on a partial accounting is conclusive.

to notice given in accordance with the statute, and on a partial settlement contest the validity thereof, a judgment rendered thereon is as conclusive as if rendered on final settlement, and is a bar, as to the matters determined by such judgment, to all inquiry at the final settlement.³ In California,⁴ Delaware,⁵ Iowa,⁶

Pennsylvania,⁷ and Virginia,⁸ it * is held that the partial [* 1125] accounting is conclusive, unless excepted to within the time allowed for that purpose by statute. Hence a statute authorizing the opening up of former accounts for the correction of errors does not authorize the probate court to open up or vacate an order of the appellate court.⁹

General and partial settle-

Most generally, however, the effect of periodical or partial settlement is that of *prima facie* validity;¹⁰ they

303, 312, referring to the surrogate's court, "is the proper tribunal for such proceedings, and it is not necessary or proper to remove them into another court in the absence of special reasons which require that course to be taken."

¹ Backhouse v. Jett, 1 Brock. 500, 504.

² See *ante*, § 498; 2 Lomax on Ex. 312, § 6.

³ Shinz v. Shinz, 90 Wis. 236, 248; Duke v. Duke, 26 Ala. 673, 676; State v. Parish Court, 30 La. An. 183; Voorhees v. Voorhees, 18 N. J. Eq. 223, 227; Mercer v. Hogan, 4 Mack. 520. But the affirming of a partial account, upon a former appeal taken by a party interested in some of the items, but not the one under consideration, will not conclude other parties as to the latter: Clement's Appeal, 49 Conn. 519, 535. See *ante*, § 502, and statutory provisions on this subject collected in note 7, p. * 1121.

⁴ Estate of Fernandez, 119 Cal. 579, 582; Marshall's Estate, 118 Cal. 379.

⁵ Peckard v. Price, 5 Del. Ch. 239, 258.

⁶ Harlin v. Stevenson, 30 Iowa, 371, 374; the order of approval has the force of an adjudication, and will not be set aside by a creditor after five years of acquiescence: Holderbaum's Estate, 82 Iowa, 69.

⁷ Rhoads's Appeal, 39 Pa. St. 186, 189; Shindel's Appeal, 57 Pa. St. 43, 45; Fross's Appeal, 105 Pa. St. 258, 268.

⁸ Carter v. Edmonds, 80 Va. 58, 61.

⁹ Stayner's Case, 33 Oh. St. 481, 488.

¹⁰ Bliss v. Seaman, 165 Ill. 422, 428; Burnes v. Burton, 1 A. K. Marsh. 349; Curd v. Benner, 4 Coldw. 632, 638; Valentine v. Valentine, 4 Redf. 265, 271; Goodwin v. Goodwin, 48 Ind. 584, 588; State v. Wilson, 51 Ind. 96, 98; Turney v. Williams, 7 Yerg. 172, 210; Curatorship of Beecroft, 28 La. An. 824; Succession of Bellocq, 28 La. An. 154; Runyon's Estate, 53 Cal. 196; Field v. Hitchcock, 14 Pick. 405; Shields v. Alsop, 5 Lea, 508, 515; Heath's Estate, 58 Iowa, 36; Grant v

are liable to be rebutted, falsified, or surcharged,¹ and mistakes may be corrected and omissions supplied at any subsequent periodical or final accounting.² It has been held in Missouri, that guardians' and curators' annual settlements have not even *prima facie* validity;³ and the reasoning by which this conclusion is reached is fully applicable to the annual "settlements" of executors and administrators. These are strictly neither "settlements" (but only the exhibition of accounts) nor judgments (being entirely *ex parte*, no provision existing in Missouri requiring notice to be given); the court is utterly powerless to do more than to require the debits to include all that was charged in the inventory, and to strike out credits appearing *on their face* to be illegal.

Hence it was intimated in several cases, that it would be [* 1126] unjust to consider * these exhibits as proving any of their contents in favor of the parties having made them.⁴ But it was nevertheless held in a later case, that annual settlements are *prima facie* evidence in favor of administrators, and that this rule was in accordance with the practice throughout the State, and that any other rule would in most cases work injustice and hardship.⁵ In Kentucky, a statute directing county court commissioners to settle the accounts of executors and administrators

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validity.

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buttal, falsifi-
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tion of mis-
takes on final
accounting.

Hughes, 94 N. C. 231, 236, 238. See also cases cited in Woerner on Guardianship, § 97; and also, showing the *prima facie* validity of settlements of guardians of insane persons, Woerner on Guardianship, § 151.

¹ West v. West, 75 Mo. 204, 208; Seighman v. Marshall, 17 Md. 550, 569; Newton v. Poole, 12 Leigh, 112, 142; Smith v. Smith, 13 Ala. 329, 335; Shearman v. Christian, 9 Leigh, 571, 577; Leake v. Leake, 75 Va. 792, 803; Kyles v. Kyle, 25 W. Va. 376, 378; Sewell v. Stingluff, 62 Md. 592, 596; Hilton v. Briggs, 54 Mich. 265.

² Mix's Appeal, 35 Conn. 121, 122; Clement's Appeal, 49 Conn. 519, 534; Potter's Appeal, 56 Conn. 1, 20; Glessner v. Clark, 140 Ind. 427; Demont v. Harth, 45 Miss. 388; Succession of Caballero, 25 La. An. 646; Sherman v. Chace, 9 R. I. 166; Jackson v. Reynolds, 39 N. J. Eq. 313; Liddell v. McVickar, 11 N. J. L. 44, 47; Ingraham v. Rogers, 2 Tex. 464, 467; Coburn v. Loomis, 49 Me. 406; McPike v. McPike, 111 Mo. 216, 225; Ritchey v. Withers, 72 Mo. 556, 569; Stratton's Estate, 46 Md. 551, 554; Long v. Thompson,

60 Ill. 27; Bliss v. Seaman, 165 Ill. 422; Bachelor v. Schmela, 49 Neb. 37; North v. Priest, 81 Mo. 561. See also in connection herewith, *post*, § 539.

³ The reason is thus forcibly stated by Bakewell, J., in State v. Roeper, 9 Mo. App. 21, 22 (affirmed in 82 Mo. 57); "The annual settlements of a guardian are merely *ex parte*; they are not in any sense judicial in their character. They merely show the state of the guardian's account as exhibited by him. On final settlement they are merged in that settlement, and are open at all times to correction and examination until the final settlement has been made. The balance found is no judgment of the probate court that the amount is due from the guardian to the estate, or from the estate to the guardian, as the case may be." But see State v. Jones, 89 Mo. 470, 479; and later cases ascribe *prima facie* validity to annual settlements: Clarke v. Sinks, 144 Mo. 448, 454, citing earlier Missouri cases.

⁴ Kidd v. Guibar, 63 Mo. 342, 343; Murphy v. Murphy, 2 Mo. App. 156, 159.

⁵ Myers v. Myers, 98 Mo. 262, 269.

upon summons issued to heirs, devisees, and distributees, was held to be directory only as to the requirement of notice, and a settlement made without notice to the parties in interest was held of *prima facie* validity;¹ and such seems to be the prevalent doctrine.² But even where the accounting or settlement is conclusive as to the matters adjudicated, it cannot be conclusive as to matters omitted from the account, which may therefore be surcharged in subsequent settlements;³ and so an item once rejected for the want of evidence may be allowed on sufficient evidence in a subsequent accounting.⁴

§ 505. **Nature of Final Settlements.**—Final settlements of the administration, when made by the executor or administrator in pursuance of statutory requirement, after legal notice to all parties interested in the estate, are conclusive as to all matters therein directly adjudicated. This is declared by statute in a number of States; for instance, in California,⁵ Indiana,⁶ Nevada,⁷ New Jersey,⁸ New York,⁹ Ohio,¹⁰ and Rhode Island.¹¹ But, aside from statutory enactment,¹² the current of authorities so holding is almost unbroken; it seems supererogatory to refer to them specially. Where the notice has been given as required by the statute, the judgment will be conclusive, although rendered in the absence of all parties but the administrator;¹³ and where the statute directs notice by publication, actual or personal notice is not *required;¹⁴ but 'if required by the statute, proof [*1127] thereof cannot be made by parol, but must be shown by the record.¹⁵ After the parties have appeared to the final settlement and consented to a continuance, they will not afterward be heard to complain of irregularity of the notice.¹⁶

¹ "Under the statute, and on general principles, and by common usage applicable to such cases, entitled *prima facie* to credence, so far as it accords with the evidence on which it professes to be founded, although the evidence may have been received *ex parte*, and with no other scrutiny than that which the commissioners must be presumed to have applied to it": *per* Marshall, J., in *Scott v. Kennedy*, 12 B. Mon. 510, 512.

² *Sheetz v. Kirtley*, 62 Mo. 417, 419; *Bantz v. Bantz*, 52 Md. 686. See cases *supra*.

³ *McLellan's Appeal*, 76 Pa. St. 235; *Saxton v. Chamberlain*, 6 Pick. 422, 425; *Blake v. Pegram*, 109 Mass. 541, 551. As to matters omitted from the final settlement, see *post*, § 506.

⁴ *Walls v. Walker*, 37 Cal. 425.

⁵ Code Civ. Pr. § 1637; *Tobelman v. Hildebrandt*, 72 Cal. 313, 315.

⁶ Rev. St. 1894, § 2557; *Carver v. Lewis*, 104 Ind. 438.

⁷ Gen. St. 1885, § 2906.

⁸ Gen. St. N. J. 1895, p. 2380, § 108.

⁹ *Denton v. Sanford*, 103 N. Y. 607, 614.

¹⁰ *Bates' Ann. Oh. St.* 1897, § 6187.

¹¹ Gen. L. 1896, p. 748, § 10.

¹² In Oregon the statute is construed to declare final settlements to be only of *prima facie* validity: *Cross v. Baskett*, 17 Oreg. 84, *per* Stratton, J., p. 88.

¹³ *Kellett v. Rathbun*, 4 Pai. 102, 106; *Jones v. Graham*, 36 Ark. 383.

¹⁴ *Steen v. Steen*, 25 Miss. 513, 531; *Cason v. Cason*, 31 Miss. 578, 595.

¹⁵ *Winborn v. King*, 35 Miss. 157.

¹⁶ *Barnett v. Tarrence*, 23 Ala. 463; *Williams v. Williams*, 125 Ind. 156.

The conclusive character of such settlements is the necessary result of the judicial nature of the proceeding. *Res judicata pro veritate accipitur*: hence it would be unreasonable and unlawful to allow that to be again questioned which a court of competent jurisdiction has once decided.¹ *Nemo debet bis vexari pro una et eadem causa.*²

Doctrine of *res judicata* applicable.

If, however, the parties interested in the estate have not been notified in the manner required by statute, nor appeared to the settlement, they are obviously not bound by it: as to them the determination of the court constitutes no judgment.³ A publication of the notice in the English language in a newspaper otherwise printed in the German language, is illegal;⁴ and so is publication in a newspaper where the parties are entitled to notice by service of process.⁵ A notice to the heirs, creditors, and legatees, where the statute provides for notice "to all persons interested in said estate," is sufficient.⁶ Notice is as necessary in chancery as in proceedings before the probate court.⁷ A notice that a partial settlement will be made does not authorize a final settlement,⁸ but a final settlement without notice will have the effect of a partial settlement with *prima facie* validity.⁹

No one is bound by such judgment unless he has had notice, or appeared to the settlement.

Notice must be such as to enable parties in interest to learn the time and place of settlement.

So where infant distributees are entitled to be represented [* 1128] sented, and * no legally qualified guardian appears for them at a final settlement, they are not bound by such a settlement unless a guardian *ad litem* be appointed for them.¹⁰ The acceptance of the appoint-

Infants are not bound unless represented by a guardian.

¹ 4 South L. R. (N. S.) 430. Such judgment is under the United States Constitution entitled to "full faith and credit" in another State: *Fitzsimmons v. Johnson*, 90 Tenn. 416.

² *Broom's Leg. Max.* 327. See *Woerner on Guardianship*, § 98.

³ *Crawford v. Redus*, 54 Miss. 700; *Belloq's Succession*, 28 La. An. 154; *Githens v. Goodwin*, 32 N. J. Eq. 286; *Long v. Thompson*, 60 Ill. 27, 29; *Clarke v. Perry*, 5 Cal. 58; *Gray v. Myrick*, 38 N. J. Eq. 210; *Lenox v. Harrison*, 88 Mo. 491, 495; *Roberts v. Johns*, 16 S. C. 171, 186.

⁴ *Heitkamp v. Biedenstein*, 3 Mo. App. 450, 452; but not if published on the English side of a newspaper published in both German and English, one side of the paper being German and the other English: *McLean v. Bergner*, 80 Mo. 414. See on this subject of publication of notices, *ante*, § 475.

⁵ *Roberts v. Roberts*, 34 Miss. 322.

⁶ *Roberts v. Spencer*, 112 Ind. 81.

⁷ *Campbell v. Winston*, 2 Hen. & M. 10; *Stone v. Morgan*, 10 Pai. 615, 617. In Alabama it is held that in chancery infants must be personally served, but it is otherwise in the probate court: *Trawick v. Trawick*, 67 Ala. 271.

⁸ *King v. Collins*, 21 Ala. 363, 368.

⁹ *Winborn v. King*, 35 Miss. 157; *Grant v. Hughes*, 94 N. C. 231, 236. The administration remains open in such case for such further proceedings as may be necessary for final settlement and distribution, and the court may subsequently charge the administrator with other funds: *Frank v. People*, 147 Ill. 105.

¹⁰ *Gunning v. Lockman*, 3 Redf. 273, 276; *Elrod v. Lancaster*, 2 Head, 571, 575; *Kellett v. Rathbun*, 4 Pai. 102; *Cason v. Cason*, 31 Miss. 578, 595; *Turney v. Williams*, 7 Yerg. 172, 213; *Davis v. Crandall*, 101 N. Y. 311, 321; *Collins v.*

ment by the guardian *ad litem* should appear of record,¹ as well as the appearance of the guardian;² and where such appointment is not shown, the probate court may set aside the settlement at a subsequent term.³ But the failure to appoint a guardian *ad litem* for infant legatees on application for leave to appeal from the allowance of an executor's account, is a mere irregularity, cured by the appointment of such guardian in the appellate court.⁴ And where

Settlement by an administrator, who is also the guardian of a minor interested therein, is void or voidable ;

but only as to such minor.

the administrator making the settlement is at the same time the guardian of a distributee or the administrator of a deceased distributee, such settlement is void, or at least voidable by the distributee or his representative.⁵

But the fact that a probate decree is voidable as to an infant does not entitle any other party to invoke such infancy to protect them against the effect of the decree;⁶ nor can the executor or administrator be heard to assail the validity of a final settlement on the ground that due notice had not been given,⁷ nor that it was made before the time fixed by statute.⁸ It is obvious that an order directing an administrator to dismiss a suit brought by him on a claim alleged to be due the estate, and to file an account to "stand and serve as the final account," is erroneous.⁹

§ 506. Conclusiveness of Final Settlements.—It seems a self-evident proposition, that the judgment or decree of the probate court on the final settlement by an executor or administrator is conclusive only upon the matters therein embraced: that which has not been tried cannot be said to be adjudicated.¹⁰ The probate court cannot

Final settlement is not conclusive of any matter not embraced or

Collins, 140 Mass. 502, 503, 507. In Minnesota this is not necessary: Balch v. Hooper, 32 Minn. 158, 162.

¹ Searcy v. Holmes, 43 Ala. 608, citing earlier Alabama cases.

² Dogan v. Brown, 44 Miss. 235.

³ Barwick v. Rackley, 45 Ala. 215, 217.

⁴ Sanborn's Estate, 109 Mich. 191.

⁵ Alexander v. Alexander, 70 Ala. 212; Tankersly v. Pettis, 61 Ala. 354, 361; Hays v. Cockrell, 41 Ala. 75, 79; Cleere v. Cleere, 82 Ala. 581; Vaughn v. Suggs, 82 Ala. 357; *In re* Wood, 71 Mo. 623, 626; Adams v. Adams, 22 Vt. 50, 61, *et seq.*; but not under the present Mississippi code: Gregory v. Orr, 61 Miss. 307. For the same reason, where, upon the death of an administrator, his personal representative becomes administrator *de bonis non* of the intestate, he cannot account in the probate court: nor in some States, if the surviving is administrator of

the deceased partner: see on the latter points authorities cited, § 156, p. *356.

⁶ Hutton v. Williams, 60 Ala. 107, 116; Conwill v. Conwill, 61 Miss. 202.

⁷ Williamson v. Hill, 6 Port. 184, 195; Davis v. Davis, 6 Ala. 611.

⁸ Semoice v. Semoice, 35 Ala. 295.

⁹ Held erroneous, because appealed from; but such action was clearly void: Bullock's Estate, 75 Cal. 419, 421.

¹⁰ 4 South. L. R. (N. S.) 431; Nelson v. Barnett, 123 Mo. 564 (in which it is stated that parol evidence was admissible to show that certain matters were not embraced, as to which the record was silent), 570; Durham v. Williams, 32 La. An. 968, 971; McAfee v. Phillips, 25 Oh. St. 374, 377; Fish v. Lightner, 44 Mo. 268, 270; Sparhawk v. Buell, 9 Vt. 41, 77; Jefferson v. Edrington, 53 Ark. 545; Barnett v. Vanmeter, 7 Ind. App. 45; hence such a settlement concludes no right unless it is

[* 1129] *divest itself of jurisdiction over an executor ^{decided there-} or administrator by deciding that an account ^{in.}

is final as to any matter not included in the account before it;¹ nor is such decree or judgment conclusive of matters collaterally recited, but not directly adjudicated.² It is important, therefore, that the executor or administrator should, for his own protection, include in his account every item which constitutes an element in the settlement.³

Since the finality of a settlement is conditioned upon its conclusive and binding force and obligation on all persons cited or notified in the manner required by statute, there may be more than one "final settlement" concerning the same estate,⁴ for the administrator is unquestionably liable for assets received after the final accounting.⁵ Nor is such a settlement decisive as to the nature of the balance found, unless so expressed in the judgment or decree;⁶ nor does it, unless so expressed, constitute an order or decree of distribution so as to conclude an heir or legatee who has

There may be more than one final settlement concerning the same estate.

Administrator liable for assets subsequently received.

made in accordance with law: *Bank v. Carpenter*, 7 Ohio, pt. 1, p. 21; *Raab's Estate*, 16 Oh. St. 273; *Lucich v. Medin*, 3 Nev. 93.

"It is well established that a settlement of an administrator's account, by the decree of a probate court, does not conclude as to property accidentally or fraudulently withheld from the account": *Griffith v. Godey*, 113 U. S. 89, 93; but the presumption should be indulged that the account was correct, and that the executor has accounted for all the property that came into his hands as such, and a further accounting should not be ordered unless it is made to appear plainly that there are other matters for which he is responsible and has not accounted: *Soutter's Estate*, 105 N. Y. 514, 518. And see *Black, J.*, in *Patterson v. Booth*, 103 Mo. 402, 419, intimating that such settlement is conclusive as to all items properly entering into the account, though omitted.

¹ *Field v. Hitchcock*, 14 Pickering, 405; *Crossan v. McCrary*, 37 Iowa, 684, 687; *Chambers' Appeal*, 11 Pa. St. 436, 443.

² *Sparhawk v. Buell*, 9 Vt. 41, 77; *Smith v. Lambert*, 30 Me. 137, 145; *Patterson v. Booth*, 103 Mo. 402, 419.

³ *Harstel v. People*, 21 Colo. 296, 300; *Hall v. Grovier*, 25 Mich. 428, 436. Nothing should be omitted which might possibly provoke future litigation, such as omit-

ting a claim for bounty on sugar raised: *Gardner's Succession*, 48 La. An. 289. In Missouri it was held that it was a fraud for executors to make a final settlement when they must have known that the estate was not fully administered, owing to pending litigation: *Smiley v. Cockrell*, 92 Mo. 105. In Vermont the executrix was charged with property fraudulently omitted from the account, after twenty years; *Davis v. Eastman*, 66 Vt. 651 (holding that the final account operated only on property returned, and was not an adjudication that there was no other estate to account for); s. c. 68 Vt. 225.

⁴ "A final account may be had whenever there is anything to account for, so that whenever, after a final settlement, other assets come into the executor's hands, he may, as to them, have a final settlement, and so, *toties quoties*, as occasion may require"; *per* *Bradford, Surr.*, in *Glover v. Holley*, 2 Bradf. 291. See also *Pomeroy v. Mills*, 37 N. J. Eq. 578; *Wilson v. McCarty*, 55 Md. 277, 280.

⁵ *McAdoo v. Thompson*, 72 N. C. 408; *Wilson v. McCarty*, *supra*; *White v. Swain*, 3 Pick. 365. An order to pay over an income subsequently to accrue does not exhaust the jurisdiction of the probate court; there must be an accounting thereof at the proper time: *Hodges' Estate*, 63 Vt. 661.

⁶ *Sellew's Appeal*, 36 Conn. 186, 193.

not received his share of the balance found in the administrator's hands.¹ The authority of the probate court over an executor is not exhausted with the final settlement: he remains subject to its jurisdiction until he has * complied with the judgments, orders, or [* 1130] decrees against him concerning the estate.²

§ 507. **Setting aside Final Settlements in the Probate Court.**—There has been occasion heretofore³ to remark that

Settlements cannot be set aside by probate courts without statutory authority.

judgments of probate courts, within the scope of their authority, are as conclusive as those of courts of general jurisdiction; hence they cannot, after the term at which they were rendered, be opened, revised, or amended in any particular without statutory authority,

except in equity for fraud, or by appeal.⁴ In a number of States the statutes confer upon probate courts the power, under the circumstances and in the manner therein pointed out, to reopen and

Statutes conferring such authority.

review their judgments on final settlements; for instance, in California,⁵ Indiana,⁶ Kansas,⁷ Massachusetts,⁸ Mississippi,⁹ Nevada,¹⁰ New Jersey,¹¹ New York,¹²

Ohio,¹³ and Pennsylvania.¹⁴ * In others, the equity powers [* 1131]

¹ *Cox v. John*, 32 Oh. St. 532; *Negley v. Gard*, 20 Oh. 310, 316; *Ake's Appeal*, 21 Pa. St. 320, 322.

² See *post*, §§ 568-571.

³ *Ante*, §§ 145, 146.

⁴ *Sanford v. Head*, 5 Cal. 297; *Speed v. Nelson*, 8 B. Mon. 499, 507; *Lucich v. Medin*, 3 Nev. 93, 105; *Watt v. Watt*, 37 Ala. 543, 547, citing numerous Alabama authorities; *Johnson v. Johnson*, 26 Oh. St. 357; *Grady v. Hughes*, 64 Mich. 540.

⁵ Persons under legal disability may move for cause to reopen and examine the account at any time before final distribution: *Code Civ. Proc.* § 1637. See *Williams v. Price*, 11 Cal. 212, 213; *Wiggin v. Superior Court*, 68 Cal. 398; *In re Cahalan*, 70 Cal. 604.

⁶ Within three years, by any person not appearing nor personally summoned for illegality, fraud, or mistake: *Burns' Ann. St.* 1894, § 2558; but not without averment of fraud: *Reed v. Reed*, 44 Ind. 429, 432; or that he did not appear and was not personally summoned: *Dillman v. Barber*, 114 Ind. 403.

⁷ Within six months, by person not appearing nor summoned: *Gen. St.* 1897, p. 543, § 160.

⁸ Same as in Kansas: *Publ. St.* 1882, p. 805, § 9.

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⁹ *Ann. Code*, 1892, § 1960. Probate jurisdiction is in chancery in Mississippi; but the power formerly existed in probate courts.

¹⁰ Persons under disability may proceed against the executor or administrator within two years after their disability has ceased: *Gen. St.* 1885, § 2906.

¹¹ *Crombie v. Engle*, 19 N. J. L. 82, 86, 88. A petition to set aside an account as illegally and improperly allowed, and also to open the same for fraud and mistake, need not specify in what the fraud or mistake consists: *Trimmer v. Adams*, 18 N. J. Eq. 505, 507; but see to the contrary, *Hyer v. Morehouse*, 20 N. J. L. 125; *Jackson v. Reynolds*, 39 N. J. Eq. 313; *Engle v. Crombie*, 21 N. J. L. 614, 619.

¹² *Code Civ. Proc.* § 2481, subd. 6; *In re Tilden*, 98 N. Y. 434; *In re Hawley*, 100 N. Y. 206; but after the lapse of nine years from the decree, the settlement should not be opened except upon the clearest evidence of mistake: *Matter of Deyo*, 36 Hun, 512, affirmed 102 N. Y. 724.

¹³ Within eight months by persons neither present nor having notice: *Bates' Ann. St.* 1897, § 6187.

¹⁴ By petition within five years: *Pep. & L.* 1896, p. 1478, § 106. Under this

possessed by probate courts are held to authorize them to set aside or reopen their decrees on final settlement, for the purpose of correcting mistakes or relieving against fraud; so in Alabama,¹ Connecticut,² New Hampshire,³ New York,⁴ Pennsylvania,⁵ and Vermont.⁶ In Texas the settlement may be revised and corrected at any time within two years by the district court,⁷ in Maryland within a reasonable time,⁸ and in Wisconsin at any time except when rights have become confirmed.⁹ The subject of falsification, surcharge, and correction on final settlement, and the rules governing the taking of exceptions thereto, is discussed hereafter.¹⁰

States authorizing review of final settlements in the probate court by virtue of their equity powers.

§ 508. **Setting aside Final Settlements in Chancery.** — In dealing with the judgments and decrees of probate courts upon the final settlements of executors and administrators precisely as with the judgments of other courts,¹¹ courts of chancery review, enjoin, or annul

Chancery deals with final settlements in the same manner as with judgments of courts of law,

act a bill of review is a matter of right: *Meckel's Appeal*, 112 Pa. St. 554. But not after five years: *Kinter's Appeal*, 62 Pa. St. 318, 322, and only for error apparent on the record, or new matter arising since the decree; as a matter of grace for new proof discovered, and not even that if the party be guilty of *laches*: *Priestley's Appeal*, 127 Pa. St. 420. The Orphan's Court may entertain a bill of review notwithstanding a decree of affirmation by the Supreme Court: *Parker's Appeal*, 61 Pa. St. 478, 487; *Young's Appeal*, 99 Pa. St. 74. A bill of review is founded on equitable principles, and is never allowed to stand on strict law against equity: *Stevenson's Appeal*, 32 Pa. St. 318, 324. The petition for review must set forth specifically the error complained of, and that the balance has not been paid: *Cramp's Appeal*, 81 Pa. St. 90, 94, citing other Pennsylvania cases; *Lehr's Appeal*, 98 Pa. St. 25.

¹ Where an infant interested had not been represented by a guardian: *Barwick v. Rackly*, 45 Ala. 215. But not without notice to other distributees: *Thomas v. Dumas*, 30 Ala. 83, 85 (expressing doubt as to the power of the probate court to set aside its decrees at all); nor after the term at which made: *Trawick v. Trawick*, 67 Ala. 271.

² At any time before final distribution: *Sellew's Appeal*, 36 Conn. 186, 193, *et seq.*

³ *Simmons v. Goodell*, 63 N. H. 458; *Ayer v. Messer*, 59 N. H. 279.

⁴ *Strong v. Strong*, 3 Redf. 477, 479; *Sipperly v. Baucus*, 24 N. Y. 46. But since these decisions the power "to set aside, open, vacate, or modify" his orders and decrees, as exercised by courts of record of general jurisdiction, has been conferred upon the surrogate: 1 Laws N. Y. 1870, ch. 359, § 1.

⁵ *Young's Appeal*, 99 Pa. St. 74, 83; *Scott's Appeal*, 112 Pa. St. 427, 435.

⁶ Within twenty years: *Smith v. Rix*, 9 Vt. 240; *Adams v. Adams*, 21 Vt. 162.

⁷ *Birdwell v. Kauffman*, 25 Tex. 189, 191. A widow is a person "interested in the estate" so as to authorize the revisal of an administration account on her petition: *Hefflefinger v. George*, 14 Tex. 569, 581. A copy of the proceedings sought to be revised, or a statement of the matters sought to be corrected, must accompany the petition: *Dunson v. Payne*, 44 Tex. 539, 542.

⁸ Depending on the circumstances of each case, and the character of the correction to be made: *Wilson v. McCarty*, 55 Md. 277, 281; *Yearley v. Cocke*, 68 Md. 174; *Richardson v. Billingslea*, 69 Md. 407.

⁹ *Estate of Leavens*, 65 Wis. 440, 446, and authorities; *Creamer v. Ingalls*, 89 Wis. 112.

¹⁰ *Post*, §§ 539-541; the liability of partial settlements to correction and surcharge has already been adverted to in § 504.

¹¹ *Sheetz v. Kirtly*, 62 Mo. 417, 420; *State v. Gray*, 106 Mo. 526, 534; *Ragsdale*

and reviews, enjoins, or annuls them for fraud or mistake.

constructive

Irregularities in the settlements do not support jurisdiction in chancery; bill must allege the facts constituting the

them upon application of injured parties for fraud,¹ and in some cases for mistake,² or where

* the matter complained of may have arisen [*1132] either from fraud or mistake,³ or constitutes

fraud.⁴ But errors or irregularities in the settlement can only be remedied by appeal,⁵ and will not support jurisdiction in a court of chancery;⁶ and the bill must state the facts and circumstances constituting the alleged fraud with distinctness and precision;⁷ the fraud must be affirmatively proved,⁸ and the complainant must show that he has been damaged.⁹

v. Stuart, 8 Ark. 268, 270; *Boulton v. Scott*, 3 N. J. Eq. 231, 236; *Vanmeter v. Jones*, 520, 523.

¹ *Strong v. Wilkson*, 14 Mo. 116; *Baldwin v. Davidson*, 139 Mo. 118; *Clark v. Shelton*, 16 Ark. 474, 482; *Mock v. Pleasants*, 34 Ark. 63, 71; *Tebbets v. Tilton*, 31 N. H. 273; *Green v. Sargeant*, 23 Vt. 466, 476; *Miller v. Steele*, 64 Ind. 79; *Hall v. Pegram*, 85 Ala. 522; *Ridenbaugh v. Burnes*, 14 Fed. Rep. 93; *Smiley v. Smiley*, 80 Mo. 44; *Griffith v. Godey*, 113 U. S. 89, 93 (holding that a court of equity had jurisdiction even if the probate court could open its decree, and administer upon the property fraudulently omitted).

² *Black v. Whittall*, 9 N. J. Eq. 572, 585, *et seq.*; *M'Crae v. Hollis*, 4 Desaus. 122; *James v. Matthews*, 5 Ired. Eq. 28; *Walker v. Wootten*, 18 Ga. 119, 126; *Ridenbaugh v. Burnes*, 14 Fed. Rep. 93, 94. The discharge by the probate court from a citation to account is no bar to an action by the party entitled to the fund: *Richardson v. Richardson*, 9 Pa. St. 428.

³ *Tynan v. Kerns*, 119 Cal. 447. "Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly imposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another": *Story*, Eq. Jur. § 187; quoted by *Bliss, J.*, in *Clyce v. Anderson*, 49 Mo. 37, 40, in which the omission by the executor to charge himself with interest and the charge of interest on uncollected claims are held fraudulent in equity, although the administrator left the drafting of the final settle-

ment to his counsel. See also *Byerly v. Donlin*, 72 Mo. 270; *Arnold v. Spates*, 65 Iowa, 570; *Dyer v. Jacoway*, 50 Ark. 217.

⁴ *Jones v. Graham*, 36 Ark. 383, 402.

⁵ *Ringgold v. Stone*, 20 Ark. 526, 535; *Mock v. Pleasants*, 34 Ark. 63, 72; *Riley v. Norman*, 39 Ark. 158, 166; *Mayo v. Clancy*, 57 Miss. 674, 676; *Hoagland v. See*, 40 N. J. Eq. 469, 472; *Simmons v. Goodell*, 63 N. H. 458; *In re Hawley*, 100 N. Y. 206, 210; *Peckard v. Price*, 5 Del. Ch. 239. But in Indiana "illegality" is also ground for setting aside the settlement, and the allowance of attorneys' fees to an administrator for personal services constitutes such "illegality": *Pollard v. Barkeley*, 117 Ind. 40; and a final settlement will be set aside at the instance of a creditor who has been prevented from establishing his claim because the administrator has made a premature settlement before the expiration of the time for proving claims: *Shirley v. Thompson*, 123 Ind. 454.

⁶ Illegal allowances, unless obtained by fraud, are no ground for impeaching or setting aside a final settlement: *Lewis v. Williams*, 54 Mo. 200; *Sheetz v. Kirtland*, 62 Mo. 417, 421; *Nelson v. Barnett*, 123 Mo. 564; *Miller v. Major*, 67 Mo. 247; *Smith v. Worthington*, 10 U. S. App. 616; *Dyer v. Jacoway*, 50 Ark. 217.

⁷ *Riley v. Norman*, *supra*; *Ringgold v. Stone*, 20 Ark. 526, 537, citing *Conway v. Ellison*, 14 Ark. 360; *Mock v. Pleasants*, *supra*; *Akins v. Hill*, 7 Ga. 573 (holding a bill insufficient seeking to set aside a settlement after nineteen years, without alleging fraud); *Terrell v. Roland*, 86 Ky. 67, 76; *Green v. Thompson*, 84 Va. 376, 391.

⁸ The unexplained allowance of cred-

⁹ *Trimble v. James*, 40 Ark. 393, 407; *Crowley v. McCrary*, 45 Mo. App. 350; *Lennox v. Harrison*, 88 Mo. 491, 496.

Proceedings in equity for relief against fraud or mistake in the final settlement of administrators' accounts are governed by the same rules and principles as if the sought against an ordinary judgment at law. The party seeking it must show himself to be free from fraud or negligence.¹ If the question brought before [* 1133] the court *of equity by bill to open and correct a final settlement passed on by the probate court was there presented and adjudicated, either directly or by necessary implication, and the party complaining had an opportunity to be heard, and to have the error corrected by appeal, the failure to do so constitutes such *laches* as will prevent redress in equity.² If the proceeding contemplates more than the setting aside of the final settlement, and the further remedy is sought in the chancery court, all persons having any interest in the estate must be made parties;³ but if the sole object is to set aside the final settlement, the proceeding should be against the administrator alone.⁴ In some States the account cannot be taken for the benefit of one creditor alone, but must be for all the creditors who choose to come

fraud and show damage.

relief were

Party seeking relief in equity must show himself clear of fraud or negligence.

If complainant had an opportunity to be heard in probate court, it is *laches* if he failed to avail himself of his right. All persons interested must be made parties.

¹ Vincent v. Martin, 79 Ala. 540, 543; Boswell v. Townsend, 57 Ala. 308, 313, citing numerous Alabama cases: Hazlett v. Burge, 22 Iowa, 532, 534; Nelson v. Kownslar, 79 Va. 469; Gibboney v. Kent, 82 Va. 383; Bland v. Stewart, 35 W. Va. 518.

² Cawthorn v. Jones, 73 Ala. 82; Stein v. Burden, 30 Ala. 270, 275, citing numerous authorities; Duckworth v. Duckworth, holding that equity will not grant relief against a probate decree by establishing a credit or set-off on the ground that complainant's attorney informed him that it was not necessary in that court, 35 Ala. 70, 73; but see Gafford v. Dickinson, 37 Kans. 287, 291, holding an allegation that complainant had been fraudulently induced not to attend at the final settlement, suffi-

cient to set the same aside in equity, a year later. And in Missouri a collusive approval of a final settlement by the probate judge and administrator entitles the heirs to have the same set aside in equity, although the heirs had the opportunity to, and actually did, appeal therefrom, the appeal being dismissed by them before retrial: Baldwin v. Davidson, 139 Mo. 118.

³ Heitkamp v. Biedenstien, 3 Mo. App. 450, 453; Reinhardt v. Gartrell, 33 Ark. 727, 729.

⁴ Ferguson v. Carson, 9 Mo. App. 497, referring subsequent proceedings to the probate court, which thereby again has exclusive jurisdiction: Reinhardt v. Gartrell, *supra*; Byerly v. Donlin, 72 Mo. 270, 272.

its, although they have a strong appearance of fraud or mistake, is not sufficient: Picot v. Bates, 47 Mo. 390, 392; Ridenbaugh v. Burnes, 14 Fed. Rep. 93, 96. Nor can an administrator, in a proceeding to set aside a final settlement for fraud, be made to account for moneys which he has not collected, but which he

might have collected with proper diligence: James v. Withinton, 7 Mo. App. 575. In Virginia it is held that an account will not be directed in equity when there is no allegation that the administrator has not given sufficient security: Lane v. Eggleston, 2 Patt. & H. 225.

in.¹ In Arkansas the inquiry of the chancery court, on a bill impeaching an administrator's settlement is limited to such items as are affected by charges of fraud, accident or mistake, and all the other items should be left to stand as they are.²

¹ *Hazen v. Durling*, 2 N. J. Eq. 133.

² *McLeod v. Griffis*, 51 Ark. 1.

[*1134]

* CHAPTER LV.

OF THE DEBIT SIDE OF THE ACCOUNT.

§ 509. **What the Accountant must show.** — The object of compelling executors and administrators to render an account of their administration at stated periods is very obvious, and highly beneficial to all the parties having an interest in the estate, whether as creditors, legatees, or next of kin, or as executors or administrators. It is to furnish, by the records of the probate courts, inexpensive, full, and accurate information of the condition of estates, so that all persons concerned therein may resort to these records with confidence, ascertain their rights, correct errors in the accountant's administration, and take measures to protect themselves against loss by his fraud or negligence.¹ To accomplish this object it is necessary that the account should constitute a full and explicit exposition of the condition of the estate, showing what property has come into the administrator's hands, what he has disposed of or disbursed, what remains, and what the liabilities are so far as ascertained.² A proper statement of the account³ on its debit side involves a distinction — 1. between the personal property as inventoried, charging it at its appraised value, or according to the face or inventoried amount; * 2. the gain, if any, by the sale of the inventoried property above its appraised value; 3. the gain, if any, by the conversion or sale of bonds, stocks, mortgages, etc., above the inventoried amount thereof; 4. any property which may have been discovered as belonging to the estate, or received after the making of [*1135] the inventory, or which may be * scheduled

Account must show what property has come to administrator's hands, what he has disbursed, and what the liabilities are;

charge him with personal property, as inventoried;

gain in sale over inventoried price; gain in conversion of bonds;

property recovered after inventory filed;

¹ Hall v. Grovier, 25 Mich. 428, 435; *In re Place*, 1 Redf. 276; Swan v. Wheeler, 4 Day, 137, 140; Rhett v. Mason, 18 Gratt. 541.

² So that the account can be made the subject of intelligent inquiry: Solomons v. Kursheedt, 3 Dem. 307, 312.

³ The account, or, as it is sometimes styled, the settlement, is here considered in respect to its form, or method of state-

ment only. The law determining the liability of the accountant, as well as his right to the credits taken, is discussed in connection with the subjects to which the entries refer.

⁴ Post, § 510. If there be money, the administrator may be required to state the kind of money he received: Magraw v. McGlynn, 26 Cal. 420, 429; Taliaferro v. Minor, 2 Call, 190.

any interest recovered; in a supplementary inventory; 5. any interest collected on choses in action which interest is not contained in the inventory; 6. any interest received or profits realized upon loans or investments made by the administrator; 7. any interest which may be due from the administrator himself; 8. the income, if any, from the rent of real estate; 9. the proceeds of the sale of real estate; 10. any accretion to the estate from any source whatever. And each individual transaction should be accurately noted.

The credit side should distinguish, — 1. between the expenses of probate and of administration; 2. the allowance to the widow or minor children as fixed by statute or directed by the court, referring to the order of court, if any; 3. the loss, if any, arising out of the sale of the inventoried property below its appraised value; 4. the loss, if any, arising by the conversion or sale of bonds, stocks, mortgages, etc., below their inventoried amount; 5. the loss, if any, by reason of uncollectible debts, compromises with debtors, diminution of debts due the estate by set-offs proved, etc.; 6. debts paid according to their priority; 7. interest which may be allowable for advances; 8. compensation of the executor or administrator.

In addition to this, the account should set forth the exact condition of the balance remaining, showing to what extent the assets consist of ready money, and the degree of availability of such as do not; and also a full schedule of demands proved or allowed against the estate, showing their rank and the rate of interest they bear, as well as of all demands of which the administrator has been notified, and which have not yet been proved or allowed, or which may be pending on appeal or suit in court.⁵

* § 510. **Inventoried Assets to be charged in the Account.** — The inventory is the foundation of the account, and should constitute the first item of charge against the executor or administrator, carrying out on the debit side the aggregate

¹ And the account should distinguish between the income and the principal: *Estate of Evans*, 11 Phila. 113, 116; *Atwater v. Barnes*, 21 Conn. 237, 243.

² *Haberman's Appeal*, 101 Pa. St. 329; *Sanderson v. Sanderson*, 20 Fla. 292, 317; including commissions and bonuses from borrowers of the trust estate: *Savage v. Gould*, 60 How. Pr. 217, 229.

³ See *post*, as to the interest chargeable to executors and administrators, § 511.

⁴ See *post*, § 513.

⁵ See *Gary's Prob. Law*, § 567; also *Hutchinson's Appeal*, 34 Conn. 300, 303; *In re Jones*, 1 Redf. 263, 265, *et seq.*; *Fairman's Appeal*, 30 Conn. 205. In New Jersey it is held that the items on the credit side of an account may be stated in general terms: *Liddell v. McVickar*, 11 N. J. L. 44.

amount of all the personal property inventoried. It is, as appears elsewhere,¹ *prima facie*, but not conclusive evidence, either for or against the accountant, and may therefore be rebutted in the final settlement.² If any of the property has been sold or converted into money at the exact price or amount stated to be its value in the inventory, it need not again figure in the account, because the executor is already charged therewith in the item representing the inventory; but for any excess obtained above the amount at which the property is inventoried, he must charge himself. If he has property in his hands not contained in the inventory, but belonging to the estate, his settlement is fraudulent unless he charges himself therewith;³ and so he must charge himself with any property or money coming to him in his capacity as executor or administrator, if the same has not been inventoried.⁴

Inventory is *prima facie* evidence, but may be rebutted.

The account must charge the administrator with all the inventoried assets, as well as all that are in his hands not inventoried.

§ 511. **What Interest Administrators are chargeable with.** — It is obvious that executors and administrators are liable for, and must charge themselves with, all interest received by them on assets or funds belonging to the estate, in so far as the interest [*1137] has not *already been charged in the inventory. If they fraudulently fail to account for interest on notes and bonds of the estate in their hands, every presumption of law will be against them, and they will, in the absence of proof of the actual interest collected, be charged with the highest legal rate of interest for the whole of the time during which they held

Administrators are accountable for the highest legal rate of interest, if they refuse to show the interest earned.

¹ See *ante*, § 320. There can be no final settlement without an appraisal of the personal property: *Selna's Estate*, Myr. 233. The account need not contain all the items, nor a detailed statement of the debts inventoried: *Sheldon v. Wright*, 7 Barb. 39.

² *Weed v. Lermond*, 33 Me. 492; *McGinty v. McGinty*, 19 R. I. 510.

³ Although he received such property in the lifetime of the intestate: *Stone v. Stillwell*, 23 Ark. 444, 451. And he may be required to disclose the assets of a partnership of which he and the deceased were members at the time of the death of the latter, although the interest of the deceased is unliquidated: *Woodruff v. Woodruff*, 17 Abb. Pr. 165, 167; *Marre v. Ginochio*, 2 Bradf. 165, 168. He must charge himself in his account for all property of the estate not inventoried: *Hurlburt v. Wheeler*, 40 N. H. 73; *Boston*

v. Boylston, 4 Mass. 318; *Downie v. Knowles*, 37 N. J. Eq. 513.

⁴ Money received from the government of the United States, by means of a treaty with a foreign nation, as indemnity for the loss of property taken from the intestate by such nation, is assets, and must be administered as such: *ante*, § 306, and cases there cited. Money found in a chest specifically bequeathed does not pass with the chest, but must be administered: *Smith v. Jewett*, 40 N. H. 513, 515. Premiums received on the sale of gold coin, bonds, stock, etc., belong to the estate and not to the administrator: *Valentine v. Strong*, 20 Md. 522, 527; also lambs born after testator's death, wool shorn from sheep, and net proceeds, from sale of milk from decedent's cows: *Merchant's Case*, 39 N. J. Eq. 506, affirmed in 41 N. J. Eq. 349.

If they act prudently, they are chargeable with such interest only as they have realized; but if negligently, with such interest as they ought to have realized, *i. e.* the usual legal rate of interest.

the fund.¹ If the administrator has exercised prudent care, reasonable skill, and proper diligence, he is chargeable merely with the actual interest realized by him.² If, however, he negligently permits funds of the estate to lie idle, instead of applying them to the payment of debts or other liabilities of the estate, or, where that cannot be done, investing them safely and so as to yield interest for the estate, he is liable to be charged with interest at the usual legal rate, or at such rate as he might by reasonable skill and diligence have obtained,³ commencing from the time when the payment ought to have been made.⁴ Hence he is not

¹ *Scott v. Crews*, 72 Mo. 261, 267, *et seq.*; *Ringgold v. Stone*, 20 Ark. 526, 536; *Finch v. Ragland*, 2 Dev. Eq. 137, 143; *Smithers v. Hooper*, 23 Md. 273, 285; *Succession of Touzanne*, 36 La. An. 420; *Stong v. Wilkson*, 14 Mo. 116; *Lommen v. Tobiason*, 52 Iowa, 665, 669. See for earlier authorities on the liability of executors and administrators for interest, 1 Am. L. Cas. (1st ed.) pp. 362-365, *tit. Selleck v. French*; also *Perrin v. Lepper*, 40 N. W.-R. 859.

² *Voorhees v. Stoothoff*, 11 N. J. L. 145, 159 (reviewing English and American authorities); *McClendon v. Gomillon*, *Dudley*, 48; *White v. White*, 3 Dana, 374, 376; *Karr v. Karr*, 6 Dana, 3, 5; *Anderson v. Gregg*, 44 Miss. 170, 182; *Clyce v. Anderson*, 49 Mo. 37, 43; *Griswold v. Chandler*, 5 N. H. 492, 497; *McQueen's Estate*, 44 Cal. 584, 588; *Stearns v. Brown*, 1 Pick. 530, 531; *Ogilvie v. Ogilvie*, 1 Bradf. 356, 358; *Bartlett v. Fitz*, 59 N. H. 502; *Smith v. Smith*, 101 N. C. 461.

³ *Gwynn v. Dorsey*, 4 Gill & J. 453, 461; *Dunscumb v. Dunscumb*, 1 John. Ch. 508, 510, *et seq.*; *Jacot v. Emmet*, 11 Pal. 142, 145; *Moore v. Beauchamp*, 4 B. Mon. 71, 79; *Calvert v. Holland*, 9 B. Mon. 458, 462; *In re Davis*, 62 Mo. 450, 454; *Hough v. Harvey*, 71 Ill. 72, 77 (charging six per cent compounded, because the administrator had neglected to make annual settlements, the highest rate in Illinois being ten per cent); *Estate of Evans*, 11 Phila. 113, 115; *Slade v. Slade*, 10 Vt. 192; *Riley v. McInlear*, 61 Vt. 254; *Ricker's Estate*, 14 Mont. 153 (refusing to charge compound interest), 192; *Monteith v. Baltimore Association*, 21 Md. 426, 432, and earlier Maryland cases there cited;

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Lloyd's Estate, 82 Pa. 143 (charging interest on \$25,000 United States bonds converted into cash, which the executor permitted to lie idle for five years, there being a suit pending, the judgment and cost in which aggregated less than \$13,000), 148; *Elliott v. Sparrell*, 114 Mass. 404, 406; *Mathis v. Mathis*, 18 N. J. L. 59, 61; *Lyendecker v. Eisemann*, 3 Dem. 72; *Eppinger v. Canepa*, 20 Fla. 262, 288; *May v. Green*, 75 Ala. 162 (holding an administrator liable for interest on funds of the estate in his hands, where, without sufficient excuse, he delayed making final settlement and distribution for an unreasonable time), 166; *Eubank v. Clark*, 78 Ala. 73, 83 (holding likewise); *Danforth's Estate*, 66 Mo. App. 586 (likewise charging the administrator with interest for delay in settling); *In re Glenn*, 20 S. C. 54; *Burnside v. Robinson*, 28 S. C. 583; *Lent v. Howard*, 89 N. Y. 169, 179; *Frost v. Denman*, 41 N. J. Eq. 47.

⁴ *Brandon v. Hoggatt*, 32 Miss. 335, 340; *Davis v. Wright*, 2 Hill (S. C.), 560; *White v. Ditson*, 140 Mass. 351, 363; *Koon v. Munro*, 11 S. C. 139, 155; *Moody v. Hemphill*, 71 Ala. 169; *Brooks v. Brooks*, 12 S. C. 422, 465; *Lansing v. Lansing*, 45 Barb. 182, 190; *Pickens v. Miller*, 83 N. C. 543, 548; *Sargent v. Davis*, 3 La. An. 353; *St. Andr   v. Rachal*, 3 La. An. 574; *Graves v. Barnes*, 7 La. An. 69. The administrator is not to be charged with debts due to the estate of his intestate from the time they are due, but only from the time when he actually receives them: *Reitz v. Bennett*, 6 W. Va. 417, 423; *Verner's Estate*, 6 Watts, 250. See *Anderson v. Piercy*, 20 W. Va. 282.

[*1138] * liable if he is bound to retain the funds to meet payments demandable at a time which cannot be ascertained beforehand.¹ But the mere fact that a balance in the administrator's hands is claimed by several parties, or that he does not know who the distributees are, will not justify him in retaining the money dead in his hands.² It has been held that the charging of interest for failure to distribute is, to some extent, a discretionary matter with the trial court.³

They are not liable for interest on funds necessarily retained to meet liabilities of the estate.

If the administrator mingle the funds of the estate with his own, whether he has used them or not, and *a fortiori* if he has employed them in his own business, or for his own purposes, he may be chargeable with interest thereon at the highest legal rate compounded for the whole of the time during which they were thus used or mingled.⁴ It has been held that the compounding of interest is exacted as one of the penalties for gross delinquency and intentional violation of duty.⁵ In a recent case decided in Missouri, the Supreme Court, after a comprehensive review of the authorities bearing on this question, reached the conclusion, that "all orders for periodical rests and for compounding interest should be adopted, *not for punishing the delinquent trustee*, but for the purpose of attaining the

Are chargeable with the highest rate of interest compounded on moneys mixed with their own, or used by them.

Rule as stated in other States.

¹ Wade v. Wade, 1 Wash. C. C. 477; *In re Doremus*, 33 N. J. Eq. 234; *In re Glenn*, 20 S. C. 64, 71; *Cannon v. Apperson*, 14 Lea, 553, 580; *Booker v. Armstrong*, 93 Mo. 49, 61; *Taylor v. Minor*, 90 Ky. 544. Nor under circumstances making it extremely difficult to obtain interest as in time of war: *Brent v. Clevinger*, 78 Va. 12.

² *Duncan v. Dent*, 5 Rich. Eq. 7, 11, 13; *Almy v. Probate Court*, 18 R. I. 612. See also *Danforth's Estate*, 66 Mo. App. 586, 590.

³ *Gloyd's Estate*, 93 Iowa, 303.

⁴ *Union Bank v. Smith*, 4 Cr. C. C. 509, 511, *et seq.*; *Hook v. Payne*, 14 Wall. 252, 257; *Grigsby v. Wilkinson*, 9 Bush, 91, 95; *In re Davis*, 62 Mo. 450, 454; *Williams v. Petticrew*, 62 Mo. 460, 472; *Troup v. Rice*, 55 Miss. 278, 297; *Perrin v. Lepper*, 40 N. W. R. 859, 905; *Estate of Camp*, 6 Mo. App. 563; s. c. 74 Mo. 192; *Estate of Clark*, 53 Cal. 355, 359; *Merrifield v. Longmire*, 66 Cal. 180; *Berwick v. Halsey*, 4 Redf. 18, 20; *In re Withinton*, 7 Mo. App. 575; *McCloskey v. Gleason*, 56 Vt. 264, 283; *In re Kernochan*, 104

N. Y. 618; *Schieffelin v. Stewart*, 1 John. Ch. 620, 624; *Spear v. Tinkham*, 2 Barb. Ch. 211. The rule applies to an executor who loans the funds to a firm of which he is a member: *Matter of Myers*, 131 N. Y. 409; and to a trust company acting in the capacity of executor, which loans money to itself on its own certificate, and this, although the statute expressly permitted other executors to deposit their trust funds with it in like manner: *St. Paul Trust Co. v. Kittson*, 62 Minn. 408, 414 (the certificate in this case bearing four per cent, the court charging the executor seven at simple interest on one hundred and twenty thousand dollars, but not charging interest on such funds as were kept on hand to meet current expenses, etc.).

⁵ *Ackerman v. Emott*, 4 Barb. 626, 649; *Matter of Mairs*, 4 Redf. 160, 162; *Roberts's Appeal*, 92 Pa. St. 407, 421; *Thorn v. Garner*, 42 Hun, 507, 515; *Barney v. Saunders*, 16 How. (U. S.) 535, 542. "Nothing but very culpable conduct will justify the compounding of interest": *Alvis v. Oglesby*, 87 Tenn. 172, 185.

actual or presumed gains, and to make certain that nothing of profit or advantage remains to the trustee." And again: "A simple use of the funds by the trustee in his trade or business has not been viewed in the same light by all courts considering the *matter. By some it has not been regarded as such gross [* 1139] delinquency as to justify more than simple interest, especially in the absence of profits indicating a greater gain;¹ while by others it has been denounced as gross delinquency and wilful violation of duty, justifying the charge of compound interest."² So it is held in many States, on the theory that the compounding of interest is not resorted to as a punishment, but to make certain that the executor has made no profit from the unauthorized use of the funds, that if he can show that he has acted in good faith and realized no greater profits from the use of the funds, he will be charged only simple interest.³

Where an executor or administrator pays an unauthorized demand against the estate,⁴ or a legacy or distributive share under circumstances leading to a rejection of such payment, he is accountable for simple interest thereon.⁵ So upon any funds which he has misapplied,⁶ or lost by an unauthorized investment.⁷

¹ Citing *Rocke v. Hart*, 11 Ves. 58; *Newton v. Bennett*, 1 Bro. Ch. 359, 362; *Kyle v. Barnett*, 17 Ala. 306; *Johnson v. Miller*, 33 Miss. 553.

² *Per Martin, C.*, in *Cruce v. Cruce*, 81 Mo. 676, 686, *et seq.*, citing further authorities with those mentioned above. In Missouri the probate court, in requiring administrators to account for interest, should exercise the power equitably and in view of all the circumstances: *Myers v. Myers*, 98 Mo. 262, 267; but when the funds are used by the administrator for his private purposes, the statute is mandatory that he shall pay interest to the estate: *Wolfert v. Reilly*, 133 Mo. 463. In Missouri the use of trust funds by any trustees (including executors and administrators) is made felony by statute: *Laws*, 1887, p. 162; and so in New York: *Laws*, 1877, ch. 208.

In Alabama it seems that by statute he is liable, when he uses the funds of the estate for his own benefit, for any profits made thereon, or legal interest: *Clark v. Knox*, 70 Ala. 607, 618. In a case in New Jersey, apparently simple interest at seven per cent was charged: *Aldridge v. McClelland*, 36 N. J. Eq. 288, 291, 292; and in Pennsylvania he is chargeable with the

profits realized, or six per cent interest: *McGeary's Appeal*, 6 Atl. R. 763; in Tennessee simple or compound interest is charged according to circumstances: *Canon v. Apperson*, 14 Lea, 553, 581.

³ *Wheeler v. Bolton*, 92 Cal. 159, 172; *Perkins v. Hollister*, 59 Vt. 348; *Hazard v. Durant*, 14 R. I. 25. See remarks of *Start, C. J.*, in *St. Paul Trust Co. v. Kittson*, 62 Minn. 408, as to the policy and limitation of this rule. See further on this subject, *Woerner on Guardianship*, § 67.

⁴ *Crowder v. Shackelford*, 35 Miss. 321, 359; *Clement's Appeal*, 49 Conn. 519, 538; *Galloway v. McPherson*, 76 Mich. 318.

⁵ *Jones v. Ward*, 10 Yerg. 160; *Van Houten v. Post*, 32 N. J. Eq. 709, 710; *Moody v. Hemphill*, 71 Ala. 169. See also *Miller v. Lux*, 100 Cal. 609, charging compound interest on unauthorized payments as family allowance.

⁶ *Julian v. Wrightsman*, 73 Mo. 569, 572.

⁷ *Garesché v. Priest*, 9 Mo. App. 270, 274. In *Wyckoff v. Van Siclen*, 3 Dem. 75, an executor was held liable for *devastavit*, but, having acted in good faith, was not charged with interest.

§ 512. Debts of Executor or Administrator to be charged. —

The liability of executors and administrators for debts due by them to the deceased, and the principle upon which and the extent to which they become assets have been discussed in an earlier chapter.¹ It results from what is there stated, that it is the duty of the accountant to charge himself with all debts owing by him to the deceased and remaining unpaid, and that he is accountable to the creditors, heirs, and devisees or distributees, either as for so much ready cash, or as for debts owing to the estate by strangers, according to the law of the respective States.² But he is not bound to charge himself [*1140] with a *debt for which he is only contingently liable, nor with a debt owing, not to the deceased, but to his former representative.³

All debts due by the accountant must be charged.

It was also mentioned, that in some of the States, the courts of which do not favor the fiction of law according to which the administrator's liability to the deceased is converted into ready cash, the administrator may defend against his official liability by showing that at the time of the grant of letters to him he was, and until the time of final settlement remained, insolvent.⁴

May show that he is insolvent,

That an executor or administrator is entitled to show that a claim of the testator or intestate against him is unjust, or has been paid or discharged, seems self-evident, and has been held in several cases.⁵ So, also, that the Statute of Limitation may be invoked by him, but does not run in his favor during his term of office.⁶ The administrator's debt carries interest from its maturity, which must be charged in his account, like interest on other cash assets.⁶

or that he has paid, or does not owe the debt,

or that it is barred by limitation.

Such debt carries interest from maturity.

It has been held that the presumptive payment of the [*1141] debt, in *consequence of the debtor being appointed executor or administrator of the creditor, does not operate to discharge a lien upon real estate by which the debt is secured, or so as to give subsequent encumbrancers priority.⁷

¹ *Ante*, § 311.

² See also *Raab's Estate*, 16 Oh. St. 273, 283; *Tracy v. Card*, 2 Oh. St. 431, 448; *Bigelow v. Bigelow*, 4 Ohio, 138; *Wilson v. Rose*, 3 Cr. C. C. 371; *Baucus v. Stover*, 89 N. Y. 1.

³ *Shields v. Odell*, 27 Oh. St. 398.

⁴ *Everts v. Everts*, 62 Barb. 577, 582; *Black v. White*, 13 S. C. 37; *Wood v. Tallman*, 1 N. J. L. 153; although inventoried: *Lynch v. Divan*, 66 Wis. 490; *Simms v. Guess*, 52 Ill. App. 543; but if inventoried without comment, the onus is

on the administrator: *Dickie v. Dickie*, 80 Ala. 57. See also to the effect of inventorying his own note: *Young v. Thrasher*, 48 Mo. App. 327.

⁵ *Wilson v. Rose*, 3 Cr. C. C. 371.

⁶ *Calvert v. Holland*, 9 B. Mon. 458, 462; *Ackerman's Case*, 40 N. J. Eq. 533; *Rodenbach's Appeal*, 102 Pa. St. 572. But an administrator cannot be charged with eight per cent interest because he is indebted to the estate and realized that rate on his own money: *Grant v. Edwards*, 92 N. C. 442.

⁷ *Soverhill v. Suydam*, 59 N. Y. 140,

§ 513. **Rents and Proceeds of Real Estate Chargeable to the Executor or Administrator.** — The liability of executors and administrators in respect of the real estate of their testators or intestates has been considered and discussed in various aspects.¹ The anomalous condition of the law in most of the States, creating an artificial distinction between real and personal property belonging to estates of deceased persons, gives rise to many exceedingly technical rules, the reasons for which have long ago ceased to exist in England and never existed in America,² and to contradictory, vacillating, and arbitrary decisions, creating confusion and uncertainty as

The accountant must charge himself with all rents from property lawfully in his charge.

to the rights and duties of all parties interested in such questions. It may, however, be laid down as a universal rule, that whenever an executor or administrator comes into the possession of real estate by virtue of his office, whether by force of statute, by order of the court, or under the terms of a will, he must charge himself with all rents, profits, and proceeds of sale arising therefrom.³ But if he collects rents or receives proceeds of sale, not in the exercise of his official functions, yet under color of his office, — that is, if he assumes control of the real estate as executor or administrator when not authorized by statute, order of court, or direction in the will, — he is clearly liable to those whose rights he has usurped. It is not always easy to determine whether, in such case, he is liable in his official capacity, so that the rents, profits, or proceeds of the real estate constitute an element of his administration account, or to the heirs or devisees directly; in which case the remedy of the latter would not be in the probate court, nor the transaction be brought into the official account. There are many au-

He should charge himself with all rents received *virtute officii*,

thorities both ways. * It would seem to be [* 1142] safe to hold him to account in his official capacity whenever such accounting is demanded by all the parties adverse in interest, because he cannot be heard to allege his own wrong to shield himself from

142; *Kinney v. Ensign*, 18 Pick. 232, 236; *Crow v. Conant*, 90 Mich. 247.

¹ *Ante*, §§ 276, 277, in respect of property to which the personal representative is entitled; § 314, as to the distinction between real and personal assets; § 337, giving the States in which the real estate goes to the personal representative by statute; § 300, discussing the subject of rents as assets; § 344, concerning the administrator's duties in the management of real estate.

² See chap. ii. of the Introduction.

³ *Stiver v. Stiver*, 8 Ohio, 217, 220; *Stagg v. Jackson*, 1 N. Y. 206, 212; *Smith*

v. King, 22 Ala. 558, 561; *Henderson v. Simmons*, 33 Ala. 291, 298; *Chenery v. Davis*, 16 Gray, 89; *Burns v. Cox*, 10 Phila. 8; *per Haskell, J.*, in *Brown v. Fessenden*, 81 Me. 522; *Washington v. Block*, 83 Cal. 290; *In re Missamore*, 90 Cal. 169. And if under a testamentary power he sells in bad faith for less than the real value, he is accountable for the difference in the probate court: *Brown v. Reed*, 56 Ohio St. 264; so also where an administrator sells for less than he is offered by others: *Johnson v. Johnson*, 72 Mo. App. 386.

liability;¹ and he cannot defeat an action by the heirs for rents or other profits collected by him under color of his office, on the ground of his liability to account in the probate court.² On principle, it would seem to follow from the administrator's liability to the heirs or devisees directly, as a wrong-doer or trespasser, or as their agent or trustee, *dehors* his official status, that he is not liable in his official capacity, and therefore not chargeable in his administration account with the profits, rents, or proceeds of sale of real estate;³ and it is accordingly held in many cases that the probate court has no jurisdiction to try the liability of the executor or administrator in respect of real estate not legally in his charge,⁴ and that the sureties of the administrator are not bound for the funds so collected.⁵ *A fortiori*, a creditor cannot hold an administrator liable for rents or proceeds of real estate not legally taken charge of by him,⁶ although he may be liable for negligence in failing to collect rents when it is his duty to do so, or for not obtaining an order to sell or take charge of real [* 1143] estate;⁷ * and the liability of the administrator to the

but is also liable to heirs if he is not in lawful possession.

Not liable in some States to account in the probate court.

¹ Conger v. Atwood, 28 Oh. St. 134, 140; Kathman v. Markson, 34 Kans. 542, 549; Gamage v. Bushell, 1 Mo. App. 416, 418, approved in Hartnett v. Fegan, 3 Mo. App. 1, 3; Gamble v. Gibson, 59 Mo. 585, 594; Crowder v. Shackelford, 35 Miss. 321, 358; *In re* Boyd, 4 Redf. 154, 156; Terry v. Ferguson, 8 Port. 500; Dix v. Morris, 66 Mo. 514.

² Rodman v. Rodman, 54 Ind. 444, 447; Boynton v. Peterborough R. R. Co., 4 Cush. 467; Stoner v. Zimmerman, 21 Pa. St. 394; McClead v. Davis, 83 Ind. 263.

³ Head v. Sutton, 31 Kans. 616, 620; Lucy v. Lucy, 55 N. H. 9; Hankins v. Kimball, 57 Ind. 42; Goodrich v. Thompson, 4 Day, 215, 221; Ball v. First Nat. Bank, 80 Ky. 501, 505; Levy's Estate, Tuck. 148; Calhoun v. Fletcher, 63 Ala. 574, 581; *In re* Vandervoort, 1 Redf. 270; Reynolds v. Canal Co., 30 Ark. 520, 525; Newcomb v. Stebbins, 9 Met. 540; Schwartz's Estate, 14 Pa. St. 42, 47; Walker's Appeal, 116 Pa. St. 419.

⁴ Lucy v. Lucy, *supra*; Calyer v. Calyer, 4 Redf. 305; Terry v. Bale, 1 Dem. 452, 454; Belcher v. Branch, 11 R. I. 226, 229; *In re* Blauvelt, 131 N. Y. 249, 254; Matter of Blow, 2 Connoly, 360.

⁵ Haslage v. Krugh, 25 Pa. St. 97 (in this case a tenant was held liable to the heirs for use and occupation, although he

held under a lease from the administrator and paid the rent, which was applied in the payment of debts of the estate: p. 99); McCoy v. Scott, 2 Rawle, 222; Gregg v. Currier, 36 N. H. 200; Hutcherson v. Pigg, 8 Gratt. 220; State v. Barrett, 121 Ind. 92, 98; Brown v. Fessenden, 81 Me. 522, in which Haskell, J., says: "Rents do not belong to the executor or administrator, and are not assets that he is required to administer or account for, within the condition of his bond." See also Young v. People, 35 Ill. App. 363; McPike v. McPike, 111 Mo. 216, 233; Guthmann v. Vallery, 51 Neb. 824.

⁶ The administrator is not estopped from showing that the rents in his hands are not assets, although he has used part of such rents in payment of debts: Griffith v. Beecher, 10 Barb. 432; McPike v. McPike, 111 Mo. 216 (at common law), 225; Estate of Burnell, 13 Phila. 387; Bucher v. Bucher, 86 Ill. 377, 381; Fike v. Green, 64 N. C. 665, 667, citing earlier cases; Kinsler v. Holmes, 2 S. C. 483. But see Tyler v. Priest, 31 Mo. App. 271, 283.

⁷ Eppinger v. Canepa, 20 Fla. 262, 287; Vaughn v. Deloatch, 65 N. C. 378; Haines v. Price, 20 N. J. L. 480, 486; Clark v. Knox, 70 Ala. 607, 623; Wilson v. Bynum, 92 N. C. 717, 724.

heir is not affected by the application of the rents and profits to the payment of debts of the estate,¹ or by the insolvency of the estate, if the land has not been legally subjected to the administrator's control;² nor will the rights of the heirs to rents collected or accrued be affected by subsequent orders of the probate court directing the administrator to collect the rents.³

In Massachusetts, it is held that under the statute of that State the executor or administrator is bound to account in the probate court for rents of real estate received by him from the time of the death of the testator, and his failure to account for and pay over the same is a breach of the bond for which he and his sureties are liable.⁴ A similar conclusion is reached in Missouri, where it is held that an executor is liable in his official capacity for rents collected by him with the consent of the heirs, although collected without an order of court, and such rents were not necessary for the payment of debts;⁵ and in North Carolina, where it is held that, if an administrator possess himself of rents, they constitute a part of the estate, and are liable to the claims of the creditors of the deceased.⁶ In Vermont, apparently, the executors were entitled for one year to collect the rents of a specific devise, and account for the same like personalty.⁷ In Ohio, a widow entitled to possession of the mansion-house, the rent of which was collected by the administrator, may hold him liable in his personal or representative capacity at her election.⁸ It has already been mentioned, that, where realty is by will required to be converted into personalty, the executor must account for the same as personalty.⁹

It is held in Nebraska that since a lease by a life-tenant is terminated by his death, his administrator has no right to collect rent maturing subsequently, although the lessee had given a promis-

¹ *Kimball v. Sumner*, 62 Me. 305; *McClead v. Davis*, 83 Ind. 263, 265. Hence an administratrix cannot defend against an action by the heirs for rent collected by her, on the ground that she has an unpaid claim against the deceased: *Bakes v. Reece*, 150 Pa. St. 44.

² *Gibson v. Farley*, 16 Mass. 280, 287; *ante*, § 300.

³ *Bealey v. Blake*, 70 Mo. App. 229, 236. To similar effect, *Howard v. Patrick*, 38 Mich. 795, 802; and see *ante*, § 300, on this point.

⁴ But not for rents collected by him after his removal from office: *Brooks v. Jackson*, 125 Mass. 307, 310, citing earlier Massachusetts cases. Income from the realty received by the executors is assets; hence the products of a farm occupied by

one of two executors, who is also sole devisee, for the benefit of the estate, cannot be attached as property of the devisee: *Brigham v. Elwell*, 145 Mass. 520. An executor erroneously charging himself with rents to which he is entitled as devisee may have the mistake corrected: *Brown v. Baron*, 162 Mass. 56, holding that the presumption is that he collects as devisee, and not as executor.

⁵ *Gamble v. Gibson*, 59 Mo. 585, 594; *Lewis v. Carson*, 93 Mo. 587.

⁶ *Jennings v. Copeland*, 90 N. C. 572, 579.

⁷ *Allen v. Tarbell*, 65 Vt. 150.

⁸ *Conger v. Atwood*, 28 Oh. St. 134, 143.

⁹ *Ante*, § 339.

sory note payable to the life-tenant for the same; and that if the administrator collected such note on its maturity, though given for rent including a period after the life-tenant's death, which would therefore enure to the reversioner, he is not liable to such reversioner, though he had converted the money to his own use.¹

¹ *Guthmann v. Vallery*, 51 Neb. 824.

* CHAPTER LVI.

[* 1144]

OF THE CREDIT SIDE OF THE ACCOUNT.

§ 514. **What the Accountant may take Credit for.** — As a general rule, it may be stated that executors and administrators are allowed, as proper credits in their accounts, all disbursements made in good faith for any liability of the estate, either arising in the course of the administration, or existing against the deceased at the time of his death, and paid in the manner prescribed by the law. It has been mentioned elsewhere,¹ that expenses of administration are necessarily entitled to payment before the debts of the deceased, because they are incurred for the very purpose of securing the payment of the debts;² hence the administrator is entitled to credit, whether the estate is sufficient to pay all debts or not, for all outlays to pay funeral expenses,³ taxes assessed against property in his charge,⁴ expenses in recovering the estate,⁵ costs accrued in defending the estate against the claims made thereto by others,⁶ and for labor necessary in perfecting a crop credited to the estate,⁷ and expenses incident thereto,⁸ or expenditures in preserving the estate,⁹ as well

Credit may be taken for all disbursements necessary in the administration.

¹ *Ante*, §§ 356, 362.

² *Nimmo v. Commonwealth*, 4 Hen. & M. 57, 68; and see assignment of errors adopted as embodying the law by Roane, J., in delivering his opinion: p. 60.

³ See *ante*, §§ 357–360, and authorities; *Crapo v. Armstrong*, 61 Iowa, 697; *In re Miller*, 4 Redf. 302, 304; *Allen v. Allen*, 3 Dem. 524; *Spire v. Lovell*, 17 Ill. App. 559. But not if the funeral expenses were reimbursed from another source: *Estate of Hyneman*, 11 Phila. 135; nor a husband for the funeral of his wife: *Staples's Appeal*, 52 Conn. 425; but see *ante*, § 358, showing that this is not the universal rule.

⁴ *Nimmo v. Commonwealth*, 4 Hen. & M. 57, 68; *Dugan's Estate*, Tuck. 338; *Estate of Mogan*, Myr. 80; *Whittaker v. Wright*, 35 Ark. 511, 515; *People v. Olvera*, 43 Cal. 492. The subject of the representative's duties and rights with

reference to taxes on personal property has been referred to *ante*, § 329; and with reference to taxes on the real estate, see *post*, § 518.

⁵ *Nimmo v. Commonwealth*, *supra*; *Hapgood v. Jennison*, 2 Vt. 294, 298; *Bowers v. Williams*, 34 Miss. 324, 325.

⁶ See as to allowance for costs, *post*, § 517; as to their priority over other debts, see *ante*, § 362.

⁷ *Nimmo v. Commonwealth*, *supra*; *Lee v. Lee*, 6 Gill & J. 316, 320; *Byrd v. Wells*, 40 Miss. 711, 717; *Wattles v. Hyde*, 9 Conn. 10, 15; *Succession of Wederstrandt*, 19 La. An. 494. See *ante*, § 328.

⁸ *Bomford v. Grimes*, 17 Ark. 567, 572; *Bantz v. Bantz*, 52 Md. 686, 696; *Edelen v. Edelen*, 11 Md. 415, 424; *Myrick's Estate*, 81 La. An. 611.

⁹ *Smith's Estate*, 118 Cal. 462; *ante*, § 329.

as for feeding and keeping stock belonging to the estate.¹ [* 1145] But a direction in the will to raise crops does * not authorize the purchase of brood mares, slaves, etc., at the expense of the estate, nor of a suit of clothes for the executor.²

Unless the statute in terms so provides, an administrator or executor will not be entitled to charge the estate with money which he paid a surety corporation or trust company for becoming surety on his bond.³

Premium paid for bond.

There is some diversity in the allowance of some of the expenses connected with the administration, arising partly out of the different methods of making compensation to the executor or administrator. It has been held that a reasonable amount for office rent and the assistance of an agent in the transaction of the business of the estate is allowable.⁴ It is proper to employ an agent for the performance of services requiring appliances or a degree of skill not within the command of ordinary persons, and the reasonable expenses of such agents are a proper charge against the estate;⁵ such, for instance, as a broker to sell real estate in cases requiring unusual exertion,⁶ or an auctioneer;⁷ so, also, expenses of advertising;⁸ but refreshments furnished to those present at a sale have been disallowed.⁹ Travelling expenses actually paid, when necessary in the transaction of the business of the estate, will be allowed,¹⁰ unless they are included in the commissions.¹¹ But items similar to these are not allowed in some States, as will be more particularly mentioned hereafter.

Credit has been allowed for office rent; skilled or professional assistance necessary,

e. g. broker to sell real estate,

or auctioneer;

expenses of advertising;

travelling expenses.

§ 515. **What Counsel Fees will be allowed.** — It is the duty of every executor or administrator to take the advice of competent counsel learned in the law on every question which affects his duty as such, on which he is in doubt.¹² Hence, reasonable fees for

¹ *Branham v. Commonwealth*, 7 J. J. Marsh. 190.

² *Johnson v. Henagan*, 11 S. C. 93, 116, *et seq.*

³ *Eby's Estate*, 164 Pa. St. 249.

⁴ *Glover v. Holley*, 2 Bradf. 291, 294; *Hawley v. Singer*, 3 Dem. 589, 596; *Clarke v. Blount*, 2 Dev. Eq. 51, 54, 58; *Whitted v. Webb*, 2 Dev. & B. Eq. 442, 451; *McWhorter v. Benson*, Hopk. 23, 34.

⁵ *Henderson v. Simmons*, 33 Ala. 291, 299; *Wendell v. French*, 19 N. H. 205.

⁶ *Dey v. Codman*, 39 N. J. Eq. 259, 262; *Estate of Ballentine*, Myr. 86; *Jacobs v. Jacobs*, 99 Mo. 427.

⁷ *Pinckard v. Pinckard*, 24 Ala. 250, 258; *Garrett v. Garrett*, 2 Strobb. Eq.

272, 281; *Shepard v. Shepard*, 19 Fla. 300, 332.

⁸ *Shepard v. Shepard*, *supra*; *Reynolds v. Reynolds*, 11 Ala. 1023.

⁹ *Griswold v. Chandler*, 5 N. H. 492, 498.

¹⁰ *Clarke v. Blount*, 2 Dev. Eq. 51, 54, 58; *Pinckard v. Pinckard*, 24 Ala. 250, 258; *Wendell v. French*, 19 N. H. 205, 209; *Dey v. Codman*, 39 N. J. Eq. 259, 265; *Ladd v. Stephens*, 48 S. W. (Mo.) 915. So of the travelling expenses of the administrator's attorney: *Rose's Estate*, 80 Cal. 166, 179.

¹¹ *Stephenson v. Stephenson*, 3 Hayw. 123, 124.

¹² See *ante*, § 384.

Reasonable
counsel fees
paid in good
faith are
allowed.

such services, paid in good faith, are proper items of credit in the administration account, and will be allowed for legal assistance in resisting claims against the estate which the administrator does not know

* to be just and lawful,¹ or in assisting him in discharging [* 1146] his official duties,² such as settling the estate in equity when necessary,³ collecting the assets, if a suit be necessary,⁴ preparing the account,⁵ or defending the settlement.⁶ The circum-

Contingent fee
may be stipu-
lated.

stances may be such as to justify the administrator in contracting to pay a percentage contingent on the amount of recovery by the estate,⁷ and therefore estimated at a larger figure than would be proper when the compensation is certain and enforceable in any event.⁸ It has been decided

Testator can-
not select at-
torney for
executor.

that the selection of counsel cannot be controlled by a testator; that the provision in a will nominating and appointing a person by name as "advisory and counsel"

to assist the executor in winding up the business of the estate, is not binding upon the executor; and that he may employ other counsel, whose reasonable fees will be allowed out of the estate, or act without counsel.⁹

The rule is, that the administrator can be allowed credit only for counsel fees which he has actually paid,¹⁰ and no more than is

¹ *Fagan v. Fagan*, 15 Ala. 335, 339; *Davis v. Walker*, 2 Harr. 125, 127; *Poin- dexter v. Gibson*, 1 Jones, Eq. 44, 46; *Ammon's Appeal*, 31 Pa. St. 311, 313; *Warden v. Burts*, 2 McCord Ch. 73, 76; *Young v. Brush*, 28 N. Y. 667; *In re Grout*, 15 Hun, 361; *Eppinger v. Canepa*, 20 Fla. 262, 286; *De Leon v. Barrett*, 22 S. C. 412, 424; *Livermore v. Rand*, 26 N. H. 85, 90; *Portis v. Cole*, 11 Tex. 157.

² *Harris v. Parker*, 41 Ala. 604, 624; *Gilman v. Gilman*, 6 Th. & C. 211, 214; *Wassell v. Armstrong*, 35 Ark. 247, 268; *Sterrett's Appeal*, 2 Pa. R. 419, 426; *Young v. Kennedy*, 95 N. C. 265.

³ *Atcheson v. Robertson*, 4 Rich. Eq. 39, 45; *Bryson v. Nickols*, 2 Hill Ch. 113, 121.

⁴ *Turner v. Tapscott*, 30 Ark. 312, 318; *Spencer v. Strait*, 40 Hun, 463 (allowing costs).

⁵ *Forward v. Forward*, 6 Allen, 494, 497.

⁶ *Jacobs v. Jacobs*, 99 Mo. 427, 436; *Pinckard v. Pinckard*, 24 Ala. 250, 258; *Williamson v. Mason*, 23 Ala. 488, 504; *Sanderson v. Sanderson*, 20 Fla. 292, 342; *In re Levison*, 108 Cal. 450, 458, holding

the administrator entitled to credit for fees paid for his defence where the charges of misfeasance against him were false. But see *Burr v. McEwen*, *Baldw.* 154, 163, denying reimbursement for professional services in defending an account, although perfectly fair.

⁷ *Mackie v. Howland*, 3 Dist. Columbia App. 461. But of course the administrator cannot create a lien on the estate's property for such services: *ante*, § 356, note.

⁸ *Filbeck v. Davis*, 8 Colo. App. 320, 323; *Pike v. Thomas*, 47 So. W. (Ark.) 110, 112.

⁹ *Young v. Alexander*, 16 Lea, 108; *In re Ogier*, 101 Cal. 381.

¹⁰ *Bates v. Vary*, 40 Ala. 421, 441; *Succession of Holbert*, 3 La. An. 436; *Thacher v. Dunham*, 5 Gray, 26; *Estate of Donnelly*, 3 Phila. 18. But see *In re Coutts*, 87 Cal. 480, 482, and *Pennie v. Roach*, 94 Cal. 515, which seem to hold that the probate court has jurisdiction to determine whether such charges are proper, upon notice to all interested, before actual payment has been made.

a reasonable compensation for the services rendered to the estate, no matter what the administrator have actually paid or contracted to pay;¹ and the onus to prove the necessity and value of such services is on the administrator.² Compensation for legal services rendered by the executor or administrator in person is not usually allowed,³ unless it be extra compensation as is provided for by statute in some States.⁴ Hence he cannot claim credit for legal services rendered to the estate by a law firm of which he is a member.⁵

Onus of proof is on the administrator to show that fees were paid, and were reasonable.

Legal services rendered by himself.

In New York, counsel fees constitute taxable costs of litigation, and it is there held to be error to allow the administrator credit for a gross sum as counsel fees, taxable costs only being allowable.⁶ In Arkansas, also, there are statutory provisions seeking to regulate the amount to be allowed for attorney's fees out of the estate.⁷ But it is evident that, where the subject is not regulated by statute, justice requires that counsel fees actually paid in good faith should be allowed, although [*1147] in excess of amounts allowed by *law, if the excess be not of such magnitude as to show negligence in the administrator.⁸ So, where several counsel are employed, credit should not

Counsel fees taxable as costs.

¹ Thomas v. Moore, 52 Oh. St. 200, 206; Succession of Macarty, 3 La. An. 517, citing earlier Louisiana cases to same effect; Porche v. Banks, 8 La. An. 65; Fairbairn v. Fisher, 5 Jones Eq. 385, 387; In re Moore, 72 Cal. 335, 342.

² St. John v. McKee, 2 Dem. 236; Munden v. Bailey, 70 Ala. 63, 70.

³ Kuhn's Appeal, 4 Wash. 534; Collier v. Munn, 41 N. Y. 143 (in which the co-executor had requested such services); Hough v. Harney, 71 Ill. 72. It is so provided by statute in Indiana: Pollard v. Barkeley, 117 Ind. 40. But see the remarks of Bird, J., in Bates v. Vary, *supra*, intimating that professional services performed by an administrator, which are not within the scope of his duty, will be allowed; and see authorities to same effect, *post*, § 529, p. *1169.

⁴ On which point see *post*, § 529, p. *1169, note.

⁵ Taylor v. Wright, 93 Ind. 121, 126; Parker v. Day, 155 N. Y. 383, holding, however, that the executor may as an individual employ his co-partner, as an individual, to do the work outside of, and independent of, the co-partnership, if the executor is entirely excluded from all participation in the compensation, and that

such a contract will bind the executor personally.

⁶ Reed v. Reed, 52 N. Y. 651, 652, citing earlier New York cases; Seaman v. Whitehead, 78 N. Y. 306, 309; Hawley v. Singer, 3 Dem. 589, 596.

⁷ These curious statutes provide that no fee shall be allowed except for prosecuting or defending a suit, under the direction of the court, and provide a per centum rate of compensation of from eight down to two and one half per centum (according to the amount) "on all sums,"—presumably the amount involved: Rev. St. 1887, §§ 217-219. These provisions seem to be unsatisfactory, and the wisdom thereof doubtful. The reason of their enactment is set forth in Turner v. Tapscott, 30 Ark. 312, 320 (holding that the court could make an allowance, though no previous order of court had been asked); and held to be inapplicable in a suit by the attorney for his fee: Tucker v. Grace, 61 Ark. 410; and to attorney's fees in claims against the government, or other extraordinary litigation: Pike v. Thomas, 47 So. W. (Ark.) 110, 112.

⁸ Lindsay v. Howertson, 2 Hen. & M. 9; Noel v. Harvey, 29 Miss. 72, 78; Holmes v. Holmes, 28 Vt. 765, 769.

be allowed for the fees of more than one.¹ The proper amount to be allowed is, of necessity, largely within the discretion of the probate court.²

The same principle, as will appear further on, is applicable to the question of other costs incurred in litigation; the executor is to be allowed all costs necessarily paid by him in the prosecution or defence of actions in behalf of the estate, in good faith; and his right to credit for either counsel fees or costs does not depend upon the favorable issue of the litigation, but only upon good faith and prudence in prosecuting or defending.³

§ 516. What Counsel Fees will not be allowed.—The right of the administrator to reimbursement for counsel fees and costs of litigation depends upon his prudence and good faith in incurring the expenditure for the benefit of the estate. Hence he cannot be allowed credit for such outlays when they were occasioned by his own fault, neglect, or gross ignorance;⁴ as where he does not follow the advice of his counsel and fails to show a satisfactory reason for not doing so,⁵ or brings an action under circumstances under which no prudent man would have done so;⁶ nor where they are made for the personal benefit of the administrator.⁷ This principle involves that the administrator cannot be allowed the costs and counsel fees incurred in resisting proper charges against him,⁸ or in defending against a suit brought against him to recover or secure the trust fund, [* 1148] if the complainant was justifiable in bringing such suit,⁹ or for services rendered in defence of the personal interest of the administrator,¹⁰ or for services

¹ Crowder v. Shackelford, 35 Miss. 321, 362; and see also Sparrow's Succession, 40 La. An. 484, 492, to same effect.

² Schmidt's Estate, 185 Pa. St. 579, 585.

³ This subject is treated *post*, § 517.

⁴ O'Reilly v. Meyer, 4 Dem. 161; Fagan v. Fagan, 15 Ala. 335, 340; Aldridge v. McClelland, 36 N. J. Eq. 288, 292; Robbins v. Wolcott, 27 Conn. 234, 237; Estate of Bradley, 11 Phila. 87, 89; Morrow v. Allison, 39 Ala. 70, 73.

⁵ Munden v. Bailey, 70 Ala. 63, 70.

⁶ Anderson v. Piercy, 20 W. Va. 282, 327; or takes an unwarrantable appeal: Switzer v. Kee, 69 Ill. App. 499.

⁷ Stephens's Appeal, 56 Pa. St. 409, 413; Sherman v. Angel, 2 Hill Ch. 26; Withers's Appeal, 13 Pa. St. 582, citing earlier Pennsylvania cases; Villard v. Robert, 1 Strobb.

Eq. 393; Estate of Chinmark, Myr. 128; Robbins v. Robbins, 1 S. W. R. (Ky.) 152.

⁸ Anderson v. Anderson, 37 Ala. 683, 687; Moses v. Moses, 50 Ga. 10, 33; Beatty v. Trustees, 39 N. J. Eq. 452; Allen v. Royster, 107 N. C. 278; Taylor v. Minor, 90 Ky. 544. Nor for resisting unreasonably a proper application for bond, &c.: Matter of O'Brien, 145 N. Y. 379.

⁹ Lilly v. Griffin, 71 Ga. 535, 540, citing earlier Georgia cases.

¹⁰ *Ex parte* Allen, 89 Ill. 474; Estate of Stott, Myr. 168; Heister's Appeal, 7 Pa. St. 455; May v. Green, 75 Ala. 162, 166. Where a portion of such services are for the benefit of the estate and a portion for the benefit of the executors themselves, the auditing judge may determine what proportion thereof should be charged to the estate: Fox's Appeal, 125 Pa. St. 518.

which the executor or administrator ought to have performed in person.¹ It is obvious, too, that the estate cannot be held liable for the costs or counsel fees arising out of litigation between the beneficiaries thereof among themselves, or in the protection of the interests of particular persons, for such expense is properly chargeable to the interest or persons specially benefited. Thus counsel fees for watching over the interests of heirs or legatees,² prosecuting the widow's right to dower,³ resisting the claim of a pretermitted heir,⁴ or representing a minor distributee as guardian *ad litem*,⁵ are not proper items of credit in an administrator's account; nor are the fees of an attorney employed by the heirs, or a portion of them, to contest the settlement⁶ or hasten the administration;⁷ nor can the estate be charged with any part of the fees of an attorney who is employed by one of the creditors or beneficiaries, though thereby a fund is realized which is distributable among all the creditors or beneficiaries.⁸ It also results from the principle stated — according to which no credit can be allowed for expenditures, whether counsel fees, costs, or other disbursements, not growing out of the administration of the estate — that the administrator has no right to use the funds of the estate to prosecute his intestate's murderer,⁹ though the object be the vindication of decedent's moral character;¹⁰ or to maintain ejectment for the benefit of the heirs¹¹ or for any purpose not shown to be necessary and proper in the administration.¹²

or for services which he ought to have performed himself;

or for costs or counsel fees in litigation among the beneficiaries of the estate themselves.

It frequently happens that counsel fees are charged in gross for legal advice and services in a contest on final settlement, in which exceptions taken are in part sustained and in part overruled. In such cases the administrator should
[* 1149] * demand an itemized account from his attor-

Charges of counsel not allowed in gross,

¹ Edwards v. Crenshaw, Harp. Eq. 224, 233; Estate of Ballentine, Myr. 86; Pullman v. Willets, 4 Dem. 536; *In re Moore*, 72 Cal. 335, 342; Steel v. Holloday, 20 Oreg. 462, 469.

² Kingsland v. Scudder, 36 N. J. Eq. 284, 287; Succession of Hughes, 14 La. An. 863; Estate of Marrey, 65 Cal. 287; Miller v. Simpson, 2 S. W. R. (Ky.), 171, 175; Brandon v. Hoggatt, 32 Miss. 335, 341.

³ Pinckard v. Pinckard, 24 Ala. 250, 259. So the costs of setting aside an election of dower fraudulently obtained, must be paid out of the share of those who improperly obtained the election: Sill v. Sill, 39 Kan. 189, 192.

⁴ Jessup's Estate, 80 Cal. 625.

⁵ Pinckard v. Pinckard, *supra*.

⁶ Contribution by all interested in the

estate can be enforced in equity only: McPaxton v. Dickson, 15 Ark. 97, 100, *et seq.* And in Maryland "counsel fees for resisting the claim of an administrator against the estate will not be allowed the contestant out of the estate: Bell v. Funk, 75 Md. 368.

⁷ And an order of court directing the fee in such case to be paid out of the estate is void: Stuttmeister's Estate, 75 Cal. 346.

⁸ Rives v. Patty, 74 Miss. 381.

⁹ Lusk v. Anderson, 1 Met. (Ky.) 426, 429. See also Alexander v. Alexander, 120 N. C. 472, 474.

¹⁰ Woodard v. Woodard, 36 S. C. 118.

¹¹ Reynolds v. Canal Co., 30 Ark. 520.

¹² Johnson v. Henagan, 11 S. C. 93,

but must show how much for each item. ney, so as to show the charge on each item of the exceptions, and enable the court to distinguish between them.

For it would be unjust to deny the administrator credit for fees paid in defence of his account when unjustly assailed; and equally unjust to impose upon the estate the cost of defending erroneous or improper charges by the administrator. If the claim be for a gross amount, including charges for all services indiscriminately, the court should reject it;¹ but if it be ascertainable how much is chargeable to the estate and how much the administrator must himself pay, the court will distinguish between the charges, and allow such amounts as may be just.²

§ 517. Costs, including Probate and Establishing the Right to Administer. — An executor or administrator bringing suit in the interest of the estate in his charge does not thereby render himself liable for costs incurred, so long as he acts in good faith and in the discharge of his official duty.³ But if he sues without reasonable cause, or for the purpose of vexing or harassing the defendant, he will be held personally liable for costs.⁴ Where suit is brought on a cause of action accrued after the death of the testator or intestate, the ordinary rule applies which makes the unsuccessful party liable for costs, and the executor or administrator, if he fails in the action brought by him, is personally liable.⁵ On a cognate theory a distinction has been

No liability for costs incurred in good faith.

Rule as to costs in actions accrued after appointment.

¹ *Morrow v. Allison*, 39 Ala. 70, 73, citing earlier Alabama cases: *Smyley v. Reese*, 53 Ala. 89, 100; *Brandon v. Hoggatt*, 32 Miss. 335, 341; *Steel v. Holladay*, 20 Oreg. 462 (announcing such as the rule, but excepting the case from its operation), 467.

² *Price's Estate*, 81 Pa. St. 263, 272; *Edelen v. Edelen*, 11 Md. 415, 422; *Pinckard v. Pinckard*, 24 Ala. 250, 259; *Meeker's Estate*, 45 Mo. App. 186; *Clement's Appeal*, 49 Conn. 519, 530; *Robbins v. Robbins*, 1 S. W. R. (Ky.) 152.

³ Says the Supreme Court of Illinois in *McKay v. Riley*, 135 Ill. 586, 590: "The administrator acted in good faith and for what he deemed to be the best interest of the estate, and costs should therefore only have been adjudged against him as administrator to be paid in due course of administration." — "Ordinarily an administrator is not personally liable for costs incurred in the settlement of the estate": *Cuppy v. Hoffmann*, 82 Iowa, 214; *Wiesman v. Town*, 83 Wis. 550.

See list of cases in 4 American & Eng. Cycl. of Law, p. 316, note 3.

⁴ *Show v. Conway*, 7 Pa. St. 136; "If an executor or administrator wantonly bring a wrongful action, or is guilty of any other wilful default, he may incur liability for costs": *Hutchcraft v. Gentry*, 2 J. J. Marsh. 499, 501; "ordinarily," says Chancellor Kent, "executors and other trustees do not pay costs, unless guilty of misbehavior or some wilful default": *Getman v. Beardsley*, 2 John. Ch. 274, 276. See also *Stevens v. R. R. Co.* 103 Cal. 252 (under the Cal. statute).

⁵ *Lynch v. Webster*, 17 R. I. 513, 515, citing and approving *Hardy v. Call*, 16 Mass. 530, and mentioning a number of later cases from Massachusetts, New York, Pennsylvania, New Hampshire, Kentucky, and South Carolina (on pp. 515 *et seq.*); "When he sues in the right of the testator," says Danforth, J., in the case of *Buckland v. Gallup*, 105 N. Y. 453, 456, "he pays no costs, because the law does not presume him to be suffi-

recognized between *costs*, in the technical sense, for which the executor or administrator, acting officially, is not, and the *fees* to the officers rendering service for which he is, primarily, liable.¹

The rule is substantially the same, when the executor or administrator is defendant in his official character. He is entitled to court costs attending the administration in all *bona fide* litigation,² but where a suit is occasioned by his negligence or bad faith, or a just demand is unreasonably resisted, the estate will not be charged with the costs.³ It may be stated, as a general rule of law, and one always applied in equity, unless restrained by some statutory provision, that an administrator or executor, having acted in good faith and with ordinary prudence, is entitled to be credited in his administration account for all costs he may have been compelled to pay in litigation affecting the estate in his charge.⁴ And his right to credit therefor does not depend upon the favorable issue of the litigation, but only upon good faith in prosecuting or defending.⁵ A favorable issue in the first instance, however, is decisive that the proceeding was not groundless.⁶ The rule relating to credit for counsel fees taxed as costs has been mentioned heretofore.⁷ The principle upon which costs of litigation connected with the administration, or payable out of the estate, are chargeable, differs in no material particular from the rule relating to counsel fees. Great stress is laid in some States upon a strict adherence to the statutory regulation of officers' fees, and administrators are not allowed credit for any amount they may have paid in excess of these, although so taxed by the judge of the court before whom the proceeding was had.⁸ As with reference to counsel fees, so in regard to costs, they

ciently cognizant of the nature and foundation of the claims he has to assert, and in all these cases it is necessary for him to sue in his representative character, and expressly to name himself executor. But if he may bring the action in his private capacity " (as he may for an injury to the property, or its conversion after the decedent's death, or upon a contract made with an executor or administrator personally), " then, if he fails, he is liable for costs."

¹ *Musser v. Good*, 11 Serg. & R. 247, 249.

² *Bendall v. Bendall*, 24 Ala. 293, 298, *et seq.*

³ *Jones v. Deyer*, 16 Ala. 221, 228; *Glen v. Fisher*, 2 Johns. Ch. 33, 35.

⁴ "After payment, he may charge the amount in his account of administration, to be allowed or not, as it may appear to the judge of probate that the suit was

discreet or otherwise"; *Hardy v. Call*, 16 Mass. 530, 532. In *Mackey v. Ballou*, 112 Ind. 189, 202, the administrator was allowed credit for costs paid in defending a claim, though the property in litigation had been held not [to belong to the estate, and the costs had been assessed against him personally. See also *Clapp v. Coble*, 1 Dev. & B. Eq. 177, 181; *Collins v. Moxie*, 9 Paige, 81, 86; *Bartlett v. Filz*, 59 N. H. 502.

⁵ *Anderson v. Piercy*, 20 W. Va. 282, 327; *Moore v. Randolph*, 70 Ala. 575, 585; *Polhemus v. Middleton*, 37 N. J. Eq. 240; *Holman v. Sims*, 39 Ala. 709, 712.

⁶ *In re Miller*, 4 Redf. 302.

⁷ *Ante*, §§ 515, 516.

⁸ *Canfield v. Bostwick*, 21 Conn. 550, 556; *Liddel v. McVickar*, 11 N. J. L. 44, 61; *Pursel v. Pursel*, 14 N. J. Eq. 514, 526; *Shepard v. Shepard*, 19 Fla. 300, 340. So it was held that the fees of

are not allowed credit for such as arise out of suits made necessary by their misconduct,¹ or in which they are not interested in their official capacity.² Where the appellate court rules on the question of costs in the litigation before it, the ruling is final and cannot be affected by the probate court.³

Since executors and administrators usually give bond for faithful administration, and to answer for all damages or liabilities touching their official acts as such, they are not required to give bonds for costs, or on appeal.⁴ And in Kansas the administrator may, in a proper case, sue *in forma pauperis*.⁵

Whether the executor is entitled to credit for the expenses incurred in the litigation to establish a will depends upon circumstances in several directions. In so far as he simply performs a duty, the expenses fairly incurred by him in a contest with the heirs at law are payable out of the estate, whatever be the consequences

Costs necessary in propounding the will for probate will be allowed;

to the successful contestants;⁶ but if he voluntarily assume the burden of a contest which properly belongs to the legatees or devisees, he must look to them, and not to the estate for reimbursement.⁷ It is held to be the duty,⁸ or at least the privilege,⁹ of the person

appraisers, being fixed by statute, the executor will not be allowed for payments in excess thereof, though the estate be a very large one, and a custom prevailed to allow larger fees in such cases; *Matter of Harriot*, 145 N. Y. 540; see also *Fairbanks v. Mason*, 19 R. I. 499; payment of witness fees to a physician in excess of the statutory amount were disallowed in *Re Levinson*, 108 Cal. 450, 457.

¹ *Binion v. Miller*, 27 Ga. 78, 82; *Garr v. Harding*, 45 Mo. App. 618; *Heath's Estate*, 58 Iowa, 36 (holding that the administrator can only be charged with such costs as he wrongfully occasioned), 40; *Sanders v. Peck*, 131 Ill. 398 (holding likewise), 407. "If the executor desires to indulge in litigation as a luxury, he must pay for it": *Warner's Estate*, 130 Pa. St. 359, 365.

² *Axtel's Appeal*, 6 Atl. (Pa.) 560; *Dalrymple v. Gamble*, 68 Md. 156, 163, 166.

³ *Peabody v. Mattocks*, 88 Me. 164; *Haines v. Hay*, 169 Ill. 93.

⁴ *Ross v. Alleman*, 60 Mo. 269.

⁵ *Coal Co. v. Britton*, 3 Kans. App. 292, 295, *et seq.*

⁶ *Per Brinkerhoff, J.*, in *Andrews v. Andrews*, 7 Oh. St. 143, 150; *Hazard v. Engs*, 14 R. I. 5, 8; *Meeker v. Meeker*, 74 Iowa, 352, 359; *Lassiter v. Travis*, 98

Tenn. 330; *Mathis v. Pitman*, 32 Neb. 191, 194; *Heffner's Succession*, 49 La. An. 407.

⁷ *Mumper's Appeal*, 3 Watts & S. 441, 443; *Brown v. Vinyard*, Baily Eq. 460, 462; *Shaw v. Moderwell*, 104 Ill. 64, 70; *Moyer v. Swygart*, 125 Ill. 262, 276.

⁸ *Bradford v. Boudinot*, 3 Wash. 122, 124; *Scott's Estate*, 9 Watts & S. 98, 102; *Hazard v. Engs*, 14 R. I. 5, 8; *Phillips v. Phillips*, 81 Ky. 328, 334; and in Tennessee it was held to be the duty of the executor to defend the probate against an improper attack; *John v. Tate*, 7 Humph. 388; *Lassiter v. Travis*, 98 Tenn. 330. So in California: *In re Whetton*, 98 Cal. 203; while in Pennsylvania it is held that, save under exceptional circumstances, an executor is not bound to defend his testator's will, and if he undertakes to do so, it must be as the agent, and in the interest, of those benefited by his action: *Titlow's Estate*, 163 Pa. St. 35. See *In re McKinney*, 112 Cal. 447, where the court points out the distinction in the executor's duty on an original contest before probate and on a contest after probate once granted.

⁹ *Henderson v. Simmons*, 33 Ala. 291, 299; *Compton v. Barnes*, 4 Gill, 55; *Gilbert v. Bartlett*, 9 Bush, 49, 54.

named as executor in a paper purporting to be a last will, to propound the same for probate in the proper court; but the executor is not bound to become a party to an issue of *devisavit vel non*, unless he be secured for the expenses by the persons interested in the will.¹ But if the terms employed by a testator are so vague or ambiguous as to make it necessary or proper that the opinion of a court be taken as to the proper construction of the will, the costs should be awarded against the residuary fund of the estate.² So where executors defend against a construction militating against the residuary legatees, the costs of such defence ought to be paid out of the residuary [*1150] fund.³ If, therefore, * an administrator or executor incur expense at the request or in the interest of legatees or devisees, in the fruitless attempt to establish a will, the parties are liable therefor, but not the estate.⁴ If the will is established, however, the costs and counsel fees, being chargeable against those who are benefited by the litigation, may be charged against the estate, if it go to the parties so benefited;⁵ otherwise, the executor's remedy is by action for contribution.⁶ So it has been held, that it is not the duty of an administrator to contest the probate of a will, and that counsel fees paid by him in such contest cannot be charged against the estate;⁷ nor, of course, are such expenses incurred by third parties chargeable to the estate, although under agreement to that effect by one who was subsequently appointed administrator.⁸ The right of executors and administrators to reimbursement for counsel fees, expended in good faith, either in establishing or resisting a will, must necessarily depend upon whether the litigation is for the benefit of the estate, or in promotion of the interest of those eventually entitled to the fund.⁹ The right of executors to

but costs of a contest in the interest of legatees or distributees should be paid by them.

¹ Royer's Appeal, 13 Pa. St. 569, 574; Andrews v. Andrews, 7 Oh. St. 143, 152.

² Buchanan v. Lloyd, 64 Md. 306, 313; Beatty v. Trustees, 39 N. J. Eq. 452; ante, near end of section 155.

³ Fidelity Ins. Co.'s Appeal, 99 Pa. St. 443, 460.

⁴ Koppenhaffer v. Isaacs, 7 Watts, 170; Gorton v. Perkins, 63 Md. 589; Brown v. Eggleston, 53 Conn. 110, 117. See Taylor v. Minor, 90 Ky. 544. As to the rule in New York, see Collyer v. Collyer, 110 N. Y. 481.

⁵ Scott's Estate, 9 Watts & S. 98, 102; Mesick v. Mesick, 7 Barb. 120, 124; Mathis v. Pitman, 32 Neb. 191, 194; and in Seebrook v. Fedowa, 33 Neb. 413, costs and attorney's fees of an unsuccessful contestant were taxed against the estate, there being probable cause to contest;

but where probate simply is denied and no right of administration is involved, an unsuccessful proponent cannot have his expenses out of the estate: Clark v. Turner, 50 Neb. 290, 304.

⁶ Koppenhaffer v. Isaacs, *supra*.

⁷ Estate of Parsons, 65 Cal. 240; Dalrymple v. Gamble, 68 Md. 156, 165; Soulard's Estate, 141 Mo. 642, 668.

⁸ Brown v. Eggleston, 53 Conn. 110.

⁹ Sheetz's Appeal, 100 Pa. St. 197, 200; "All the provisions of the code bearing upon the subject of probate contest indicate that good faith and reasonable cause are the things to be inquired into by the court, in the exercise of its discretion to award costs": Henry v. Superior Court, 93 Cal. 569, 572 (holding void an order to pay counsel fees upon the initiation of the contest). See further, *In re McKinney*,

credit for counsel fees paid in maintaining the right to administer has been deduced by analogy from the right to credit for counsel fees expended in the successful defence of a will;¹ but the authorities are not unanimous, and the same considerations should govern which are decisive in regard to counsel fees for the probate of wills.²

A reference to the rules governing the allowance of costs and counsel fees to guardians of insane persons and of minors may afford some light on this subject.³

* § 518. Disbursements in Respect of the Real Estate. [*1151]

— The executor or administrator is bound, whenever he is lawfully in charge of real estate of the decedent, to exercise the same diligence and prudence in its preservation and protection as if it were personal property in his hands.⁴ Hence they should be allowed credit for all disbursements, made prudently and in good faith, for necessary repairs,⁵ insurance against loss by fire,⁶ municipal assessments,⁷ and in discharging mortgages or other encumbrances upon the same,⁸ or interest thereon,⁹ or in redeeming lands sold for the non-payment of taxes,¹⁰ not including, of course, such penalties and expenses as are occasioned by the negligence of the administrator.¹¹ So also with respect to taxes; the executor or administrator should pay them and receive credit therefor whenever accruing while the real estate itself is lawfully in charge or under his control;¹² and

Accountant is entitled to credit for expenses of real estate lawfully in his charge, for repairs, insurance, taxes, discharging or paying interest on mortgages,

and for taxes on real estate,

112 Cal. 447, and *Lassiter v. Travis*, 98 Tenn. 330.

¹ *Ex parte Young*, 8 Gill, 285. But see *Dalrymple v. Gamble*, 68 Md. 156, 163; also *Heffner's Succession*, 49 La. An. 407.

² *Estate of Nicholson*, 1 Nev. 518, 520; *Edwards v. Ela*, 5 Allen, 87, 89. See also *Clark v. Turner*, 50 Neb. 290, 303.

³ *Woerner on Guardianship*, §§ 155, 156; as to minors, ib. §§ 58, 59 (costs) and § 105 (counsel fees).

⁴ *Ante*, § 513; also § 344. The States in which the real estate by statutory provision is properly in charge of the executor or administrator to the exclusion of the heir or devisee, are enumerated *ante*, § 337, where the effect of these statutes is also pointed out.

⁵ *Henderson v. Simmons*, 33 Ala. 291, 298; *Wiggin v. Swett*, 6 Met. (Mass.) 194, 201; *Sparrow's Succession*, 40 La. An. 484, 491; even for improvements: *In re Clos*, 110 Cal. 494.

⁶ *Rubottom v. Morrow*, 24 Ind. 202; 1256

Howard v. Francis, 30 N. J. Eq. 444; *Pineo v. Goodspeed*, 120 Ill. 524, 536.

⁷ *Dey v. Codman*, 39 N. J. Eq. 259, 265; *Cannon v. Apperson*, 14 Lea, 553, 589.

⁸ *Bowers v. Williams*, 34 Miss. 324, 326; *Williams v. Stratton*, 10 Sm. & M. 418, 425; *Burnett v. Lyford*, 93 Cal. 114, 118; *Bloomer v. Bloomer*, 2 Bradf. 339, 348; *Jennison v. Hapgood*, 10 Pickering, 77, 102. Since a purchaser at an administrator's sale to pay debts takes subject to all encumbrances, the administrator will not be allowed credit for payments made to discharge a mortgage on the land, for the benefit of the purchaser: *Pryor v. Davis*, 109 Ala. 117.

⁹ *Stillwell v. Melrose*, 15 Hun, 376, 380.

¹⁰ *Bowers v. Williams*, *supra*; *Jones v. Le Baron*, 3 Dem. 37, 42; *Cummings v. Bradley*, 57 Ala. 224, 239; *Ferris v. Van Vechten*, 9 Hun, 12, 15; *Eddy's Estate*, 13 Phila. 262.

¹¹ *Brackett v. Tillotson*, 4 N. H. 208.

¹² *Cummings v. Bradley*, 57 Ala. 224.

even when not, it seems to be generally held that he should pay such taxes as were assessed against the deceased and due in his lifetime, constituting a lien at the time of his death, and a liability of the estate,¹ and this although such claim be not probated against the estate.²

though assessed on realty not in discharge of a personal debt.

The converse of the proposition holds equally good: the expenditure of money in the repairing or improvement, or in the protection in any shape of the real estate *not* lawfully in the possession of the executor or administrator, constitutes *devastavit*, and should not be allowed in their accounts,³ although such expenditure had been authorized by the probate court.⁴ Hence, disbursements for taxes on real estate which are not a lien at the time of the decedent's death,⁵ for insurance of buildings against loss by fire,⁶ or for the erection or repairs of [* 1152] * buildings,⁷ or for special taxes or charges against real property for the opening, construction, or repair of streets, sewers, etc., will not be allowed;⁸ nor for money paid to extinguish a claim for dower upon land devised;⁹ nor for the discharge of a mechanic's lien.¹⁰ From the same principle, it results that expenses of administering real estate cannot be allowed, when the administrator has delivered the personal property to legatees or heirs without a refunding bond to pay debts,¹¹ nor taxes on¹² nor the expenses of selling lands in another State.¹³

Secus, if he is not lawfully in charge.

Payment to the widow of her share of rents collected by the administrator on real estate in which her dower has not been assigned, is a proper credit.¹⁴ But the administrator cannot be

239; *Dillard v. Dillard*, 77 Va. 820; *Valentine, J.*, in *Brown v. Evans*, 15 Kans. 88, 92. And he may avail himself of a statute permitting him to apply for a refunding in case of payment under a void assessment: *Adams v. Supervisors*, 154 N. Y. 619; and where the executor is entitled to statutory notices relating to taxation of realty in his charge under the will: *Crawford v. Liddle*, 101 Iowa, 148.

¹ *Shaw v. Camp*, 56 Ill. App. 23; *Fell's Estate*, 13 Phila. 289.

² *Findley v. Taylor*, 97 Iowa, 420. The duty of the personal representative respecting payment of taxes on personal property is discussed, *ante*, § 329.

³ *Kimball v. Sumner*, 62 Me. 305; *Willcox v. Smith*, 26 Barb. 316, 337; *Motier's Estate*, 7 Mo. App. 514, 518; *Brackett v. Tillotson*, 4 N. H. 208, 209.

⁴ *Burke v. Coolidge*, 35 Ark. 180, 182.

⁵ *Reading v. Wier*, 29 Kan. 429; *Dillard v. Dillard*, 77 Va. 820, 823; *Polhemus*

v. Middleton, 37 N. J. Eq. 240, 244; *Fessenden*, Appellant, 77 Me. 98; *Young v. Kennedy*, 95 N. C. 265, 268; *Deraismes v. Deraismes*, 72 N. Y. 154, 158; *In re Selleck*, 111 N. Y. 284, 287; *Reeves v. McMillan*, 101 N. C. 479; *Shaw v. Camp*, 56 Ill. App. 23.

⁶ *Kimball v. Sumner*, *supra*; *Aldridge v. McClelland*, 36 N. J. Eq. 288, 291.

⁷ *Byrd v. Governor*, 2 Mo. 102; *Rolfson v. Cannon*, 3 Utah, 232, 234; *Aldridge v. McClelland*, *supra*; *In re Moore*, 72 Cal. 335, 342; *Clark v. Bettelheim*, 144 Mo. 258, 274.

⁸ *Motier's Estate*, 7 Mo. App. 514, 518; *Matter of Hun*, 144 N. Y. 472.

⁹ *Forward v. Forward*, 6 Allen, 494, 499.

¹⁰ *Kimball v. Sumner*, *supra*.

¹¹ *McKee v. McKee*, 8 B. Mon. 461, 462.

¹² *Jennison v. Hapgood*, 10 Pick. 77, 105.

¹³ *Storer v. Hinkly*, 1 Root, 182.

¹⁴ *Brewer v. Vanarsdale*, 6 Dana, 204,

allowed out of the estate the sum he has paid her to release her dower, not being authorized by the statute to do so.¹

§ 519. **Payments to Widow and Heirs.**—It has been stated, that in many of the States the statutes provide that the property appropriated by the law for the immediate support of the widow and minor children is not to be included in the inventory.² Where no such provision exists, and the property so set apart is included in the inventory, it is obvious that the executor or administrator is entitled to credit for whatever he turns over or pays to the widow or infant children, whether upon order of court or in compliance with the statutory allowance. But he is not entitled to credit for such property unless he show that it was actually appropriated,³ and that, where the same was not set apart by the court or appraisers, the amount advanced to the family was reasonable and proper.⁴ With the exception of the property so appropriated or set apart, the widow or children have no claim upon the personal assets until creditors * are paid; hence money advanced for their [* 1153] support or education cannot be allowed in the administration account.⁵ But advances made to the widow, or for necessities to minor heirs, are properly chargeable to them, and on final accounting the amounts so advanced should be credited to the administrator against the shares of the respective distributees;⁶

206; but not after assignment: *Munden v. Bailey*, 70 Ala. 63, 69. If the widow is herself administratrix, she is not chargeable with such rents before assignment of dower: *Mock v. Pleasants*, 34 Ark. 63, 71; *Trimble v. James*, 40 Ark. 393, 404, 411; *Jenks v. Terrell*, 73 Ala. 238.

¹ *Needham v. Belote*, 39 Mich. 487.

² *Ante*, § 317.

³ *Cooley v. Vansyckle*, 14 N. J. Eq. 496, 498; *Clark v. Bettelheim*, 144 Mo. 258, 272.

⁴ *Simmons v. Byrd*, 49 Ga. 285, 289; *Schoeneich v. Reed*, 8 Mo. App. 356, 362.

⁵ *Scott v. Monell* (holding that pendent for the use of the widow and children cannot be allowed against the personal estate), 1 Redf. 431, 443; *Willis v. Willis*, 9 Ala. 330, 334; *Patterson v. Phillips*, *Hemp*. 69, 71; *Sorin v. Olinger*, 12 Ind. 29, 33; *Brewster v. Brewster*, 8 Mass. 131; *Washburn v. Hale*, 10 Pick. 429; *Price v. Mitchell*, 10 Sm. & M. 179, 183; *Latta v. Russ*, 8 Jones L. 111, 114; *Scott v. Dorsey*, 1 Har. & J. 227, 232; *Mead v. Byington*, 10 Vt. 116, 121; *Black's Estate*,

Tuck. 145; *Pearson v. Darrington* (holding that the widow is not entitled when the will does not so provide), 32 Ala. 227, 238; *Parker v. McGaha*, 11 Ala. 521; *Rittenhouse v. Levering*, 6 Watts & S. 190, 200; *Harris v. Foster*, 6 Ark. 388, 390; *Bland v. Hartsoe*, 65 N. C. 204; *Fitzgerald's Estate*, 57 Wis. 508 (applying the rule to heirs of the intestate), 513; *Sorrels v. Trantham*, 48 Ark. 386, 390; *Treat v. Treat*, 80 Me. 156, 162; *Williams v. Adams*, 94 Ga. 270 (holding that the subsequent approval of the administrator's account containing such items will not legalize his acts).

⁶ *Succession of Broadaway*, 3 La. An. 591; *King v. Whiton*, 15 Wis. 684, 689; *Trigg v. Daniel*, 2 Bibb. 301, 303; *Black's Estate*, *Tuck*. 145; *Bailey v. Munden*, 58 Ala. 104, 108; see *Martin v. Campbell*, 35 Ark. 137, 144; *Hyland v. Baxter*, 98 N. Y. 610; *Lyle v. Williams*, 65 Wis. 231; *Dickie v. Dickie*, 80 Ala. 57, 59; *Cary v. Simmons*, 87 Ala. 524; *Rose's Estate*, 80 Cal. 166, 180. Where the will directs the education of all the children out of the

advances to minor heirs cannot, however, be charged against them, any more than against the estate, if for any purpose except necessities.¹

The same rule holds good in respect of payments to adult distributees and legatees. The accountant is entitled to credit against these to the full extent of payments made to them, whether ordered by the court or not. It is very evident, however, that such payment, without an order of the court, cannot affect the rights of creditors or other distributees or legatees;² it has, therefore, been held irregular to allow the executor credit for payment of a legacy, where the court has not the power, or is not in condition, to adjudicate the validity of such payment.³ Whether an executor can recover back from a legatee an excess of advancements which may have been made to him above his ratable proportion, is mentioned elsewhere.⁴ But a distributee or legatee, having received payment of his legacy or distributive share, will not be heard to object to credit therefor in the settlement of the administrator's account.⁵ Nor can such credit be denied on the ground of the invalidity of a bequest [* 1154] having been * properly admitted to probate,⁶ if payment is made in accordance with the will.⁷ But where payment is made to a legatee whose interest, though vested on the death of the testator, is determinable by some future condition or contingency, the executor is not entitled to credit for such payment, if the contingency determining the legatee's interest happen before the legatee is entitled to possession.⁸ Credit may be allowed for the

Payments to adult distributees are good against them, but not against creditors.

same fund, the charge should be general, against the estate, and not to each child: *Wood v. Lee*, 5 T. B. Mon. 50, 62. It has been held, that the administrator is entitled, as against a widow to whom he has made an advance, to a decree by the probate court that the sum advanced is a charge against her entire share, whether real or personal: *In re Moore*, 96 Cal. 522, 529.

¹ *Jones v. Ward*, 10 Yerg. 160, 162; *ante*, § 460, and authorities.

² *North v. Priest*, 9 Mo. App. 586, affirmed in 81 Mo. 561. See authorities to this effect referred to *post*, § 562, p. *1234.

³ *Williams v. Herrick*, 18 R. I. 120; *Arnold v. Smith*, 14 R. I. 217; *Granger v. Bassett*, 98 Mass. 462, 469; *Cowdin v. Perry*, 11 Pick. 503, 511; *Yundt's Estate*, 6 Pa. St. 35, 36; *Robins' Estate*, 180 Pa. St. 630. So where the executor makes distribution and procures the approval of his report at a time when it is impossible

to determine the beneficiaries, such action may be set aside by the rightful legatees when ascertained: *Glessner v. Clark*, 140 Ind. 427.

⁴ *Post*, § 560, p. *1229; and as to overpayment to creditors, see next section.

⁵ *Rice v. Smith*, 14 Mass. 431; *Palmer v. Whitney*, 166 Mass. 306; *Good's Estate* (in which case the distributee was a married woman), 150 Pa. St. 307; see also *Mills v. Smith*, 141 N. Y. 256, 264; and cases *supra*, p. *1153, note 6.

⁶ *Succession of Barker*, 10 La. An. 28.

⁷ *Parker v. Cowell*, 16 N. H. 149, 156.

⁸ Hence where a testator devised property in trust to pay the income to his widow during her life, and on her death the principal to his children, the issue of any deceased child "to stand in the parent's stead, and receive the parent's share," a portion of the principal which the executor allowed a son to appropriate during the widow's life was held not chargeable against his children, he having

payment of a debt or legacy although not actually paid, if the creditor or legatee will accept the personal liability of the executor or administrator, and there be no collusion to circumvent adjudication on the question.¹ So payment made to the creditor of a legatee at his request will be treated as payment to the legatee himself,² and so if made on the legatee's order³ and advancements made by the administrator's procurement as payment by himself.⁴ But legatees cannot be charged with sums decreed to be paid to them by a former executor or administrator, unless they have actually received them.⁵ An executrix cannot be allowed credit for payments made upon the mere verbal request of the testator on his death-bed, no steps being taken to reduce the request to writing as a nuncupative will.⁶

§ 520. **Disbursements in Payment of Debts.** — It is evident that the accountant is to be allowed credit for all debts of the estate which he has paid in accordance with the order of the court having jurisdiction; and also for the *bona fide* payment of any debt allowed by such court, to the extent of the dividend payable thereon,⁷ although the same may appear on its face to be barred by the Statute of Limitation, or although in truth it ought not to have been allowed,⁸ unless the decree or judgment * under which he paid it was void,⁹ or the [* 1155] claim fraudulently concocted by the executor, or with his consent, for the purpose of charging the estate unduly.¹⁰ Proof that the claim itself was tainted with fraud is not sufficient to have the claim set aside in equity; there must have been fraud *in*

died before the widow: *Dodd v. Winship*, 144 Mass. 461, 464.

¹ *Vreeland v. Vreeland*, 16 N. J. Eq. 512, 528.

² *Watson v. McClenahan*, 13 Ala. 57, 61.

³ *Palmer v. Whitney*, 166 Mass. 306. As to the right of the assignee of a distributee, see *post*, § 563.

⁴ *Munden v. Bailey*, 70 Ala. 63, 73.

⁵ The decree of distribution is not an extinguishment or satisfaction of the claims of those to whom the payment is ordered: *Clapp v. Meserole*, 38 Barb. 661, 663.

⁶ *Kerr v. Hill*, 2 Desaus. 279, 284.

⁷ In California, where periodical accounting is made conclusive unless appealed from, it is held that payment of a debt without order of court, for which credit has been taken in an annual settlement and allowed by the court, will bind an unpaid creditor of an insolvent estate,

who has not appealed from the allowance of the account: *Estate of Fernandez*, 119 Cal. 579.

⁸ *Pursel v. Pursel*, 14 N. J. Eq. 514, 526; *Edelen v. Edelen*, 11 Md. 415, 423; *Lockhart v. White*, 18 Tex. 102, 108; *Cameron v. Morris*, 83 Tex. 14; *Owens v. Collinson*, 3 Gill & J. 25, 38; *Deck v. Gherke*, 6 Cal. 666, 669; *Pate v. Oliver*, 104 N. C. 458, 465. So where an administrator gave his note for a debt of the estate, took credit therefor in his account, and, upon confirmation thereof, paid the note, held, upon a bill of review to surcharge him on the ground of excessive payment, that the decree protected him: *Kost's Appeal*, 107 Pa. St. 143. As to debts barred, see *infra*.

⁹ *Pearson v. Darrington*, 32 Ala. 227, 250, *et seq.*

¹⁰ *Hurlbut v. Hutton*, 44 N. J. Eq. 302, 308; *Garr v. Harding*, 37 Mo. App. 24.

the procurement of the judgment;¹ and clear evidence of guilty knowledge, fraud, or collusion should be produced to justify equity in holding the executor responsible for a claim paid by him after it has been passed by the Orphan's Court.² The allowance or judgment in favor of a creditor is conclusive as to the validity of the debt;³ but whether the executor or administrator is entitled to credit for its payment depends upon the further question of the sufficiency of assets, and if he has paid such debt or allowance in advance of an order to that effect, he has done so at the risk of having so much disallowed as may be in excess of the dividend to which the creditor is found to be entitled. Hence no credit can be allowed in such case until the amount to which the creditor is entitled has been ascertained.⁴ It is held in some States that he cannot even recover an over-payment from the creditor;⁵ but in others he may.⁶ The administrator may be subrogated to the rights of unpreferred creditors whose claims he has satisfied and to receive their *pro rata* dividends.⁷

But not for payments in excess of the dividend,

It is clear that the payment of a debt before it has been allowed or established before a competent court is at the risk of the administrator, who must, in order to receive credit for such payment, establish not only the sufficiency of assets, but also the validity of the demand, in such form as the law may require.⁸ If the estate be solvent and the debt undisputed, or sufficient proof is offered thereon at the time of the accounting, the administrator is generally entitled to credit for the amount paid, no matter when he paid it;⁹ and

nor for payment of a debt not properly established.

¹ Ramsey v. Hicks, 53 Mo. App. 190, 192.

² Garrison v. Hill, 81 Md. 206, 212.

³ Ante, § 392, p. *816.

⁴ Tell Co. v. Stiles, 60 Miss. 849, 857; Dullard v. Hardy, 47 Mo. 403; Schoeneich v. Reed, 8 Mo. App. 356, 359; People v. Phelps, 78 Ill. 147, 149; Foskett v. Wolf, 19 Ill. App. 33; Jackson v. Wood, 108 Ala. 209.

⁵ Lawson v. Hansborough, 10 B. Monroe, 147; Adams v. Smith, 19 Nev. 259, 268 and authorities cited; Findlay v. Trigg, 83 Va. 539; Beardsley v. Marsteller, 120 Ind. 319 (holding, however, that a refunding receipt was valid).

⁶ Heard v. Drake, 4 Gray, 514; Morris v. Porter, 87 Me. 510; Mansfield v. Lynch, 59 Conn. 320; Wolf v. Beaird, 123 Ill. 585; and a statute in Kentucky now gives such right to the personal representative: Moore v. Moore, 88 Ky. 683; but this is held not to afford him any relief if the creditor has been prejudiced by the ad-

ministrator's failure to comply with the law, or by his bad faith or negligence in any respect: Brooking v. Farmers' Bank, 83 Ky. 431, 435.

⁷ Byrd v. Jones, 84 Ala. 336, 341, and see cases cited, p. *1039, note 9.

⁸ See ante, on the subject of demands against the estates of deceased persons; also Pearson v. Darrington, 32 Ala. 227; Gaunt v. Tucker, 18 Ala. 27, 29; McDonald v. Carnes, 90 Ala. 147; Rostel v. Morat, 19 Oreg. 181, 185; Woods v. Ridley, 27 Miss. 119, 149; Sims v. Sims, 30 Miss. 333, 341; Surber v. Kent, 5 W. Va. 96, 105; Wilson v. Baptist Society, 10 Barb. 308, 316, et seq.; Moyer v. Albritton, 7 Ired. Eq. 62, 66; Walker v. Diehl, 79 Ill. 473, 476; Jenks v. Terrell, 73 Ala. 238; Millard v. Harris, 119 Ill. 185, 194; In re Kellogg, 104 N. Y. 648; Wonn's Estate, 80 Iowa, 750, 754.

⁹ Hill v. Buford, 9 Mo. 869, 873; McPike v. McPike, 111 Mo. 216; Wysong v. Nealis, 13 Ind. App. 165, 175; Ames

* conversely, if the administrator, even in a State which [* 1156] allows the payment of debts of deceased persons without previous adjudication, pay a debt without sufficient proof of its validity, he is not protected by such payment;¹ nor is the administrator in a better position touching the assets of the estate than the creditor whom he has paid would be.² Thus, if he pay to a person falsely representing himself to be entitled,³ or pay usurious interest with notice of the usurious character of the transaction,⁴ or if he discharge a mortgage debt not primarily payable out of the general assets, before it is ascertained whether the general assets are sufficient to pay all the debts,⁵ he cannot be allowed credit for the amounts so paid when the parties to whom he paid could not have recovered. In some States credit is allowed for proved up claims only;⁶ in such States credit will not be allowed in the administration account for the payment of claims not so proved up.⁷ So where it is held to be the duty of the executor or administrator to plead the bar of the Statute of Limitations, he cannot be allowed credit for claims paid by him, in disregard of this duty;⁸ and if the personal assets are insufficient to pay such debt, his claim for reimbursement out of the proceeds of lands is subject to the right of the heirs to plead the

v. Jackson, 115 Mass. 508, 510; *Adair v. Brimmer*, 74 N. Y. 539, 555; *Kinnan v. Wight*, 39 N. J. Eq. 501; *In re Frazer*, 92 N. Y. 239. A sheriff's receipt, showing that an execution was in his hands against the decedent, and that the executor paid it, is *prima facie* good as a voucher: *Harrison v. White*, 38 Miss. 178, 179. A husband administering on the estate of his deceased wife is entitled to credit for the payment of her debts contracted *dum sola*: *Bryan v. Weems*, 25 Ala. 195, 200.

¹ *Bank of Poughkeepsie v. Hasbrouck*, 6 N. Y. 216, 231; *Loomis v. Armstrong*, 49 Mich. 521, 525; *Hottenstein's Appeal*, 2 Grant's Cas. 301, 303. Nor in case of collusion: *Hill's Estate*, 67 Cal. 238, 244. But if he honestly believes such debt to be due, and pays it without notice from those interested in the estate, he is not to be charged with the amount: *Ritter's Appeal*, 23 Pa. St. 95, 97.

² *Blank's Appeal*, 3 Grant's Cas. 192, 194; *Teague v. Corbitt*, 57 Ala. 529.

³ For instance, to a person representing himself as guardian without proof that he was such, or that the money was used for the benefit of the minor entitled: *Landreth v. Landreth*, 9 Ala. 430.

⁴ *Smith v. Britton*, 2 Patt. & H. 124, 128 (a simple affirmance: p. 132). But when an executor paid notes of the testator for gambling debts in ignorance of their illegality, he was allowed credit therefor: *Coffee v. Ruffin*, 4 Coldw. 487, 521.

⁵ *Johnson v. Corbett*, 11 Pai. 265, 273. See also *Evans v. Halleck*, 83 Mo. 376.

⁶ The statute prohibiting the allowance of credit in the administrator's account for disbursements in payment of debts not "allowed by the court according to law," as it does, for instance, in Missouri, 1 Rev. St. 1889, § 223.

⁷ *Huebner v. Sessemann*, 38 Neb. 78; *Bunnell v. Post*, 25 Minn. 376, 380. Nor can he claim credit in his account for notes not paid, or for notes of the intestate purchased by him after the intestate's death and secured by mortgage, if they have not been presented to the commissioners for allowance: *Pelton v. Johnson*, 52 Vt. 138.

⁸ *Butler v. Johnson*, 111 N. Y. 204, 212; see as to the various States in which the statute must be set up, *ante*, § 401, pp. * 843, * 845, and cases there cited *pro* and *con*.

statute;¹ but in other States, where such plea is not obligatory upon him, he will be allowed credit for claims paid whether outlawed or not.² It is self-evident that equity will not hold executors to the mistaken payment of rents, under a decree under which the payee was not entitled, if she is entitled to payment in another capacity, but will apply the payments as if made in the proper way.³ Nor will payment be ordered to creditors, if there be no assets, on the ground that other creditors in the same class have received payment under the erroneous supposition by the executor that there were assets.⁴

[* 1157] *§ 521. **Payments at Discount, or in Depreciated Currency.**

—An executor or administrator cannot make any profit to himself by speculating with trust funds,⁵ and if he compromise claims or pay off the debts at a discount, or procure an assignment of such to himself or to the estate, he is entitled to credit for such amount only as he shall have actually paid out.⁶ So if he pay in a depreciated currency, he can only receive credit for such value of such currency as he stands charged with, and not for the amount of the debt in money of higher value;⁷ or if he pay a debt of the estate in property of his own of less value than the amount of such debt, he can obtain credit only for the value of his property.⁸ So it was held that if the administrator receive gold when bearing a premium and disburse part thereof at such premium, retaining the balance, though not needed for purposes of the estate, until it had depreciated, he should be charged with the premium on the whole amount;⁹ and so, if he retain depreciated currency which he might use in the payment of liabilities of the estate, he is not entitled to credit for the depreciation.¹⁰ But if he is not able to

Accountant allowed credit for the amount paid by him, at the actual value of the currency in which he paid.

If the administrator have gold bearing premium, he should reduce it to currency and charge himself with the whole amount, and if he can pay debts in a de-

¹ *Teague v. Corbitt*, 57 Ala. 529, 543; ante, §§ 401, 402.

² *Haliburton v. Carson*, 100 N. C. 99.

³ *Pinneo v. Goodspeed*, 120 Ill. 524, 534.

⁴ *Ib.*, 535.

⁵ See ante, § 336.

⁶ *Chevalier v. Wilson*, 1 Tex. 161 (applying the doctrine that a trustee cannot be allowed to make profit out of the trust to a case in which the administrator had purchased a claim before his appointment) 177; *Miller v. Towles*, 4 J. J. Marsh. 255; *Wolf v. Banks*, 41 Ark. 104; *Powell v. Powell*, 80 Ala. 11; *Furth v. Wyatt*, 17 Nev. 180, 183; *Pinneo v. Goodspeed*, 120 Ill. 524 (allowing credit for the face value where there was no profit made by the purchase, but loss rather),

535; *Cox v. John*, 32 Oh. St. 532 (applying the rule where the administrator's attorney purchased for the joint benefit of the administrator and others); *Woods v. Irwin*, 163 Pa. St. 413 (where the executor's attorney bought for the executor's benefit without his knowledge).

⁷ *Calvert v. Holland*, 9 B. Mon. 458, 463; *Moss v. Moorman*, 24 Gr. 97, 106; *Caruthers v. Corbin*, 38 Ga. 75, 91. But if the administrator converted par funds of his own to obtain the currency with which he paid the debts of the estate, he is entitled to credit for the full amount thereof at par: *Surber v. Kent*, 5 W. Va. 96, 105.

⁸ *Amos v. Heatherby*, 7 Dana, 45, 47.

⁹ *Ex parte Glenn*, 20 S. C. 64, 69.

¹⁰ *Hix v. Hix*, 25 W. Va. 481, 485.

preciated currency he is not entitled to credit for the depreciation.

use the depreciated money, he is chargeable only with the actual value thereof;¹ and if money or other assets depreciate while in his hands, he is entitled to credit *pro tanto*.² He cannot be charged the premium on specie left by the intestate if there is no proof that he realized a premium by an exchange for paper money or otherwise, since he is not bound to make such exchange.³ This subject, as affected by the value of Confederate money, has been more fully treated heretofore.⁴ On the other hand, if he have no assets applicable to the payment of debts, and advance his own money for that purpose, he is entitled to receive interest thereon from the time he made the payment until he can reimburse himself out of the assets;⁵ and any reasonable or necessary expenditures in procuring funds at a discount, which * he is [* 1158] enabled to use in discharge of the debts of the estate, he is entitled to credit for.⁶

§ 522. Credits for Difference between Inventoried and Actual Values. — The administrator having charged himself with the appraised value of property, the face value of debts owing to the deceased, and the nominal amount of money found and inventoried,⁷ and being accountable to the estate for the actual value of property and money realized by a prudent and honest management, but not

Administrator is entitled to credit for the difference between the inventoried value of assets and what he realized.

necessarily for the appraised or nominal value thereof, it follows that on the final accounting he is entitled to credit for any difference between the amount with which he stands charged and what he has actually realized.⁸ If the property for which the administrator is responsible has not been charged in the inventory, he is not accountable for such property specifically, but only for the price actually received;⁹ and so, of debts due the estate, only for the amount actually collected;¹⁰ and where a debtor is also creditor, the administrator is liable only for the balance after

¹ *White v. Alexander*, 73 N. C. 444, 459; *Williams v. Williams*, 43 Miss. 430, 436 (under a statute of Mississippi).

² *Pitts v. Singleton*, 44 Ala. 363, 365.

³ *Cunningham v. Cauthen*, 37 S. C. 123 (see s. c. 44 S. C. 95).

⁴ *Ante*, § 333.

⁵ See *post*, § 523, as to interest allowed administrators in accounting.

⁶ *Wingate v. Pool*, 25 Ill. 118, 121.

⁷ *Ante*, ch. xxxiii., as to the inventory; and §§ 509, 510, as to charging himself with the inventoried amount. He should not charge himself with the amount received only, if less than the inventoried amount, but with the whole inventoried

value, and ask credit for the difference between it and the actual sum realized, and thus assume the burden of showing the propriety of his acts: *McCully v. Lum*, 49 N. J. Eq. 552.

⁸ *Dudley v. Sanborn*, 159 Mass. 185.

⁹ *McCall v. Peachy*, 3 Munf. 288, 303; *Dobbs v. Cockerham*, 2 Port. 328, 341.

¹⁰ *Hobbs v. Craig*, 1 Ired. L. 332, 337; *Douthitt v. Douthitt*, 1 Ala. 594, 597; *Estate of Taylor*, 52 Cal. 477, 479; *Lightcap's Appeal*, 95 Pa. St. 455; *Watkins v. Bevans*, 6 Md. 489, 495; *Syme v. Badger*, 92 N. C. 706, 715; *O'Conner v. Gifford*, 117 N. Y. 275.

deducting from the greater sum owing to the estate the smaller sum owing by the estate.¹ But the onus is on the administrator who asks credits for the amount of uncollected debts, to prove that they are uncollectible,² unless it appear that they are inventoried as desperate or worthless.³ The duties and liabilities of executors and administrators concerning the bringing of actions to collect the debts due the estate have been heretofore adverted to.⁴

Onus to prove that debts are not worth their face is on accountant.

In like manner the administrator is entitled to credit for all property with which he is improperly charged in the inventory,⁵ or which has been lost without [* 1159] fault on his part,⁶ * or consumed in the administration;⁷ but he is responsible to the estate for any property or money lost by reason of negligence or gross ignorance, and will not be allowed credit for losses in such case.⁸

He is entitled to credit for all property improperly inventoried, or lost without his fault.

§ 523. **Interest on Advancements by the Executor or Administrator.** — As executors and administrators are liable for interest on the funds in their hands which they have earned, or ought to have earned, so they are entitled to credit for interest on moneys borrowed or advanced for the benefit of the estate. Charges upon the estate

¹ Johnson v. Corbett, 11 Pai. 265, 274; and it is the administrator's duty so to set off the same: Tell Furniture Co. v. Stiles, 60 Miss. 849, 857.

² Tell Furniture Co. v. Stiles, 60 Miss. 849, 857; *In re Haffey*, 10 Mo. App. 232, 234; Julian v. Abbott, 73 Mo. 580, 582, 585. See, however, Tomkins v. Tomkins, 18 S. C. 1, 27. Failing in this, he is liable: Munden v. Bailey, 70 Ala. 63, 71; Harrington v. Keteltas, 92 N. Y. 40; Anderson v. Piercy, 20 W. Va. 282, 325; Booker v. Armstrong, 93 Mo. 49, 59. But the Supreme Court of North Carolina seems to relax the rule in favor of the representatives of the *sureties* on the administrator's bond: Gay v. Grant, 101 N. C. 206, 213. The administrator cannot be charged for a failure to collect a debt unless it be shown that it came to his knowledge as a subsisting claim due the estate; where a note is executed jointly for the equal benefit of the parties, and the estate is compelled to pay the whole note, the administrator must make all reasonable efforts to enforce contribution, and the onus is on him to show that he did use such efforts, or that there was in fact

no liability to the estate: Myers v. Myers, 98 Mo. 262, 271.

³ As appears *ante*, § 319.

⁴ See § 324.

⁵ Johnson v. Corbett, *supra*. So he is not liable to the estate for a pension due the deceased, which is not liable for debts; this he holds in trust for the children: Watson's Appeal, 6 Pa. St. 505; nor for the wearing apparel of the testator, unless he have converted the same: McCall v. Peachy, 3 Munf. 288.

⁶ State v. Meagher, 44 Mo. 356; Foster v. Davis, 46 Mo. 268; Williams v. Petticrew, 62 Mo. 460, 469; Hoke v. Hoke, 12 W. Va. 427, 479, citing Estill v. McClintic, 11 W. Va. 399; Furman v. Coe, 1 Cal. Cas. 96; Woodruff v. Lounsbury, 40 N. J. Eq. 545.

⁷ White v. Alexander, 73 N. C. 444, 459.

⁸ Finney's Appeal, 37 Pa. St. 323, 326. As to the degree of care and skill required of executors and administrators in the preservation of the property, and of diligence in the collection of debts, for the want of which they will be held personally responsible for losses of assets, see *ante*, § 336, on the management of the estate.

for interest to the person managing it are viewed with caution, and the circumstances justifying them will be examined with scrupulous care; but the condition of estates is sometimes such as not only to authorize, but strongly commend, the advancement of money, where debts, perhaps bearing heavy interest, are to be paid, and the immediate reduction of the real or personal property into ready cash to meet such payments might be attended with serious loss. If under such circumstances the administrator will borrow or advance the money necessary to relieve the estate, both justice and policy require that he should have credit for customary interest thereon.¹ But he cannot be allowed interest if the funds of the estate are sufficient to meet the claims against the same,² or if he have assets which he might have converted into money.³ Nor can he claim credit for the amount paid to creditors on account of interest accrued on their demands after it was in his power to pay them.⁴

¹ Liddel v. McVickar, 11 N. J. L. 44, 47, *et seq.*, citing Jones v. Williams, 2 Call, 102, 106, and Darrel v. Eden, 3 Des. 241, 243; Mann v. Lawrence, 3 Bradf. 424, 425; Pearson v. Darrington, 32 Ala. 227 (holding that the administrator is chargeable with interest on balances against him, and entitled to credit for interest on balances in his favor), 270; Rix v. Smith, 8 Vt. 365, 366; Callaghan v. Hall, 1 Serg. & R. 241; Pettingill v. Pettingill, 60 Me. 411, 425, citing Jennison v. Hapgood, 10

Pick. 77; Trimble v. James, 40 Ark. 393, 406.

² Evarts v. Nason, 11 Vt. 122, 128; Booker v. Armstrong, 93 Mo. 49, 57. Where an administrator paid debts of the estate with his own funds, having at the same time sufficient assets in bank to meet them, and the bank failed, held that the loss was his own: Guthrie v. Wheeler, 51 Conn. 207, 214.

³ Billingslea v. Henry, 20 Md. 282, 286.

⁴ Forward v. Forward, 6 Allen, 494, 499.

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* CHAPTER LVII.

COMPENSATION OF EXECUTORS AND ADMINISTRATORS.

§ 524. **Commissions allowed by Statute.** — At common law, executors and administrators are entitled to no compensation for their personal trouble and loss of time in the discharge of their duties, either at law or in equity.¹ A more enlightened policy was early adopted in America. The several legislatures, in deference to the views and convictions of their constituents, enacted in almost every State provisions for a just and moderate remuneration of trustees having faithfully and prudently administered their trusts, and more especially to compensate executors and administrators for their services. The wisdom of these statutes is attested by the experience of more than a century, and recognized by the courts in numerous decisions, as well as by modern text-writers without notable exception.²

No compensation to executors or administrators at common law.

In America compensation is provided by statutes.

Like other expenses of administration, compensation to the executor or administrator is payable before debts, legacies, or distributive shares;³ and it has been held that the policy of the law and the interest of estates demand this compensation to be exempt from attachment by their creditors;⁴ and the same ground forbids the assignability of his commissions before they are ascertained and liquidated in the manner authorized by law.⁵

Payable as expenses of administration.

Not subject to attachment

or assignment.

¹ Woerner on Guardianship, § 106; Wms. on Ex. [1852]; Boyd v. Hawkins, 2 Dev. Eq. 329, 334, *et seq.*, commending the English rule.

² 2 Sto. Eq. Jur. § 1268, note 5, commenting upon the defence of Chancellor Kent of the English rule, as well as the remarks of Lord Cottenham in *Home v. Pringle*, 8 Clark & Fin. 264, 287, and expressing his own dissent therefrom; 2 Perry on Trusts, § 917; 3 Redf. on Wills, 408; Schoul. Ex. § 545. And see as to compensation of guardians of insane persons, Woerner on Guardianship, § 154.

³ Logan v. Troutman, 3 A. K. Marsh. 66, 67; Williamson v. Wilkins, 14 Ga. 416,

420; Estate of Nicholson, 1 Nev. 518, 520.

⁴ On the ground, among others, that such attachment "would make the main interests of the estate subservient to collateral claims; and its effect would be to diminish the interest of the executors or administrators in making speedy and effectual efforts to settle the estate, by taking away his compensation": *Adams' Appeal*, 47 Pa. St. 94. But a different rule probably prevails in Alabama: *Dudley v. Falkner*, 49 Ala. 148.

⁵ *Matter of Worthington*, 141 N. Y. 9; *Mulligan's Estate*, 157 Pa. St. 98. See *post*, § 533, p. *1176.

Compensation is fixed by statute in Alabama¹ and South Carolina² at a commission of two and one-half per cent on collections, and two and one-half per cent on disbursements; the same in Georgia,³ except that in Georgia and South Carolina ten per cent is allowed on all earnings of interest for the estate, and no commissions on the administrator's share; in Arizona⁴ seven per cent for the first one thousand dollars, five per cent for all above that, and not exceeding ten thousand dollars, and four per cent for all above that sum; in Arkansas,⁵ not exceeding ten per cent on sums less than \$1000, five per cent on sums over \$1000 and less than \$5000, and three per cent on *all sums over \$5000; in California,⁶ [*1161] Idaho,⁷ and Nevada⁸ seven per cent on the first \$1000, five per cent on all over \$1000 and not over \$10,000, and in California four per cent on all over \$10,000 and under \$20,000, three per cent on all over \$20,000 and under \$50,000, two per cent on sums over \$50,000 and under \$100,000, and one per cent on all over \$100,000, but in Idaho and Nevada four per cent on all over \$10,000; in Colorado⁹ and Illinois¹⁰ six per cent on all personal property and three per cent on sales of real estate; in Florida¹¹ six per cent on all sales; in Idaho¹² and Montana¹³ seven per cent on the first \$1000, for all over that sum and not exceeding \$10,000, five per cent, for all over that sum and not exceeding \$20,000, four per cent, and in Montana two per cent for all sums over \$20,000, but in Idaho for all sums above \$10,000 four per cent; in Indiana,¹⁴ Kansas,¹⁵ Rhode Island,¹⁶ Tennessee,¹⁷ Virginia,¹⁸ and West Virginia¹⁹ such sum as the court may deem reasonable and just; in Iowa,²⁰ Michigan,²¹ Nebraska,²² and Wisconsin²³ five per cent on the first \$1000, two and one-half per cent on all over \$1000 and not over \$5000, and one per cent on all over \$5000, in Wisconsin, in addition thereto, \$1 for every day consumed in actual service; in Kentucky,²⁴ Missouri,²⁵ *North Carolina,²⁶ and Texas²⁷ five per cent [*1162]

¹ Code Ala. 1896, § 219.

² 1 Rev. St. S. C. 1893, § 2069; Jones v. Jones, 39 S. C. 247.

³ Code Ga. 1895, § 3484

⁴ Rev. St. Ariz. 1887, § 1212.

⁵ Dig. of St. 1894, § 134.

⁶ Code Civ. Pr., §§ 1616, 1618.

⁷ Rev. St. Idaho, 1887, § 5586.

⁸ Gen. St. 1885, § 2890.

⁹ 2 Mills' Ann. St. 1891, § 4805.

¹⁰ 1 St. & C. Ann. St. 1896, ch. 3, ¶ 133.

¹¹ Rev. St. Fla. 1892, § 1868; see Shepard v. Shepard, 19 Fla. 332.

¹² Rev. St. Ida. 1887, § 5586.

¹³ Const. & St. Mont. 1895, § 2776.

¹⁴ Ann. Ind. St. 1894, § 2551.

¹⁵ 2 Gen. St. Kans. 1897, ch. 107, § 179.

¹⁶ Gen. L. 1896, ch. 219, § 8.

¹⁷ Code, 1884, § 3142.

¹⁸ Code, 1887, § 2695.

¹⁹ Code W. Va. 1891, ch. 87, § 17, p. 694.

²⁰ Code Iowa, 1897, § 3415.

²¹ How. St. 1882, § 5959.

²² Comp. St. Nebr. 1891, ch. 23, § 284.

²³ Sanb. & B. Ann. St. 1889, § 3929.

²⁴ Not exceeding: Ky. St. 1864, § 3883.

²⁵ Rev. St. 1889, § 222. Where the surviving partner administers the partnership of a firm dissolved by the death of one of its members he is allowed three per cent on the interest of the deceased partner.

²⁶ Not exceeding: Code, 1883, § 1524.

²⁷ On all sums received and paid out in cash: Sayles' Tex. St. 1897, art. 2245.

on the amount of the property administered; in Louisiana,¹ two and one-half per cent on the amount of the inventory, bad debts deducted; in Maine² at \$1 for every ten miles of travel, \$1 for every day consumed in actual service, and a commission not exceeding five per cent, in the discretion of the court; in Maryland³ not less than two nor more than ten per cent on the first \$20,000, in the discretion of the court, and on the balance of the estate not more than two per cent, — compensation bequeathed to an executor to be reckoned in the amount allowed if insufficient, but if sufficient, then no further commission to be allowed; in Minnesota⁴ and Vermont⁵ a *per diem* of \$2 for actual services; in Mississippi⁶ a commission of not less than one nor more than seven per cent; in New Jersey⁷ seven per cent on sums not exceeding \$1000; if over \$1000 and not exceeding \$5000, four per cent on such excess; if over \$5000 and not exceeding \$10,000, three per cent of the excess; and if over \$10,000, two per cent on the excess; but if exceeding \$50,000, the whole compensation not to exceed five per cent on all sums that came to the administrator's or executor's hands. In New York⁸ five per cent on the first \$1000, two and one-half per cent on all above \$1000 and not exceeding \$10,000, and one per cent on all above \$10,000; in Ohio⁹ for the first \$1000 six per cent, for all above that sum and not exceeding \$5000 four per cent, and for all above \$5000 two per cent; in North Dakota,¹⁰ Oklahoma;¹¹ and South Dakota¹² five per cent for the first \$1000, for all above \$1000 and not exceeding \$5000 four per cent, and for all above \$5000 two and one-half per cent; in Oregon¹³ seven per cent on the first \$1000, five per cent on the next \$1000, four per cent on the next \$2000 and two per cent on all above \$4000; in Utah¹⁴ for the first \$1000 five per cent, for all above that sum and not exceeding \$5000 two and one-half per cent, for all above \$5000 and not exceeding \$10,000 two per cent, for all above \$10,000 one per cent; in Washington¹⁵ for the first \$1000 seven per cent, for all above that sum and not exceeding \$2000 five per cent, for all above that sum four per cent.

In many of the States, the statutes provide for additional compensation, to be allowed in the discretion of the court, for extraordinary, special, or unusual services,¹⁶ while in one, at least, extra

¹ Code, 1870, § 1069.

² Rev. St. 1883, p. 533, § 32.

³ Pub. Gen. L. 1888, p. 1316, § 5.

⁴ 2 Gen. St. Minn. 1891, § 5245.

⁵ Vt. St. 1894, § 5384.

⁶ Miss. Ann. Code, 1892, § 1956.

⁷ Gen. St. 1896, p. 2389, § 110.

⁸ Banks & Bro. (ed. 1882), p. 2303, § 58.

⁹ 2 Bates' Ann. St. 1897, § 6188.

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¹⁰ Rev. Code N. D. 1895, § 6492.

¹¹ St. Okla. 1893, § 1410.

¹² Comp. L. Terr. Dakota, 1887, § 5888.

¹³ Code, 1887, § 1180.

¹⁴ Rev. St. Utah, 1898, § 3934.

¹⁵ Code Wash. 1896, § 5549.

¹⁶ In Alabama, California, Georgia (not exceeding three per cent), Iowa, Michigan, Minnesota, Nevada, Ohio, South Carolina (by suit in common pleas), Ver-

Extra compensation.

Compensation by will.

Statutes prohibiting certain compensation,

and directing apportionment of commissions among several.

performed.⁴

compensation is denied.¹ The statutes of some of the States require executors whose compensation is provided for by will to renounce such provision in writing, or forfeit their compensation under the statute.² In Indiana the statute prohibits allowances to the administrator for services rendered by him as attorney at law;³ and in Georgia the allowance of commissions on property turned over to the distributees in kind. In several States, it is made the duty of the court to apportion the compensation, if there be more than one executor or administrator, according to the services respectively

* § 525. Compensation allowed in the Absence of Statutory Provision. — In those of the American States in whose

Compensation is allowed as a matter of right and justice,

including special administrators.

statutes no provision for the compensation of executors and administrators is found, the courts usually allow, as a matter of justice and policy, such compensation as may be considered reasonable, varying in amount according to the time, trouble, and responsibility involved, as well as the magnitude of the estate administered, — usually five per cent on personal and two and a half on real estate.⁵ Three per cent is deemed sufficient for personal estate,⁶ where it is large and the trouble small, and also for real estate; but under peculiar circumstances enhancing the trouble, five per cent has been allowed for real estate.⁷ So in Connecticut trustees are allowed a reasonable compensation for their services out of the fund;⁸ also in Massachusetts⁹ and New Hampshire.¹⁰ And a special administrator, for whose compensation the statute fails to provide, is held to be within the equity of the statute as to executors and adminis-

trators, Wisconsin, and in most of the Western and Pacific States. The subject of extra compensation is discussed, *post*, § 529.

¹ In Illinois: *Askew v. Hudgens*, 99 Ill. 468.

² So in California, Indiana, Maryland, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New York, Ohio, Oregon.

³ And it was therefore held that an administrator could not claim credit for attorney's fees paid a law firm of which he was himself a member: *Taylor v. Wright*, 93 Ind. 121.

⁴ So in New Jersey, New York, South Carolina. See as to compensation of joint executors and administrators, *post*, § 530.

⁵ *Eshleman's Appeal*, 74 Pa. St. 42,

48; *Miller's Appeal*, 7 Atl. Rep. 190; *Gable's Appeal*, 36 Pa. St. 395, 396.

⁶ *Pusey v. Clemson*, 9 Serg. & R. 204; *Estate of Walker*, 9 Serg. & R. 223.

⁷ *Robb's Appeal*, 41 Pa. St. 45, 49. See also *Kelly's Estate*, 181 Pa. St. 478, holding five per cent to be the "usual commissions," in a large estate, within the meaning of that term in the will. More than five per cent will not be allowed without evidence of unusual services or responsibility: *Gilpin's Estate*, 138 Pa. St. 143.

⁸ *Clark v. Platt*, 30 Conn. 282, 284; *Kendall v. New England Co.*, 13 Conn. 383; *Comstock v. Hadlyme*, 8 Conn. 254.

⁹ *Smith's Prob. L.* 182.

¹⁰ *Gordon v. West*, 8 N. H. 444; *Wendell v. French*, 19 N. H. 205.

trators.¹ Under what circumstances surviving partners administering the partnership estate are entitled to commissions has been mentioned in connection with the subject of partnership estates.²

Partnership estates.

§ 526. **Compensation in Cases of Maladministration.**—It is held in numerous cases that compensation must be refused if the administrator has been guilty of wilful default or gross negligence in the management of the estate, whereby the same has suffered loss.³ This principle is adhered to in some of the States in which the compensation is fixed by statute, denying any discretion in the matter to the courts on the ground that the statute gives compensation for faithful administration only.⁴ But it

No compensation allowed if administrator has been in default or grossly negligent,

although statute fixes commission.

[* 1164] would * seem that the language of the statute in most States fixing the compensation of executors and administrators precludes all discretion in this respect. The court can neither add to nor detract from, nor in any wise vary, the compensation directed to be allowed by the statute; it can neither allow nor disallow commissions scaled by the degree of skill or of vigilance, of good or of bad faith, displayed in the management of the estate, unless such discretion is vested in the court by statute.⁵ The principle upon which compensation is refused is, that, where the estate has suffered loss by the dereliction of the executor or administrator, the loss will not be enhanced by the allowance of commissions. But where the loss arising out of the misconduct is made up to the estate, so that the beneficiaries get the full benefit of a vigorous and efficient administration, it seems neither just nor logical that a bonus should

Unless the statute precludes discretion in the court.

¹ *Green v. Sanders*, 18 Hun, 308; *Wright v. Wilkerson*, 41 Ala. 267. See also *In re Moore*, 88 Cal. 1, 4; and whether compensation may be allowed to guardians of insane persons in analogy with the statute allowing same to administrators, see *Woerner on Guardianship*, § 154.

² *Ante*, § 124, pp. * 284, * 286.

³ *Brooks v. Jackson*, 125 Mass. 307, 311; *Jennison v. Hapgood*, 10 Pick. 77; *Clauser's Estate*, 84 Pa. St. 51, 54, citing earlier Pennsylvania cases; *Thomas v. Frederick*, 9 Gill & J. 115; *Smith v. Kenard*, 38 Ala. 695, citing Alabama cases, p. 702. As to compensation of guardians of minors in such cases, see *Woerner on Guardianship*, § 106; and of guardians of lunatics, *Ib.* § 154.

⁴ *State v. Berning*, 74 Mo. 87, 100; *Badillo v. Tio*, 7 La. An. 487; *Warbass*

v. Armstrong, 10 N. J. Eq. 263, 265, approved in *Frey v. Frey*, 17 N. J. Eq. 71, 75; *Arnold v. Blackwell*, 2 Dev. Eq. 1, 4; *Succession of Touzanne*, 36 La. An. 420; *Eppinger v. Canepa*, 20 Fla. 262, 289; *Grant v. Reese*, 94 N. C. 720, 731.

⁵ The statutes of Florida, Georgia, New Jersey, Rhode Island, and West Virginia forfeit the administrator's commissions if he fail to render regular accounts. A similar law prevailed in South Carolina: *Ramsay v. Ellis*, 3 Des. 78; *Benson v. Bruce*, 4 Des. 463; *Black v. Blakely*, 2 McCord Ch. 1, 5, 7, *et seq.*; but was changed in 1872: *Lay v. Lay*, 10 S. C. 208, 222; *Davidson v. Moore*, 14 S. C. 251, 266. In Virginia it is now in the court's discretion, whether to allow commissions where the accounts are not settled in time: *Moorman v. Crocket*, 90 Va. 185, 198; *Trevelyan v. Lofft*, 83 Va. 141, 148.

be granted to them in the shape of the commissions denied for the administration, thus increasing the burden which, in such cases, usually falls upon the delinquent's sureties. To the extent to which the estate has been properly administered, and on the amounts which either he or his sureties pay to make up for the losses by *devastavit* or maladministration, the administrator should be allowed such commissions as the statute provides.¹

§ 527. **Discretion of the Court under the Statutes.**—It results from the nature and scope of power vested in probate courts, that the discretion intrusted to them must be exercised in the manner and within the limits pointed out by statute. Thus, under a statute empowering the court to allow not less than five nor more than ten per cent on the property administered as commission to the [* 1165] executor or administrator, the percentage cannot be different for different transactions of the administration, but must be

uniform on the whole of the assets.² Where the estate is small and the trouble great, the rate of percentage allowed should be higher than in greater estates with proportionally less trouble;³ thus, under a statute fixing the maximum commission at five per cent in all estates exceeding \$50,000 in value, three and a half per cent was held a proper allowance where the estate amounted to \$289,000,⁴ while three per cent on an estate of nearly \$500,000 was held too much.⁵ The amount of labor expended does not furnish the sole criterion for the rate of compensation; the value of the services rendered, and the promptness of the attention given, should also be considered.⁶ It is not the policy of the law to allow liberal commissions for settling the estates of deceased persons, and at the same time to allow payments to attorneys for doing the business;⁷ but the frequent employment of

¹ Foster v. Stone, 67 Vt. 336, 343; Jennison v. Hapgood, 10 Pick. 77, 112; Halsey v. Van Amringe, 6 Pa. 12, 16; Hawkins v. Cunningham, 67 Mo. 415, 419; Clyde v. Anderson, 49 Mo. 37, 44; Shinn's Estate, 166 Pa. St. 121, and Brennan's Appeal, 65 Pa. St. 16, 19 (illustrating the principle, though not under a statute); Tiner v. Christian, 27 Ark. 306, 312; Ward v. Ford, 4 Redf. 34, 39 (reviewing the New York law on this subject and citing numerous cases); Edmonds v. Crenshaw, Harp. Ch. 224, 232; Powell v. Powell, 10 Ala. 900, 914; Succession of Rice, 14 La. An. 317; Welling v. Welling, 3 Dem. 511; Fitzgerald's Estate, 57 Wis. 508, 516; Handy v. Collins, 60 Md. 229, 233. But not where the result of allowing the defaulting administrator such

commissions would be to twice charge the estate therewith, as where the administrator *de bonis non* is entitled to commissions for collecting the judgment against the defaulting predecessor: Chapman v. Brite, 4 Tex. Civ. App. 506, 513.

² McPherson v. Israel, 5 Gill & J. 60, 64 (holding, however, that, where the administration has not been fully completed, the minimum limitation does not apply); *Ex parte* Bell, 14 Ark. 76; McWhorter v. Benson, Hopk. 28, 37.

³ Cavendish v. Fleming, 3 Munf. 198, 202; Washington v. Emery, 4 Jones Eq. 32, 37; McCall v. Peachy, 3 Munf. 288, 306.

⁴ Rogers v. Hand, 39 N. J. Eq. 270.

⁵ Pomeroy v. Mills, 37 N. J. Eq. 578.

⁶ Powell v. Burrus, 35 Miss. 605, 615.

⁷ Trammel v. Philleo, 33 Tex. 395, 411.

counsel to aid the executor in transacting the business of the estate is no ground for disallowing him compensation.¹

Whether the discretion exercised by the probate court is final, or reviewable on appeal, may depend upon various considerations. It is held in some States that such discretion is not subject to review on appeal,² unless flagrant abuse is shown,³ or want of evidence upon which the allowance was made.⁴ The distinction has been drawn, that, when commissions are objected to and the exercise

Decisions holding the discretion of probate court final, unless flagrant abuse be shown.

of discretion is in reference to a matter arising collaterally, [*1166] *the decision of the court below is conclusive; but when in reference to a question in the cause, it is subject to review.⁵ Where the appeal is to a court in which there is a trial *de novo*, the question of commissions is necessarily triable by the appellate court, which *pro hac vice* takes the place of the probate court, and passes upon all questions accordingly.⁶

But is reviewable in appeals triable *de novo*.

§ 528. Upon what Property Commissions are allowable. — It is not always clear upon what property administered, and for what services rendered to the estate, the compensation is to be computed. But manifestly no commissions can be allowed upon property which is neither included in the inventory nor ever came into the hands of the administrator;⁷ nor upon funds having only a constructive and not actual existence;⁸ nor on any property which, although it belongs to the estate, has not been administered, and is not under the control of the probate court;⁹ nor on property belong-

No commissions on property not administered, or having only constructive existence.

¹ Estate of Lancaster, 14 Phila. 237.

² Handy v. Collins, 60 Md. 229, relying on Wilson v. Wilson, 3 Gill & J. 20, 23; Nicholls v. Hodges, 1 Pet. 562, 565; West v. Smith, 8 How. (U. S.) 402, 411; Mower's Appeal, 48 Mich. 441, 451.

³ Spratt v. Baldwin, 33 Miss. 581; Ramsey v. Ramsey, 4 T. B. Mon. 151; Reynolds v. Canal, &c., 30 Ark. 520, 526; Arnold v. Smith, 14 R. I. 217; Sanderson v. Sanderson, 20 Fla. 292, 322; Green v. Barbee, 84 N. C. 69, 72; Clark v. Newman, 1 S. W. R. (Ky.) 880. See also Woerner on Guardianship, § 106.

⁴ McCracken v. McCracken, 6 T. B. Mon. 342, 348.

⁵ Shepard v. Parker, 13 Ired. L. 103, 104.

⁶ Hawkins v. Cunningham, 67 Mo. 415; Walton v. Avery, 2 Dev. & B. Eq. 405, 409; Green v. Barbee, 84 N. C. 69, 72.

⁷ Succession of Macarty, 5 La. An.

434, 436; Succession of Gollain, 31 La. An. 173.

⁸ Hill v. Nelson, 1 Dem. 357. Where an executor sells land to pay a mortgage debt, as, it seems, may be done in Texas, and the creditor buys it in at less than the amount of the debt, the executor is entitled to commissions on the amount bid, although the sum bid is not paid in cash, but simply credited on the debt: Huddleston v. Kempner, 87 Tex. 372.

⁹ Steel v. Halladay, 20 Oreg. 462. Succession of Butterly, 10 La. An. 258; Ball v. Brown, Bai. Ch. 374; Key v. Jones, 52 Ala. 238, 244; Succession of Fontelieu, 28 La. An. 638; Estate of Reck, holding that the executor is not entitled to commissions on the value of the homestead set out to the widow: Myr. 59; Baucus v. Stover, 24 Hun, 109, 114 (holding that an executor selling encumbered real estate under a will is entitled to commissions on

ing to strangers to the estate, although it has been inventoried.¹ But where the administrator holds property by consent pending a suit against him for its recovery, or where he takes charge of it during a protracted litigation therefor, or rightfully takes charge during the absence of the heirs, and the administration is beneficial, he will be entitled to compensation.²

A safe and convenient rule in this respect, so far as it goes, is that commissions are allowable to the administrator on such

Commissions are computable on all property the right to which passes from the deceased through him to the creditor, heir, or other ultimate beneficiary.

property, and such property only, as constitutes assets in his hands; *i. e.* such property as passes from the deceased to creditors, heirs, devisees, distributees, or legatees through his custody.³ This rule will * include all personal property that belonged [* 1167] to the deceased having any money value,⁴ and all increase of the estate during the period of administration,⁵ as well as the proceeds of real estate where no special provision exists for such.⁶ And it has been

held, contrary to the general rule, however,⁷ that where the administrator sells real estate subject to mortgages, he is entitled to commission on the price of the real estate, not diminished by the amount of the mortgages;⁸ and where a testator directs the conver-

the equity of redemption only, *Bockes, J.*, dissenting); *Hitchcock v. Mosher*, 106 Mo. 578 (to same effect); *Buerhaus v. De Saussure*, 41 S. C. 457 (also to that effect), 497; *Reynolds v. Canal Co.*, 30 Ark. 520, 525; *Re Rickenbaugh*, 42 Mo. App. 328.

¹ *Estate of Ricand*, 70 Cal. 69; as where, for instance, it is decided after the testator's death that he had no title: *In re Delaney*, 110 Cal. 563; or that the decedent held it in trust for another: *Haines v. Hay*, 169 Ill. 93.

² *Wells v. Robinson*, 13 Cal. 133, 144; *Succession of Girod*, 4 La. An. 386, 387; *Succession of McDonogh*, 7 La. An. 475.

³ *Succession of Powell*, 14 La. An. 425; *Green v. Sanders*, 18 Hun, 308, 309; *Estate of Isaacs*, 30 Cal. 105, 113; *Pomeroy v. Mills*, 37 N. J. Eq. 578, 582.

⁴ *Pomeroy v. Mills*, *supra*; if the face value be not the true value, the property must be appraised: *Estate of Stratton*, 46 Md. 551. Commissions are allowable on the actual value of the property: *Ladd v. Stephens*, 48 So. West. (Mo.) 915, 917.

⁵ Although the statute provided compensation by commission on "the amount of the appraised value," and although such increase has not been appraised, its value may be shown by the accounts and

additional inventories: *Merrill v. Moore*, 7 How. (Miss.) 271, 291, *et seq.*; *Evans v. Iglehart*, 6 Gill & J. 171, 200.

⁶ *Shurtliff v. Witherspoon*, 1 Sm. & M. 613, 621; *Deas v. Spann*, Harp. Ch. 176; *Smith v. Cheney*, 1 Robins. 98; *Scroggs v. Stevenson*, 100 N. C. 354; *Crenshaw v. Bentley*, 31 Mo. App. 75. Where the executrix took commissions on the realty sold, it was held she could not also take credit for commissions paid an agent to effect the sale: *Jacobs v. Jacobs*, 99 Mo. 426, 437.

⁷ Which is that the executor can claim commissions only on the equity of redemption; see p. * 1166, note 9.

⁸ *Cox v. Schermerhorn*, 18 Hun, 16, 19. And see *Hahn v. Mosely*, 119 N. C. 73 (lien of judgment paid out of proceeds of sale). It seems, however, that in strictness the commissions should be restricted to the value of the equity of redemption, that being the only title that can be passed by an executor or administrator, and it was so held in *Baucus v. Stover*, 24 Hun, 109, 115 (reversed on another point in 89 N. Y. 1). And see cases cited *supra*, p. * 1166, note 9, to the effect that commissions on the decedent's interest only are allowable.

sion of real into personal property, the executor will be entitled to commissions on the value of such real estate, although the conversion does not actually take place;¹ but the administrator is not entitled to commissions on the value of real estate itself, except in some of the States where the same by statute goes to him during the administration, instead of to the heir.² The rule excludes commissions on advancements,³ all uncollectible debts,⁴ and property lost or perished.⁵ And where the administrator is charged with and delivers over to the widow the household furniture which is by law set apart for her, he should be allowed commissions on its appraised value;⁶ but when such property does not pass through his hands, as where it is collected and retained by the widow, no commission is allowable thereon.⁷ Nor are commissions allowed on his own debt.⁸

It is held in some States, however, that commissions are [* 1168] not * allowable on property delivered in kind to the distributee, nor on a specific legacy turned over to the legatee,⁹ nor on a debt due to the testator and specifically bequeathed to the executrix.¹⁰ So commissions have been denied to an executor on legacies in trust to him, if thereby he would receive double commissions; *i. e.* both as executor and as testamentary trustee.¹¹ The general rule seems to be otherwise. "On general principles," says Woodbury, J., in *West v. Smith*,¹² "it

Commissions refused on property delivered in kind to the distributee or legatee; on legacies in trust to the executor.

But general rule seems to be otherwise.

¹ *Stein v. Huesman*, 38 N. J. Eq. 405.

Where power of sale is given, but the executor joins as one of the devisees, stating that the sale under the testamentary power was unnecessary, he cannot claim commissions: *Metcalf v. Colles*, 43 N. J. Eq. 148.

² *Horton v. Barto*, 17 Wash. 675. The States in which realty goes to the personal representative are given *ante*, § 337. See also *Estate of Fernandez*, 119 Cal. 579, 584.

³ *Metcalf v. Colles*, 43 N. J. Eq. 148, 152; *Barhite's Appeal*, 126 Pa. St. 404.

⁴ *Mayberry's Appeal*, 33 Pa. St. 258, 263; *Succession of Foulkes*, 12 La. An. 537; *Moffat v. Loughridge*, 51 Miss. 211, 215; *Vanderford's Appeal*, 12 Atl. R. (Pa.) 491, 493; *Kester v. Lyon*, 40 W. Va. 161.

⁵ *Eversfield v. Eversfield*, 4 Har. & J. 12, 14. So in *May v. Green*, 75 Ala. 162, 166, an administrator was not allowed full commissions in good currency on Confederate money collected and distributed by him, but only the equitable, just value of the usual commission, reduced from Confederate to lawful currency.

⁶ *Mayberry's Appeal*, 33 Pa. St. 258, 263.

⁷ *Estate of Sharp*, 11 Phila. 92.

⁸ *Barhite's Appeal*, 126 Pa. St. 404; *Hoffer's Estate*, 156 Pa. St. 473.

⁹ *Ex parte Burney*, 29 Ga. 33 (under a statute); *Schenck v. Dart*, 22 N. Y. 420, 424; *Hall v. Tryon*, 1 Dem. 296; *Spruill v. Cannon*, 2 Dev. & B. Eq. 400, 402; *Walton v. Avery*, 2 Dev. & B. Eq. 405, 409; *Scroggs v. Stevenson*, 100 N. C. 354, 359; *Jones v. Jones*, 39 S. C. 247, 252, and cases cited.

¹⁰ *Handy v. Collins*, 60 Md. 229 (two judges dissenting); but see *Griffin v. Bonham*, 9 Rich. Eq. 71, 80.

¹¹ *Westerfield v. Westerfield*, 1 Bradf. 198; *Lansing v. Lansing*, 45 Barb. 182, 186; *Solliday v. Bissey*, 12 Pa. St. 347, 349; *McCan's Succession*, 49 La. An. 968 (allowing commissions but once on community property though both spouses died successively). But if the executor is charged with the management of such legacy, he is entitled to commission: *Perry v. Maxwell*, 2 Dev. Eq. 487, 506; *Matter of Gloyd*, 93 Iowa, 303. As to double commissions, see *post*, § 532.

¹² 8 How. (U. S.) 402, 411.

would seem just and proper for all such courts to make some compensation to executors for such services as paying over legacies, no less than for paying debts. In the case of specific legacies the trouble and risk are as great, if not greater, than in money legacies, and it would be difficult to find elementary principles to justify commissions in one case, and withhold them in the other."¹

§ 529. **Compensation for Extra Services.** — The statutes of a number of States allow extra compensation to executors and administrators for the rendition of services to the estate outside of the scope of their ordinary duties.² Unless such extra compensation is within the language or spirit of the statute, it cannot be allowed, because at common law their personal services are wholly gratuitous.³ In some of the States, however, such extra compensation is allowed on the ground that it is within the meaning of the statute, although not within the letter. The qualifications of executors and administrators do not include skill * or capacity in any particular calling; if any such [* 1169] becomes necessary in the administration of an estate, it is manifestly the duty of the person administering to employ some one possessing the requisite skill, for whose compensation the estate is liable; and the rate of compensation to the executor or administrator being fixed by the statute in recognition of this necessity, it is argued that, if with greater advantage to the estate such services are performed by the administrator himself, compensation therefor is not included in the commissions allowed for his ordinary services, and should be allowed him in addition thereto.⁴ The most usual services of this kind are those of counsellors and attorneys at law, overseers of plantations or farms, skilled accountants or clerks, and collectors, whose assistance is very often necessary in the management and settlement of the affairs of an estate.

¹ See also *McKim v. Duncan*, 4 Gill, 72, 86; *Pomeroy v. Mills*, 37 N. J. Eq. 578, 582; *McMenamin's Estate*, 15 Phila. 510; *Hardt v. Bierly*, 72 Md. 134.

² *Ante*, § 524.

³ *Gamble v. Gibson*, 59 Mo. 585, 592; *New Orleans v. Baltimore*, 15 La. An. 625, 627; *Renick v. Renick*, 92 Ky. 335; *Satterwhite v. Littlefield*, 13 Sm. & M. 302, 304; *Vanderheyden v. Vanderheyden*, 2 Pai. 287; *Fisher v. Fisher*, 1 Bradf. 335; *Morris v. Morris*, 1 Jones Eq. 326; *Snow v. Callum*, 1 Des. 542; *Collier v. Munn*, 41 N. Y. 143, 144, *et seq.*; *Sanderson v. Sanderson*, 20 Fla. 292, 320, 337.

⁴ *Lee v. Lee*, 6 Gill & J. 316; *Wendell*

v. French, 19 N. H. 205, 209, *et seq.*; *Clark v. Knox*, 70 Ala. 607, 617. In Texas, where the executor or administrator is authorized by statute to carry on the decedent's commercial business, he cannot be compensated by commissions upon the purchase and sale of new goods, but, by way of a reasonable allowance for the time and labor bestowed by him upon this business, as provided by statute for other such extraordinary services: *Dwyer v. Kalteyer*, 68 Tex. 554, 564. A similar ruling was made in South Carolina, where the executor carried on the business by order of the probate court: *Jones v. Jones*, 39 S. C. 247.

Where the statute expressly allows such compensation, it is the duty of the court to determine whether they were necessary or beneficial to the estate, and if so, to allow a reasonable compensation therefor.¹ Claims for compensation for such services should be scrutinized with jealous watchfulness, and never be allowed unless the court is satisfied of their *bona fides*.² If they fall within the ordinary routine of administration, they cannot, obviously, be allowed, for, by the terms of the statutes, the *extra* compensation is restricted to *extra* services. Thus, it is held that no special compensation is allowable for the trouble of the

Court must ascertain whether such service was necessary, and its reasonable value.

administrator in ascertaining what evidence [* 1170] might * be secured in suits depending against the estate.³ Keeping the accounts of the estate is one of the ordinary duties of an administrator, and while, if the services of an accountant or clerk be necessary for the proper management of the estate, he may obtain credit in his account for his reasonable expenses incurred therefor, he is not allowed extra compensation for his own services in this respect;⁴ and so with regard to the collection of rents and debts, if collectible without legal proceedings,⁵ time consumed in travelling,⁶ and the use of the executor's horse and buggy.⁷

Instances in which extra compensation was refused.

¹ The amount of compensation for legal services rendered by the executor or administrator in person is to be determined by ascertaining what a prudent administrator would feel authorized to pay an attorney under all the circumstances of the case: *Harris v. Martin*, 9 Ala. 895, 899, affirmed in *Teague v. Corbitt*, 57 Ala. 529, 544; *Clark v. Knox*, 70 Ala. 607, 617. But in Michigan it was held that he cannot expect to be allowed charges for services gauged by the prices of professional men: *Wisner v. Mabley*, 70 Mich. 271, 285; and so in Wisconsin it is said: "While the evidence of experts is helpful and proper to be considered, we do not consider it absolutely binding on the court. The statute . . . evidently contemplates that the court shall exercise its sound discretion and is not bound to allow exorbitant sums, though there may be evidence uncontradicted which supports such exorbitant charges. The final test is: What does the court [of probate], in view of the evidence and its own knowledge of the facts, 'judge reasonable'?" : *Ford v. Ford*, 88 Wis. 122.

The right of an administrator to extra compensation depends on the judicial

discretion of the court, which cannot be delegated to a jury: *Loomis v. Armstrong*, 49 Mich. 521, 526. See *Wisner v. Mabley*, 74 Mich. 143, as to what are or are not extraordinary services.

² *Harris v. Martin*, 9 Ala. 895, 899; and proof should be made of each special service with its particular value, and not the whole aggregated by mere estimate without being itemized: *Green v. May*, 75 Ala. 162, 167; *Steel v. Holladay*, 20 Oreg. 462. But while the better practice requires the claim for extra services to be itemized, yet failure so to do will not be held fatal, when no motion to have the claim itemized or made more certain, is made, and when the claim is in fact itemized on the trial, and proof made: *Ford v. Ford*, 88 Wis. 122. See also *Gloyd's Estate*, 93 Iowa, 303.

³ *Dockey v. McDowell*, 40 Ala. 476.

⁴ *Vanderheyden v. Vanderheyden*, 2 Pai. 287; *Lucich v. Medin*, 3 Nev. 93, 104.

⁵ *Fisher v. Fisher*, 1 Bradf. 335, 336; *Carter v. Cutting*, 5 Munf. 223, 241.

⁶ *Morris v. Morris*, 1 Jones Eq. 326, 327; *Snow v. Callum*, 1 Des. 542; *Watkins v. Romine*, 106 Ind. 378.

⁷ *Pullman v. Willets*, 4 Dem. 536.

§ 530. **Compensation of Joint Executors or Administrators.**—

It is obvious that, if an estate is administered on by more than one person, all the persons so administering will, jointly, be entitled to no greater compensation than one administering alone would be entitled to.¹ Hence, if one of two executors takes a legacy directed by the will to be in lieu of compensation for his services as executor, the probate court cannot allow to the other more than one-half of the maximum rate of commissions fixed by statute;² and if one of two executors renounces his right to commissions, the right of the other to his share of the commissions is not thereby affected.³

In some of the States there is no power in probate courts to apportion the commissions among several executors or administrators according to the amount or value of their respective services;⁴ but in other States, where one has performed more than his share of the work, the court may allow him a proportionate share of the commissions.⁵ The statute of New York distinguishes between estates exceeding and those not exceeding *\$100,000 [*1171] in amount. Previous to 1881, the law required an apportionment of commissions among the several executors or administrators of an estate of less value in personalty than \$100,000; but if the estate exceeded \$100,000, then each one of as many executors or administrators as were appointed and acted was entitled to a full commission, unless there were more than three, in which case the compensation to which three would be entitled should be divided among them, share and share alike.⁶ By the act of June 16, 1881, this statute was so amended as to provide that the aggregate sum awarded as commissions in estates exceeding \$100,000 should be apportioned among the executors or administrators "according to the services rendered by them respectively."⁷ Under this statute,

¹ *Per* Robertson, C. J., in *Phillips v. Richardson*, 4 J. J. Marsh. 212, 214; *Walker's Estate*, 9 Serg. & R. 223, 226; *Valentine v. Valentine*, 2 Barb. Ch. 430, 438.

² *Lee v. Lee*, 6 Gill & J. 316, 323; *Succession of Edwards*, 34 La. An. 216, 222.

³ *Schoeneich v. Reed*, 8 Mo. App. 356, 363.

⁴ *In re Seitz*, 6 Mo. App. 250; *Wickersham's Appeal*, 64 Pa. St. 67, reviewing the Pennsylvania cases, and citing with approbation *Davis's Estate*, 1 Phila. 360; *Schoeneich v. Reed*, *supra*; *Mount v. Slack*, 39 N. J. Eq. 230; *Oakley v. Oakley*, 111 Ala. 506.

⁵ *Hodge v. Hawkins*, 1 Dev. & B. Eq. 564, 566; *Waddill v. Martin*, 3 Ired. Eq. 562, 565; *Richardson v. Stansbury*, 4 Har. & J. 275; *Hope v. Jones*, 24 Cal. 89, 93, *et seq.* See *ante*, § 524, as to statutes giving the power to apportion commissions.

⁶ *Laws*, 1863, ch. 362, § 8. This statute is commended by Surrogate Tucker, in *Van Nest's Estate*, Tuck. 130, 131; and liberally construed, so as to include rents from real estate if necessary to make up the \$100,000: *In re Leggatt*, 4 Redf. 148, 150.

⁷ *Code Civ. Pr.* § 2736; *Matter of Harris*, 4 Dem. 463; *Welling v. Welling*, 3 Dem. 511.

it is held that the surrogate has no power to give commissions to one of several executors who has rendered no services;¹ and that an action at law will not lie to apportion compensation between two or more executors, but that the apportionment may be made by the surrogate.² When the accounting is with reference to incomes which must be annually paid over and accounted for, no matter how much the principal may be, or how much the estate of the decedent may have been, this section does not apply, unless the income exceeds \$100,000; and more than one commission can be allowed only in case the sum upon which commissions are computed amounts to at least \$100,000.³

Ordinarily, commissions should be equally divided among several persons administering;⁴ if any one claims the right to a greater share of commissions than his quotient of the dividend, the burden of proof rests upon him.⁵ Legatees and distributees have no right to object, if the commissions properly allowable in the aggregate have all been taken by one of the executors;⁶ nor has the probate court power, after the passing of an account in which commissions in gross had been allowed to two administrators, to compel one of them to pay to the other his just share,⁷ and if the court awards extra compensation to one, the co-administrator is not concluded by the doctrine of *res judicata* from showing in the proper forum, in an action against the other, that he earned a portion of such extra compensation.⁸ It was held in Michigan that equity has jurisdiction to decree a division between co-executors, one of whom has received all the commissions; and that it is not the law that co-executors are entitled to equal commissions, without regard to their respective services, responsibility, and time spent in behalf of the estate.⁹

Commissions equally divided, but distributees cannot complain if all commissions are taken by one.

An agreement among several executors or administrators, by which one of them should do all the work and incur all the responsibility, for the purpose of avoiding [*1172] *responsibility by the other, is against public policy, and void; but it is lawful for them to agree upon the share to which each shall be entitled, when the labor performed by them respectively is unequal.¹⁰ It is held in Maryland, that an agreement whereby one joint executor renounces his right to letters testamentary in favor of his co-executor, in con-

Agreement that one should do all the work, in order that the other should incur no liability, is void; but an agreement as to the compensation of each is valid.

¹ *In re Manice*, 31 Hun, 119.

² *White v. Bullock*, 4 Abb. App. Dec. 578, reversing s. c. 20 Barb. 91.

³ *In re Willets*, 112 N. Y. 289, 298.

⁴ *Squier v. Squier*, 30 N. J. Eq. 627; *Pomeroy v. Mills*, 40 N. J. Eq. 517.

⁵ *Shaw v. Shaw*, 3 Cent. Rep. 592.

⁶ *Claycomb v. Claycomb*, 10 Gratt. 589.

⁷ *Mount v. Slack*, 39 N. J. Eq. 230.

⁸ *Oakley v. Oakley*, 111 Ala. 506.

⁹ *Speirs v. Wisner*, 88 Mich. 614.

¹⁰ *Aston's Estate*, 5 Whart. 228, 240; *Walker's Estate*, 9 Serg. & R. 223, 226; *John v. John*, 122 Pa. St. 107.

sideration of being paid one-half of the commissions, is valid.¹ So it is held that an administrator, who received his appointment under an agreement or promise to administer without charge, will be held to his agreement, and will not be allowed commissions;² and an agreement as to the rate of compensation between a *cestui que trust*, acting *sui juris*, and his trustee, will also be upheld, in the absence of fraud.³ It has heretofore been mentioned that agreements amounting to a trading in the appointment of an administrator, or to transfer to the right to administer for a consideration, are void as being against public policy.⁴ A promise to compensate an executor for those things which it is his duty to do is without consideration, and an agreement by a distributee to pay an executor for saving money to the estate by favorable settlements with creditors is void as against public policy, since the executor can only serve the distributee at the expense of the creditors who are his *cestui que trustent*.⁵

§ 531. **Compensation to Successive Administrators.** — Where several executors administer, and one of them dies before completion of the administration, the commissions for what has been done before the death of the co-executor should be divided among all of them, since they are entitled to the commissions *together*. The apportionment is to be made either according to the relative amount of labor performed, or the relative value of the services rendered by each, where the law directs or allows such apportionment;⁶ or equally divided; but the survivor is entitled to no additional commissions on that part of the estate in the hands of the deceased co-executor on which commissions have already been allowed to the executors jointly.⁷

The interruption to the administration by the death, removal, or resignation of an executor or administrator, and its completion by an administrator *de bonis non*, or other successor, renders it difficult, in some instances, to adjust the compensation due to the successive administrators. This difficulty is greatly reduced in those States in which part of the commissions are allowed for taking the estate into possession,

States giving one-half of the commissions for collecting; and one-half

¹ Ohlendorf v. Kanne, 66 Md. 495, relying upon Bassett v. Miller, 8 Md. 548, 551, and the case of Dolfeld v. Kroh, not reported, in which it was held that a like contract by one entitled to letters of administration was valid and enforceable by an action at law.

² Bate v. Bate, 11 Bush, 639; *In re* Hopkins, 32 Hun, 618; Estate of Davis, 65 Cal. 309; McCaw v. Blewit, 2 McC.

Ch. 90, 103; Mott v. Fowler, 85 Md. 676; or no greater sum than was agreed on: Koch's Estate, 148 Pa. St. 159.

³ Bowker v. Pierce, 130 Mass. 262.

⁴ Ante, § 244.

⁵ Orr v. Sanford, 74 Mo. App. 187, 191.

⁶ Perry v. Maxwell, 2 Dev. Eq. 488, 506, *et seq.*

⁷ *Ib.*

[* 1173] * and part for disbursing the same.¹ A convenient measure is thus afforded for the apportionment of compensation among several successive administrators, which cannot work great injustice.² The same measure — allowing one-half of the commissions to an administrator for reducing the assets into possession — is applied by courts in the absence of a statute so directing.³ In those States, however, in which no authority is given to apportion among several executors or administrators, commissions can be allowed only on so much of the estate as has been fully administered.⁴

for disbursing the assets.

An administrator dying or being removed is entitled to commissions on what he has administered;

Where the probate court possesses the power to adjust the compensation among several executors, it is its duty, in case of the resignation, death, or removal of one, to examine into the nature and value of the services rendered, comparing, as well as possible, that which has been done with what yet remains to be done in the course of the administration, and to apportion the compensation fixed by law for the whole, according to sound judgment;⁵ the second administrator being entitled to commissions for the whole administration, less what the first administrator is entitled to.⁶

but where court is allowed to apportion, it will do so in sound discretion, the successor taking full compensation, less what the first is entitled to.

The compensation to which an executor or administrator is entitled is for the *administration* of the estate; hence, where an intestate guardian had money in his hands belonging to his ward, his administrator is not entitled to commissions for paying it over to the new guardian;⁷ but the estate of the guardian is [* 1174] entitled to * the usual commissions if the money is paid to

¹ See *ante*, § 524, where those States are enumerated, and Woerner on Guardianship, § 106.

² *Griffin v. Bonham*, 9 Rich. Eq. 71, 80.

³ *Lyendecker v. Eisemann*, 3 Dem. 72, 74. This rule was established in chancery by Chancellor Kent: *Matter of Roberts*, 3 John. Ch. 42, 43. But while it may be proper enough to apply this rule upon sums of money received, it is not applicable where the bulk of the estate comes to the executors in the form of securities; no law justifies the allowance of half-commissions upon their estimated value in advance of their conversion into money or its equivalent: *McAlpine v. Potter*, 126 N. Y. 285, 290.

⁴ *Estate of Barton*, 55 Cal. 87, 89; *McPherson v. Israel*, 5 Gill & J. 60; *Hawkins v. Cunningham*, 67 Mo. 415, 417; *Cairns v. Chaubert*, 9 Pai. 160, 164; Suc-

cession of Day, 3 La. An. 624; *Succession of Milne*, 1 Rob. (La.) 400; *Sprott v. Baldwin*, 34 Miss. 327, 329.

⁵ *Ord v. Little*, 3 Cal. 287; *Estate of Marvin*, Myr. 163, 168; *Cherry v. Jarratt*, 25 Miss. 221, 226; *Succession of Milne*, 1 Rob. (La.) 400; *McPherson v. Israel*, 5 Gill & J. 60, 63; *Parker v. Gwynn*, 4 Md. 423, 425; *Effinger v. Richards*, 35 Miss. 540, 554; *Scroggs v. Stevenson*, 100 N. C. 354, 358.

⁶ *Estate of Marvin*, *supra*; *Moore v. Randolph*, 70 Ala. 575, 586 (denying to the second administrator commissions on the proceeds of lands with which he had nothing to do); *Lemmon v. Hall*, 20 Md. 168, 171 (allowing to the successor full commissions for what he administered on, without regard to what his predecessor received).

⁷ *Floyd v. Priest*, 8 Rich. Eq. 248, 251; *Griffin v. Bonham*, 9 Rich. Eq. 71.

the ward.¹ So the surviving executors are not entitled to commissions on the sums paid to the administrator of a deceased executrix as arrears due her from the estate.²

§ 532. **Compensation determined by the Testator.**—It has already appeared that in a number of States the executor is required to renounce any provision made in the will to compensate him for his services, or forfeit his right to 'compensation under the statute.'³

In the absence of indication by statute or will, an executor will take both a legacy and statutory compensation. It seems that in the absence of statutory provision on the subject, and of any indication in the will that the bequest is intended to exclude further compensation, the executor is entitled to both the legacy and his statutory commissions;⁴ so that if the estate turn out insolvent, and the legacy thereby fail, the court will allow

compensation independent of the provision in the will.⁵ So it has been held that, where the bequest is capable of two equally reasonable interpretations, by one of which the executor would be excluded

from receiving compensation, but not by the other, the latter should be adopted.⁶ In Maryland the doctrine of election, whereby a man shall not take under a will and at the same time defeat the provisions of the instrument, is held not to apply under the statute of that State,⁷ so that nothing contained in the will can deprive the executor of his right to such commissions as

are allowed by law.⁸ The current of authorities, however, is, that if the testator has given a legacy in lieu of commissions, or imposed upon his executors the condition that they should not have commissions, the court cannot defeat the provision of the will.⁹

Where by the terms of a will the functions of an executor and of a testamentary trustee coexist in the same person, it is sometimes difficult to determine whether such person is entitled to compensation for administering property in both capacities, or whether, * as it is usually expressed, he is entitled to [* 1175] double commissions. On principle, it seems that where the same person is called on to perform two distinct acts, for each

¹ *Adams v. Lathan*, 14 Rich. Eq. 304, 309.

² *Betts v. Betts*, 4 Abb. New C. 317, 324, 438.

³ *Ante*, § 524.

⁴ *In re Mason*, 98 N. Y. 527; *Aspinwall v. Pirnie*, 4 Edw. Ch. 410.

⁵ *Estate of Guen*, 1 Ashm. 317.

⁶ *Marshall v. Wysong*, 3 Dem. 173, 178.

⁷ *McKim v. Duncan*, 4 Gill, 72, 85.

⁸ *Handy v. Collins*, 60 Md. 229, 232, citing earlier Maryland cases. Where a legacy in lieu of commissions is larger

than the allowance would otherwise be, and the executor is upon a *caveat* appointed *pendente lite* and as such does only that which he would have done as executor, the legacy must be treated as full compensation, though parts of the estate pass through his hands in each capacity: *Renshaw v. Williams*, 75 Md. 498.

⁹ *Matter of Gerard*, 1 Dem. 244, 247; *Matter of Kernochan*, 104 N. Y. 618, 631; *Secor v. Sentis*, 5 Redf. 570; *Hays's Estate*, 183 Pa. St. 296; *Succession of Fink*, 13 La. An. 103; *Haine's Accounting*, 8 N. J. Eq. 506, 509.

of which the law awards compensation, he should receive such compensation for both, that is, double commissions, because the compensation is not awarded as a bounty or gratuity, but as the equivalent for services rendered, and it is therefore indifferent whether they were performed by the same or by different persons. This principle is generally recognized,¹ even where double commissions are denied.² But the functions of an executor and of a trustee may be so interwoven and blended that they are inseparable,³ and when so, as must be the case whenever the trust is annexed to the office of executor,⁴ the act must be deemed to be that of the executor alone, and double commissions are not allowable.⁵ So, for the same reason, the executor is not entitled to compensation for services rendered as trustee, and not falling within the scope of his duties as executor, such as the sale or lease of real estate for purposes collateral to the administration,⁶ etc. The intention of the testator must be decisive, in many cases, of the question whether an executor and trustee is entitled to double commissions; if he intended to create a trust in the hands of his executor, distinct and apart from his executorship, the person performing the functions of both is entitled to commissions in both capacities; but where it is evident that he intended the * compensation given to the executor to cover also his services as trustee, double commissions will not be allowed.⁷

Executor and testamentary trustee performing distinct acts are entitled to compensation for each.

But where the acts cannot be distinguished as being those of either, double commissions cannot be allowed.

No commissions are allowable for acts collateral to the administration.

¹ "The court deals with them in the matter of compensation in such cases precisely as if the two trusts, the executorship and the trusteeship, were in different hands": *Baker v. Johnston*, 39 N. J. Eq. 493; *Laytin v. Davidson*, 95 N. Y. 263. See also *Gloyd's Estate*, 93 Iowa, 303.

² *Johnson v. Lawrence*, 95 N. Y. 154, 159; *Sanderson v. Pearson*, 45 Md. 483. So where under the will the duties of executors, as such, are first to be performed, and then they are to assume the functions of trustees, they are entitled to commissions as executors and after the termination of their duties as executors, to commissions as trustees: *Re Willetts*, 112 N. Y. 289, 296. The will must however contemplate separable action and at different stages of the administration: *McAlpine v. Potter*, 126 N. Y. 285.

³ *Johnson v. Lawrence*, *supra*; *Phoenix v. Livingston*, 101 N. Y. 451, 454.

⁴ See *ante*, § 340, discussing powers as

annexed to or separable from executorship: *Brush v. Young*, 28 N. J. L. 237.

⁵ *McAlpine v. Potter*, 126 N. Y. 285; *Everson v. Pitney*, 40 N. J. Eq. 539, 542, reversed on a question of fact, but affirmed as to the principle announced, in *Pitney v. Everson*, 42 N. J. Eq. 361, 366. In *Brush v. Young*, 28 N. J. L. 237, numerous illustrations are given when the trust is separable from the office of executor and when not: *Valentine v. Valentine*, 2 Barb. Ch. 430; *Hall v. Hall*, 78 N. Y. 535, 540; *McKie v. Clark*, 3 Dem. 380; *In re Leinkauf*, 4 Dem. 1.

⁶ *Phoenix v. Livingston*, 101 N. Y. 451, 454. The case of *Wagstaff v. Lowerre*, 23 Barb. 209, 225, holding that trustees are entitled to commissions on land, is criticised in this case, and held not to be authority to the extent of allowing commissions on the value of land not actually or constructively converted into personalty; *Sanderson v. Pearson*, 45 Md. 483.

⁷ *Shippen v. Burd*, 42 Pa. St. 461, 466;

§ 533. **Credit for Commissions in the Administration Account.**—

Compensation for the services of the executor or administrator is not justly due until they have been rendered; and since the court is to determine whether the amount claimed or taken credit for is just, or in accordance with the statute, it follows that the credits for commissions are adjudicated like any other item of credit in the account,¹ and that unless the court find that the moneys upon which commissions are claimed and charged against the estate have been fully administered, —that is to say, not only collected, but also disbursed² to creditors, distributees, or legatees lawfully entitled thereto, or otherwise paid out in due course of administration, — the credit therefor will not be allowed, but the accountant held liable for the amount as so much assets yet in hand.² Experience demonstrates that the safest and most convenient course, both for the accountant and the beneficiaries of the estate, is to take credit on each settlement or accounting, whether partial or final, for commissions on so much of the whole estate as has been administered, whether disbursed for expenses of administration, in the payment of debts, or in distribution or payment of legacies, and on which commissions are allowable by law. If the accounting be only partial and *ex parte*, any error made in the allowance of commissions may be rectified and adjusted in the subsequent final settlement. On the final settlement of the account, commissions should be allowed on the whole of the balance in the administrator's hands sub-

Credit for commissions is to be allowed like any other item of credit.

The accountant should take credit at each settlement for commissions on all assets fully administered.

Lansing v. Lansing, 45 Barb. 182, 186; Ward v. Ford, 4 Redf. 34, 45; *In re* Mason, 98 N. Y. 527, 535.

¹ Hence it is sometimes said, that commissions are allowable only by order of the court: *Welling v. Welling*, 3 Dem. 511, 512; *Collins v. Tilton*, 58 Ind. 374.

² *Vanderheyden v. Vanderheyden*, 2 Pai. 287; *Hosack v. Rogers*, 9 Pai. 461, 468; *Matter of Kellogg*, 7 Pai. 265, 266. It has been held that the amount of commissions is matter for determination on final accounting: *Sparrow's Succession*, 42 La. An. 500; and that the right is inchoate until ascertained upon final accounting, and governed by the law then in force (unless the right had become vested by reason of the service having been fully performed prior to the passage of an act changing the law: *Ricker's Estate*, 14 Mont. 153); there is no vested right to receive for future services the

compensation allowed at the time of the administrator's appointment: *De War's Estate*, 10 Mont. 426. It has been held that commissions are allowable in any court at any time when it becomes necessary to pass upon the question: *Ladd v. Stephens*, 48 So. West (Mo.) 915. The general rule is said to be that they are deemed to be appropriated as they are earned; hence the inconvenience of ascertaining the precise sum due was held to be one reason why an executor's creditors could not attach his commissions either in his or in his co-executor's hands: *Adams' Appeal*, 47 Pa. St. 94; and why such commissions should not pass to the executor's assignee for the benefit of his creditors: *Mulligan's Estate*, 157 Pa. St. 98; and why such commissions are not subject to the voluntary disposal or assignment of the executor: *Matter of Worthington*, 141 N. Y. 9.

ject to be disposed of by the order of the court, and deducted from such balance.¹

It will be noticed that, by this method of taking credit for commissions, the accounting executor or administrator is deprived of commissions on so much of the estate administered as is [*1177] *eliminated therefrom by the amount of credits taken for commissions previous to the final accounting; while, if no credit had been taken before final settlement, and the allowance made at once upon the total amount of property administered, he would get commissions upon the whole amount, including the amount allowed in payment of the commissions. To avoid the inconsistency of allowing commissions on commissions for part of the estate (so much as remains for disposition on final settlement), and denying commissions on commissions for another part of the estate (so much as has been eliminated by the payment of commissions in former accountings), it will be necessary either to allow commissions on final settlement on so much as has been credited for commissions in former settlements;² or the amount upon which commissions are to be computed must be found by multiplying the total value of the estate by 100 and dividing the product by a number equalling 100 plus the rate per cent of commission.³ In practice, however, such calculations are rarely or never resorted to; the custom of allowing the commissions on annual settlements is most convenient, and in cases where interest is to be charged on the balances in the hands of the administrator on annual rests, necessary, for the interest is computable only after deducting commissions on the whole amount administered.⁴

Commissions
on commis-
sions.

¹ Callaghan v. Hall, 1 Serg. & R. 241, 248; Hosack v. Rogers, *supra*.

² This has been held erroneous in Texas: Trammel v. Philleo, 33 Tex. 395, 411.

³ Thus, where an estate amounting to \$1,000 is administered, and the rate of

commission is five per cent, the administrator would, if commission on commissions be excluded, be entitled to five per cent on $100 \times 1000 \div 105 = 952.38\frac{2}{3}$; or \$47.61.

⁴ See De Peyster v. Clarkson, 2 Wend. 77, 95.

* CHAPTER LVIII.

[* 1178]

OF THE METHOD AND PROCEDURE IN ADJUDICATING THE ACCOUNT.

§ 534. **Devastavit.** — The preceding three chapters are devoted to the discussion of the charges which may be established against executors or administrators accounting, and of the credits to which they are entitled. Before passing on to the consideration of the methods adopted in the various States to test their correctness, it may be convenient to notice the subject of *devastavit*, which forms no inconsiderable element of the English law affecting executors and administrators. At common law, *devastavit*, or *devastavit*. Writ of *devastavit*, is the name of a writ given to any person who has been injured in his rights in consequence of the misapplication or waste of the assets or property of an estate by one or more executors or administrators, whereby he or they have made themselves liable to answer for the damages out of their own estate.¹ Remembering the simple and efficient method pointed out by statute in the several American States for calling executors and administrators to account, in the probate court,² for all property or assets of an estate which came into their hands, or which, by the exercise of reasonable prudence and diligence, might have been recovered by them, it becomes obvious that no necessity exists in America for a remedy of this kind. The accountability of executors and administrators to the probate court or in equity, as provided by statute, covers the whole ground. Under the American system, even the technical return of *devastavit* by a sheriff to an execution against a defendant executor or administrator is without application, — the decree of the probate or chancery court upon an accounting more effectually taking its place. As it rests upon an ascertained amount of assets, — either of property in kind, or of a balance in money, which is or ought to be in his hands, — the liability is necessarily a personal one, recoverable *de bonis propriis*, and binding upon his sureties. There is no occasion, therefore, to [* 1179] dwell upon the doctrine of *devastavit*; it has no application here, save that the name is still employed by judges and lawyers to designate the circumstances under which an executor or administrator is held personally liable for acts of negligence or conversion.

¹ Burr. Law Dic. 372.and see *Brown v. Reed*, 56 Ohio St. 264,² *Steel v. Holladay*, 20 Oreg. 70, 77; 272.

Thus the Supreme Court of Alabama holds that "the application of the assets to the payment of claims which do not of themselves afford *prima facie* evidence of their validity; or, if affording such evidence, which he knows, or has good reason to believe, or the means of ascertaining by proper diligence, to be unjust or illegal, is a *devastavit*." ¹ So the payment of a legacy before debts, without taking a refunding bond, ² and the transfer without value of a note made to an administrator for a debt due the estate, ³ have been declared *devastavit*; although the failure to keep funds of an estate ear-marked and separate constitutes technical *devastavit*, yet no liability attaches to such an act unless an injury result to the estate; ⁴ and it is held that the liability of an executor for *devastavit* relates back to his appointment, and that of an administrator to the date of his bond. ⁵

Instances of liability as upon *devastavit*.

It results from these considerations, that the term *devastavit* is used in America as a convenient designation for such acts of the executor or administrator as render him liable to the estate out of his own means, and has no other significance; and where such liability is found according to the principles of law applicable, the effect of the common-law remedy of *devastavit* is accomplished by the falsification or surcharge of his account.

§ 535. **Accounting by Co-executors or Co-administrators.** — The principles governing the accounting by several joint executors or administrators are inferable from what has been stated in connection with the subject of their respective rights and liabilities. ⁶ In many of the statutes requiring the accounts of executors and administrators to be rendered under oath, ⁷ it is provided that the affidavit to joint accounts may be made by one for all.

Affidavit to joint accounts may be made by one for all.

It may be mentioned as a general rule, that where they keep separate [* 1180] accounts, *each charging himself with so much of the estate only as comes into his own hands,

Each is chargeable only for the assets that come to his hands,

neither is chargeable with the assets in the hands of the other; ⁸ and in such case their separate accounts cannot be combined and may discharge himself by proper administration; in making the order of distribution. ⁹ So either of them may discharge himself by showing proper administration of all that came into his own hands; ¹⁰ but on a joint accounting they are jointly liable for all assets but are jointly liable on joint accounting,

¹ *Teague v. Corbitt*, 57 Ala. 529, 539.

² *Edmunds v. Scott*, 78 Va. 720. See on this point, § 560, p. * 1229.

³ *Krutz v. Stewart*, 76 Ind. 9.

⁴ *State v. Cheston*, 51 Md. 352, 382; 184. *Kirby v. State*, 51 Md. 383, 393.

⁵ *Leach v. Jones*, 86 N. C. 404.

⁶ *Ante*, §§ 346 et seq.

⁷ As to which see *post*, § 540.

⁸ *Ante*, § 348; *Davis's Appeal*, 23 Pa. St. 206, 208.

⁹ *Heyer's Appeal*, 34 Pa. St. 183,

¹⁰ *Bellerjeau v. Kotts*, 4 N. J. L. 359, 360.

and where they have given joint bond;

in equity he who has received assets is primarily liable.

received by any of them.¹ So two executors who have given a joint bond with sureties are jointly liable to creditors and distributees for the defalcation of either, before the sureties; ² but in equity the executor actually receiving the assets is *primarily* liable, if his co-executor had no means of knowing him to be insolvent, and did not join in the misapplication.³

Joint executor who is creditor may compel the others to account, and one accounting for full value of property becomes the owner.

One of several joint executors having a demand against the deceased may compel the others to account;⁴ but the title of one of them to property received before the testator's death cannot be litigated in opposition to an account by the universal legatee.⁵ Where one of several joint administrators accounts for the full amount of a promissory note belonging to the estate, the note thereby becomes the private property of the administrator so accounting, on the final settlement and discharge, by operation of law.⁶

In Delaware, the following presumptions were held applicable, *prima facie*, upon a joint account passed by two executors: 1st, that the balance shown by the account was held by them jointly, the account including assets jointly held and assets charged to the executors severally; 2d, that debts credited as being paid by both executors were paid out of assets jointly held, so far as they go; 3d, that as to assets charged *sever- [*1181] ally, each contributed ratably to the payment of debts credited to both equally.⁷

Where, upon application of one of two administrators, the court approved a final account and discharged the administration of the estate, the order was held to be irregular, but not assailable in a collateral action.⁸

In New York, it was held, under a statute authorizing all persons or parties having a right to appear in proceedings before the surrogate, either in person or by attorney or coun-

¹ *Duncommun's Appeal*, 17 Pa. St. 268, 270. But a number of cases in New Jersey, holding that a decree on a joint account conclusively fixes upon all the executors joining therein a joint liability for the balance shown by the account (among which may be cited: *Laroe v. Douglass*, 13 N. J. Eq. 308, 310; *Snydam v. Bastedo*, 40 N. J. Eq. 433, and *Weyman v. Thompson*, 50 N. J. Eq. 8) were emphatically overruled in *Weyman v. Thompson*, 52 N. J. Eq. 263, by the Court of Errors and Appeals, as being in disregard of the prior ruling of that court, and the doctrine was announced that a joint account does

not conclusively adjudicate their several liability.

² *Jamison v. Lillard*, 12 Lea, 690, 699. See, on the question of liability under a joint bond, *ante*, § 258.

³ *Adams v. Gleaves*, 10 Lea, 367, 381.

⁴ *King v. Shackelford*, 13 Ala. 435.

⁵ *Succession of Macarty*, 5 La. An. 434.

⁶ *Smith v. Gregory*, 75 Mo. 121, 131.

⁷ *Conner v. McIlvaine*, 4 Del. Ch. 30.

⁸ *State v. Probate Court*, 40 Minn. 296.

sel, that an executor contesting the account of his co-executor may examine the accountant by counsel.¹

§ 536. **Accounting by Successive Administrators.** — It will appear from the discussion of the relation between successive administrators of the same estate,² that at common law an administrator *de bonis non* cannot compel accounting by his predecessor, or by the representatives of a deceased predecessor, for any property of the estate which may have been confused, converted, or wasted, because

Administrator *de bonis non* cannot compel his predecessor to account at common law.

creditors, legatees, and next of kin have a direct claim against the deceased or former executor or administrator;³ and it will also appear that this doctrine, resting upon the theory that any conversion, waste, sale, or other change of condition of the assets of an estate, constitutes administration, is fast losing ground in the United States, as being inconsistent with the American theory that the wrongful conversion or waste of property does not amount to administration, but leaves the right to the converted goods or their equivalent still in the estate, so that it becomes the duty of the administrator *de bonis non* to recover the same, either *in specie*, or their equivalent in money.⁴ The difference in the extent to which courts and legislatures have departed from the common law in this respect has of course produced great divergence in the decisions; not only is the law different in different States, but it is by no means well settled in all of the States themselves. Hence no general rule can be announced; but the tendency is unmistakably in the direction of recognizing the duty of administrators *de bonis*

Secus in America.

non to continue the administration, and to complete it by doing everything which their predecessors have left undone. Thus, in many States, it is their duty to demand a full accounting and settlement of the administration down to the moment of the death, removal, or resignation of the executor or administrator,⁵ while in others they have this power only

Cases holding the duty of administrator *de bonis non* to compel former administrator or his representatives to account,

¹ Matter of Rich, 3 Redf. 177, affirmed in Buchan v. Rintoul, 10 Hun, 183, and by the Court of Appeals, to the extent that the surrogate had power to call any person to his aid in pointing out errors or defects in the account: s. c. 70 N. Y. 1, 3; but in Mead v. Willoughby, 4 Dem. 364, the executor's right to appear and contest his co-executor's right was unqualifiedly sustained.

² Ante, §§ 351, 352, 353.

³ Horner's Prob. L. § 157.

⁴ Ante, § 352.

⁵ Ante, § 352; Sanders v. Loy, 61 Ind. 298, 303; Waller v. Ray, 48 Ala. 468 (un-

der Revised Code), 472; Munroe v. Holmes, 9 Allen, 244; Curtis v. Bailly, 1 Pick. 199, 200 (allowing sureties of deceased administrator to settle the account); Matter of Rogers, 153 N. Y. 316, 322 (citing Code Civ. Pr. N. Y. § 2606, and showing how the power to compel a removed predecessor to account was extended in 1880 to the predecessor's representative in case of his death); Matter of Moehring, 154 N. Y. 423; Estate of Bradley, 9 Phila. 327, 329 (citing act of May 1, 1861); Giles v. Brown (citing Ga. Code, § 2514), 60 Ga. 658; Wilson v. Hinton, 63 Ark. 145 (Laws Ark. 1889, p. 50); *In re*

where debts have not all been paid.

where the debts have not all been paid,¹ and in yet others the common-law rule still prevails.²

It is the province of the personal representative of a deceased guardian or administrator.

Accounting by representative of deceased guardian or administrator. guardian or administrator. provisions on this subject are found in the statutes of most States, but by virtue of its general authority over guardians and administrators the probate court may compel the representatives of deceased guardians or administrators to account.³

The same principles and rules which govern the accounting of administrators are generally applicable to the accounts of administrators or their representatives settling with their successors. Such accounting, where the court has jurisdiction, is final and conclusive,⁴ but only as to the rights and liabilities of the estate on the one hand, and the deceased or removed administrator on the other; the administration of the estate as such is not thereby affected, but is to be continued in all respects as if no change in its representation had taken place.⁵ Since only the un- [* 1183]

Principles governing accounting in general are applicable between successors and their predecessors. Bingham, 32 Vt. 329 (holding that probate courts have power to enforce an accounting to a successor, but not to imprison a party for failing to comply with its decree), 335, *et seq.*; Scott v. Crews, 72 Mo. 261; *In re Ames*, 3 McArth. 30, holding that an administratrix may be ordered by the probate court to turn over a balance remaining in her hands to the administrator *de bonis non*, pp. 41, 42.

¹ Villard v. Robert, 1 Strobh. Eq. 393 (distinguishing case where debts remain to be paid), 402; in Missouri it is held that where the debts have all been paid, the heirs may maintain an action against the sureties of an absconding administrator without waiting for final settlement or order of distribution: State v. Coffey, 5 Mo. App. 577 (but see apparently to the contrary, *infra*, note 4, case of Scott v. Crews); Allison v. Abrams, 40 Miss. 747, 749.

² Bliss v. Seman, 165 Ill. 422, 428; Rowan v. Kirkpatrick, 14 Ill. 1, 7; Coleman v. McMurdo, 5 Rand. 51, 52; Cheatham v. Burfoot, 9 Leigh. 580, 597; Smith v. Carrere, 1 Rich. Eq. 123, 125 (but see, as to South Carolina authorities, Villard v. Robert, *supra*); Young v. Kimball, 8 Blackf. 167 (but see, as to Indiana, Sanders v. Loy, *supra*); Searles v. Scott, 22 Miss. 94, 96, and cases cited; Singleton

v. Singleton, 5 Dana, 87 (recognizing right of heirs to sue); Reeves v. Patty, 43 Miss. 338, 343, *et seq.*; Alsop v. Mather, 8 Conn. 584, 586; Hagthorp v. Hook, 1 Gill & J. 270, 274; but see *In re Ames*, 3 McArth. 30; Nowell v. Nowell, 2 Me. 75, 77, *et seq.*; Bradway v. Holmes, 50 N. J. Eq. 311; Green v. Byrne, 46 Ark. 453, 466 (but the law in this State was changed by statute in 1889: see preceding note).

³ See authorities cited in Woerner on Guardianship, § 99, pp 333-334; also *Ib.* § 150, p. 504. See also in connection herewith, *ante*, §§ 351-352. Under the New York statute the executor of an executor cannot be compelled to distribute the estate of his testator to the beneficiary but only to the first executor's successor, or to pay same into court: Matter of Moehring, 154 N. Y. 423.

⁴ State v. Gray, 106 Mo. 526. See Scott v. Crews, 72 Mo. 261, 265, showing the necessity of an administrator *de bonis non* to make distribution, although the deceased or removed administrator may have paid all debts, and commenting upon Spradling v. Pipkins, 15 Mo. 118; State v. Matson, 44 Mo. 305; and State v. Thornton, 56 Mo. 325. Also Villard v. Robert, *ubi supra*.

⁵ Brooks v. Mastin, 69 Mo. 58, 63, *et seq.*; but see McManus v. McDowell, 11

administered goods remaining *in specie* go to the administrator *de bonis non*, while any property which has been changed goes to the administrator's own executor or administrator,¹ it is obvious how necessary it is that the accounts of the successor should be kept distinct from and independent of those of the predecessor.²

Necessity of keeping accounts of original and succeeding administrator separate.

Where an administrator *de bonis non* takes credit in his settlement for allowances in favor of the former administrator assigned to him without deducting the amount of the indebtedness of such former administrator to the estate, which indebtedness was ascertainable from the records of the probate court, it is such fraud as will authorize the setting aside of the settlement in equity.³

The settlement between an administrator *de bonis non* and a former administrator, although final as to the parties thereto, being conclusive upon heirs and others interested in the estate, and including waste committed by the former administrator,⁴ is not such final settlement of the estate as requires the notice to be given to all persons in interest previous to the winding up of an estate; such persons are represented by the administrator *de bonis non*,⁵ and to him alone all assets after the displacement of an executor or administrator are due and payable.⁶ It follows from this principle, that there can be no accounting by an administrator *ad litem* or other administrator after his removal, before the appointment and qualifying of a lawful executor or administrator as his successor.⁷ An administrator who is removed, has the burden of showing a full accounting of the assets, and is not entitled to credit merely because his successor did not file written exceptions to the allowance of the items claimed; such written exceptions are not necessary.⁸

Settlement between successive administrators is conclusive between them; the administrator *de bonis non* represents all parties in interest, and they are not entitled to notice.

§ 537. **Accounting for Assets received in Foreign Jurisdiction.** — The liability of a foreign executor or administrator to account generally, and of a domestic administrator to account for assets received in a foreign country or sister State, appears more fully from the chapter treating of principal and ancillary Foreign administration. [*1184] *administration.⁹ It is stated, as a general administrator can

Mo. App. 436, holding that on such accounting the probate court has no power to try the liability of a former administrator for a debt due by him to the estate: p. 443.

¹ Harney v. Dutcher, 15 Mo. 89; see ante, §§ 351, 352.

² Hamaker's Estate, 5 Watts, 204.

³ Sorrels v. Trantham, 48 Ark. 386, 391.

⁴ Van Bibber v. Julian, 81 Mo. 618, 627.

⁵ State v. Gray, 106 Mo. 526; RoBards

v. Lamb, 89 Mo. 303, 311; s. c. 127 U. S. 58, 62.

⁶ State v. Heinrichs, 82 Mo. 542, 552.

⁷ Bible Society v. Oakley, 4 Dem. 450. Emmons v. Gordon, 125 Mo. 636, 645 (giving a purported final settlement the effect only of an annual settlement).

⁸ Estate of Glover & Shepley, 127 Mo. 153.

⁹ Ante, ch. xvii. §§ 157 et seq., particularly § 160.

be held to account for assets brought into the State of the forum; at least in equity.

proposition, that a foreign executor or administrator cannot be compelled to account, unless he has brought assets into the domestic jurisdiction; nor then, necessarily, as one answerable to the local probate court, and not rather in chancery, on general maxims.¹ Where the executor appointed in another State has taken letters ancillary in the State of the forum, he can be compelled to account for such assets only as the testator left in the State of the forum not removed before the grant of letters.² Nor can a suit be maintained by the heirs in the State of the domicile for money held by the administrator while his accounts are pending for settlement in the courts of another State, if the heirs have there appeared and filed exceptions.³ Neither will chancery proceed at the instance of the distributees of an estate, on which administration has been rightfully granted in another State, to final settlement of the administration of assets brought into the State of the forum, but will remit them for such purpose to the tribunal which has first taken cognizance of the cause.⁴

It results from the above principles, that a settlement of the administration in the forum of the appointment is conclusive upon the rights of all parties,⁵ except in case of fraud, where the administrator has taken letters in two States;⁶ and that the executor is there responsible, and his sureties liable, for all assets, obtained in whatever State, by virtue of the authority conferred upon him by his letters testamentary.⁷ But an executor is not chargeable for assets not obtained by him, and which he could not obtain in another State.⁸ Commissions will not be restrained within the limits of the law of one State where the executor is accountable in both that State and another, in view of the possibility that the courts of the other State are not bound thereby.⁹

* § 538. **Compelling Final Settlement.** — It is self-evident [* 1185] that final settlement of an estate cannot be made until it has been fully administered, and nothing remains to be done to complete

¹ Schoul. Ex. § 547; *McNamara v. Dwyer*, 7 Pai. 239; *Tunstall v. Pollard*, 11 Leigh, 1. It has been held in Tennessee that he may be compelled to account as trustee for the distributees, and in advance of the time allowed for a settlement of the administration in the forum of appointment, if he is improperly investing such funds: *Whittaker v. Whittaker*, 10 Lea, 93, 98.

² *Coley's Estate*, 14 Abb. Pr. 461, 463, *et seq.* See also cases cited *ante*, § 160, p. *363.

³ *Adams v. Adams*, 7 Oh. St. 83, 87.

⁴ *Worthy v. Lyon*, 18 Ala. 784.

⁵ *Whittaker v. Whittaker*, *supra*.

⁶ *Leach v. Buckner*, 19 W. Va. 36, 47.

⁷ *Hooper v. Hooper*, 29 W. Va. 276, 296, *et seq.* But see *Emmons v. Gordon*, 140 Mo. 490; also cases cited *ante*, § 160, p. *363.

⁸ *Sherman v. Page*, 85 N. Y. 123; *Young v. Kennedy*, 95 N. C. 265, 270; *ante*, § 160, p. *363.

⁹ *Matter of Colles*, 4 Dem. 387.

the execution of the trust;¹ hence it is error to require an administrator or executor to make final settlement before he has had time or opportunity to collect all the assets, and to ascertain and discharge all its liabilities.² This is necessarily so, even where the statute provides when final settlement may be compelled; for the satisfaction of creditors and the execution of the will, if any, are considerations paramount even to the policy of securing speedy settlement.³ But where the assets, although not reduced into cash, can be assigned to creditors, distributees, or legatees, and these are willing to receive them, they may compel final settlement, provided that the rights of other parties are not thereby affected. So executors and administrators may be compelled to make final settlement, although the assets have not been collected, if by their negligence or bad faith they have made themselves liable to be charged with their value as so much cash in hand; and so, also, final settlement may be coerced, if legatees or distributees are willing to assume and give bond for the payment of unmatured debts or contingent liabilities, provided there be no other reason for keeping the estate open.⁴

Final settlement cannot be compelled so long as the assets have not been collected and debts paid.

Unless creditors are willing to take the assets in payment of their claims.

Final settlement may be compelled where the executor or administrator has made himself liable for the assets.

As a general rule, final settlement may be enforced in the probate court at any time after the expiration of the period allowed creditors to prove their claims against the estate, or at a time specifically pointed out by statute, if no special circumstances intervene rendering final settlement impracticable at such time.⁵ If a long time have passed by after the final settlement ought to have been made, and no steps have been taken by the parties interested, presumptions of payment and final settlement may arise,⁶ varying in the different States as to

Settlement should be made on expiration of time in which creditors may prove their claims.

Presumption that final settlement has been made arises in course of time.

[* 1186] the time and circumstances. Thus, in * Alabama,⁷ Pennsylvania,⁸ and South Carolina,⁹ twenty years were held sufficient to raise such presumption; in Arkansas,¹⁰ fourteen years; in Michigan,¹¹ twenty-one years. In Virginia,

Instances.

¹ *Dufour v. Dufour*, 28 Ind. 421; *Blanchard v. Williamson*, 70 Ill. 647, 650.

² *Allison v. Abrams*, 40 Miss. 747, 749; *Crossan v. McCrary*, 37 Iowa, 684, 686.

³ *Scott v. West*, 63 Wis. 529, 555. An administrator cannot cut out a creditor by making a final settlement before the expiration of the time within which claims may be established: *Shirley v. Thompson*, 123 Ind. 454.

⁴ *Allison v. Abrams*, *supra*.

⁵ *Austin v. Jordan*, 35 Ala. 642; *Branch v. Hanrick*, 70 Tex. 731, 734.

⁶ *Barlage v. Detroit Railway Co.*, 54 Mich. 564, 570.

⁷ *Bass v. Bass*, 88 Ala. 408; *Austin v. Jordan*, 35 Ala. 642.

⁸ *Estate of Bentley*, 9 Phila. 344, citing *Brown's Estate*, 8 Phila. 197.

⁹ *Montgomery v. Cloud*, 27 S. C. 188, 192, recognizing the rule, but holding it inapplicable in the case under consideration.

¹⁰ *State Bank v. Williams*, 6 Ark. 156, 162.

¹¹ *Barlage v. Detroit Railway Co.*, *supra*. 1293

a decree for accounting was refused where, from the lapse of time, the loss and destruction of papers and records, and the death of all the parties cognizant of the transactions, a settlement could not be enforced without great danger of injustice to the administrator.¹

§ 539. **Falsifications and Surcharges on Final Settlement.** — The distinction between annual, partial, or periodical accounts and final settlements is fully pointed out in an earlier chapter,² where also the principles are discussed upon which corrections of errors in former settlements or accountings may be made. It is the duty of

<p>Duty of the court to correct all errors appearing at final settlement, although there be no contest.</p> <p>Instances of surcharge.</p>	<p>the court, on final settlement, to correct any omissions apparent from the account submitted for its adjudication, or from any accounts that may have been passed on previously; or to correct any error otherwise appearing,³ and this although there be no contest.⁴ Thus there may be a surcharge of interest on money shown to have been in the administrator's hands, if he has omitted to take the oath required by the statute, that he has not applied such money to his own use;⁵ items of interest and commissions may be added by the judge, after a full consideration of all the circumstances of the case;⁶ a debt due by, or to the administrator may be charged or credited, as the case may require, if omitted in a previous accounting,⁷ and any mistake corrected upon which a conclusive judgment has not been rendered.⁸</p>
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The accountant cannot, of course, be compelled to conform his *views to those of the court;⁹ but while it is for [*1187] him to make the returns, the court judges of their effect,

<p>Court may restate the account, or refer it.</p> <p>The account should be brought down so as to include</p>	<p>and will enforce its judgment; and where a restatement of the account becomes necessary, the court will state it, either upon the returns made or according to the evidence taken;¹⁰ or it may, where the power is granted by statute, refer the account to an auditor, referee, or commissioners, to be restated in conformity with the finding of the court.¹¹ The account may be brought down so as</p>
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¹ *Stamper v. Garnett*, 31 Gratt. 550, 551, *et seq.*

² *Ante*, §§ 503 to 506.

³ *Ante*, §§ 504 *et seq.*; *Burke v. Coolidge*, 35 Ark. 180, 182; *McPike v. McPike*, 111 Mo. 216, 221.

⁴ *Estate of Sanderson*, 74 Cal. 199, 202.

⁵ *King v. Cabiness*, 12 Ala. 598, 600.

In the absence of exceptions, however, the affidavit may be presumed to have been made: *Clack v. Clack*, 20 Ala. 461, 462.

⁶ *Lund v. Lund*, 41 N. H. 355, 364.

⁷ *Raab's Estate*, 16 Oh. St. 273, 282, *et seq.*; *French v. Winsor*, 24 Vt. 402, 408.

⁸ *Coburn v. Loomis*, 49 Me. 406, 410. The right to open a former settlement is self-evidently confined to an estate in course of administration: *Granger v. Bassett*, 98 Mass. 462, 467.

⁹ *Trotter v. Trotter*, 40 Miss. 704, 711.

¹⁰ It is not necessary, even where the power exists, to refer every account, if the court is able to determine the facts from the pleadings or depositions: *Maxwell v. McClintock*, 10 Pa. St. 237, 240; *Mathis v. Mathis*, 18 N. J. L. 59, 61.

¹¹ *McFarlane v. Randle*, 41 Miss. 411, 428.

to include items of expenditure and receipt to the day of passing upon the account, to be verified by additional affidavit;¹ and credit may be given for future expenses necessarily incurred by the administrator in complying with the order of the court on final settlement.²

all items of expenditure, and credit may be given for future expenses.

§ 540. **Verification and Evidence.**—The statutes of most States require the account to be verified by the affidavit of the executor or administrator, which may be taken before any officer competent to administer oaths.³ Adult parties interested in the settlement may waive the verification; but it is the duty of the court to require the account to be sworn to when the rights of infants or absentees are involved.⁴ For all items of credit claimed, there should be proper vouchers;⁵ but strict proof will not be required where, from the nature of the transaction, vouchers cannot be produced,⁶ or after a great lapse of time.⁷ It has been held, that a presumption arises in favor of an administrator whose general management evinces fidelity;⁸ but that where credit is claimed for the expenses [* 1188] of a journey in the interest of the estate, there should be an itemized account thereof.⁹

Account must be verified by the executor or administrator.

Vouchers must be produced to support the credits.

At common law, as heretofore indicated,¹⁰ sums under 40s. were sufficiently proved by the accountant's oath, provided there was no fraud by dividing greater sums into less;¹¹ and a similar provision is met with in the statutes of several of the States; for instance, in Alabama,¹² California,¹³

Statutes indicating to what extent the accountant's oath

¹ Hone v. Lockman, 4 Redf. 61, 66.

² Canfield v. Bostwick, 21 Conn. 550, 555. But the amount must be such as the law allows: Succession of Linton, 31 La. An. 130, 133.

³ Schoul. Ex. § 525; Terry v. Dayton, 31 Barb. 519, 521.

⁴ Gardner v. Gardner, 7 Pai. 112.

⁵ Succession of Foulkes, 12 La. An. 537, 539; Hall v. Hall, 1 Mass. 101; Davenport v. Lawrence, 19 Tex. 317, 319; Steele v. Morrison, 4 Dana, 617; Peyton v. Smith, 2 Dev. & B. Eq. 325, 348; Stephenson v. Yandel, 5 Hayw. 261; Romigo's Appeal, 84 Pa. St. 235, 237; Duncan v. Tobin, Cheves Eq. 143, 146. As to what is a proper voucher, see Rose's Estate, 63 Cal. 349. And as to the necessity for and effect of vouchers, see Woerner on Guardianship, § 102, on the subject of guardians' settlements governed by principles very similar to those of executors and administrators.

⁶ Lidderdale v. Robinson, 2 Brock. 159,

163; Matter of Pollock, 3 Redf. 100, 130.

⁷ Buerhaus v. De Saussure, 41 S. C. 457, 493.

⁸ Succession of Bauman, 30 La. An. 1138; Matter of Pollock, 3 Redf. 100, 130.

⁹ Williams v. Petticrew, 62 Mo. 460, 469; Pearson v. Darrington, 32 Ala. 227.

¹⁰ Ante, § 498.

¹¹ Wms. Ex. [2059].

¹² Items of \$20 or less: Code, 1876, § 2518. This provision is not found in the later revisions (of 1886 and 1896); but a credit allowed on a partial or annual settlement is presumed to be correct, and in the absence of proof of its incorrectness must be allowed: Code Ala. 1896, § 217; Dickie v. Dickie, 80 Ala. 57, 59.

¹³ Code Civ. Pr. § 1632, \$20 or less, not exceeding \$500 in the aggregate.

is sufficient proof. Idaho,¹ Indiana,² Kansas,³ Nevada,⁴ New York,⁵ North Dakota,⁶ and Ohio.⁷ On the trial of exceptions, the court proceeds according to the usual rules of evidence, including the common-law rule that items not exceeding 40s. are sufficiently proved by the oath of the accountant,⁸ unless abrogated by statute. It was held in Pennsylvania, that the Orphan's Court, in the settlement of an administration account, is not bound by the technical rules of evidence;⁹ but the reason given, to wit, because the Orphan's Court, as a court of chancery, is right in receiving evidence not admissible in a court of law,¹⁰ deprives this decision of any weight as authority in other States. The *onus probandi* rests upon the executor or administrator to establish the validity of any item of credit in the account which is challenged, and for want of sufficient *prima facie* proof such credit will be rejected.¹¹ The statement in the sworn account, that property has been sold below the inventoried value, is held not sufficient, when objected to, to establish his right to credit for the difference.¹² But to establish a surcharge, the burden of proof rests * upon those asserting it;¹³ each person [* 1189] objecting must make out his case by proper and sufficient evidence.¹⁴

Receipts given by parties still living at the time of the trial are not, in strictness, legal evidence of payment;¹⁵ but they are received as *prima facie* proof, unless the other side show a reasonable ground for their impeachment.¹⁶ Although the administrator is required to make oath to the truth and correctness of his account, and may be required to answer inter-

¹ Items not exceeding \$20, not exceeding in all \$500: Rev. St. Idaho, 1887, § 5597.

² \$5 or less, not exceeding \$100 in all; 1 Ann. St. Ind., 1894, § 2554.

³ Not exceeding \$10, nor \$200 in the aggregate: Gen. St. Kans. 1897, ch. 107, § 159.

⁴ \$20 and less, not exceeding \$500 in all: Gen. St. 1885, § 2901.

⁵ \$20, not exceeding \$500 in all: Code Civ. Pr. § 2734. But if the accountant has such vouchers and fails to produce them, the credit may be refused by the surrogate: Orser v. Orser, 5 Dem. 21, 23.

⁶ Not exceeding \$15: Rev. Code N. D. 1895, § 6502.

⁷ Bates' Ann. Oh. St. 1897, § 6184. Not exceeding \$10, nor \$200 in all.

⁸ Bailey v. Blanchard, 12 Pick. 166.

⁹ Sterrett's Appeal, 2 Pa. Rep. 419.

¹⁰ *Ib.*, p. 420.

¹¹ Williams v. Petticrew, 62 Mo. 460,

471; Barnawell v. Smith, 5 Jones Eq. 168, 171; Porche v. Banks, 8 La. An. 65, 66; Robbins v. Wolcott, 27 Conn. 234, 238; Buerhaus v. De Saussure, 41 S. C. 457, 492. So where a voucher has been lost: *In re Rowland*, 5 Dem. 216.

¹² Underhill v. Newburger, 4 Redf. 499, 507.

¹³ Pettus v. Clawson, 4 Rich. Eq. 92, 96; Estate of Johnson, 11 Phila. 83; Marre v. Ginochio, 2 Bradf. 165; Fowler v. Lockwood, 3 Redf. 465.

¹⁴ Succession of Gayle, 27 La. An. 547.

¹⁵ Finch v. Ragland, 2 Dev. Eq. 137; McDonald v. Carnes, 90 Ala. 147. See also Woerner on Guardianship, § 102.

¹⁶ Birkholm v. Wardell, 42 N. J. Eq. 337, 343; Metzger v. Metzger, 1 Bradf. 265, 268; Boughton v. Flint, 74 N. Y. 476, 485; Valentine v. Valentine, 4 Redf. 265, 271.

rogatories touching the same, yet he is not, by reason thereof, rendered a competent witness in his own favor, except as to items under 40s., or for such amounts as may be fixed by statute.¹ His competency in such case depends upon the law of the State as to the competency of parties to testify in their own favor. But it was held in Pennsylvania, deviating somewhat from the current of authorities, that the administrator is not obliged to show diligence in collecting a debt for the non-payment of which he takes credit in his account, until evidence of the want thereof has been shown by the person objecting.² In Virginia, where an administrator failed to account for the crops, rents, and hires which had come to his hands, proof of the estimated net annual value was allowed for the purpose of charging him therewith.³ It is held in California that a jury, in case of a contested account, is not a matter of right, and the verdict only advisory to the court.⁴ So it was said in Missouri, that it would be "impracticable, if not impossible, to dispose of the issues in such controversies by the verdict of a jury;"⁵ and "We cannot imagine how the final settlement could be tortured into issues properly triable by a jury."⁶

living are usually received as *prima facie* evidence.

Competency of the administrator as a witness depends upon the general law regulating the competence of witnesses.

Jury not a matter of right.

§ 541. **Judgment on the Adjudication of the Account.** — It has already been shown that the account and judgment based thereon are binding upon no one who was not either present at the accounting, or an actual party thereto, or had not been notified of the time and place at which it was had, in such manner as the law requires such notice to be given;⁷ and that, on the other hand, the judgment on such accounting after due notice to the parties interested, [*1190] *or appearance thereat or assent thereto by them, is conclusive of the matters adjudicated, and unassailable collaterally.⁸ Any person having an interest in the result of the accounting may appear when the account is before the court for adjudication, and object to any of the items for which credit has been taken or is claimed, and insist on charges against the accountant which have been omitted. The interest of the party objecting should appear of record,⁹ and the court may hear evidence to determine whether he is entitled to be heard or not.¹⁰ The allegation of a possible interest

Any person who has an interest in the account may appear and object.

¹ Bailey v. Blanchard, 12 Pick. 166.

² Ritter's Estate, 11 Phila. 12.

³ Wills v. Dunn, 5 Gratt. 384.

⁴ Consequently irregularities in the formation of the jury, or erroneous instructions, are immaterial: *In re Moore*, 72 Cal. 335.

⁵ Meeker's Estate, 45 Mo. App. 186,

195. See also *Brown v. Reed*, 56 Ohio St. 264, 270.

⁶ *Schooler v. Stark*, 73 Mo. 301, 308.

⁷ *Ante*, § 504; *Crawford v. Redus*, 54 Miss. 700, 702.

⁸ *Ante*, §§ 504, 506.

⁹ *Johnson v. Johnson*, 2 Harr. 273, 275.

¹⁰ *Garwood v. Garwood*, 29 Cal. 514, 518.

is not sufficient;¹ nor will one who claims property by a title paramount to that of the deceased be heard to object to the accounting.² Creditors may except to the account,³ but not creditors of the heir at law,⁴ or of a legatee.

The proper method of objecting to the account is to state the exceptions in writing, pointing out each item objected to and stating the ground of the objection, and to file such statement so as to give sufficient notice to the other side to enable them to prepare their defence if they have any.⁵ Thus, it is held that an objection to an administrator's final settlement or report, on the ground that he has not collected debts due the estate, is insufficient, unless it show also that the debts are collectible, or that the debtors are solvent, and such exception may be disposed of on demurrer, while the administrator's settlement or report is not the subject of demurrer, and it cannot be assigned as error that the report does not show facts sufficient to entitle the administrator to his discharge.⁶ So a general objection to an entire account, some of the items of which are properly proved, * may be over- [* 1191] ruled.⁷ The exceptors are not concluded from taking further exceptions to errors in the account which become apparent subsequent to the filing of the original objections, and which they had no means of knowing at the time;⁸ but in such case there must be sufficient time given to the adverse party to be heard in defence, and to procure witnesses to establish the same.⁹ It is not, upon the proceeding before final adjudication of the account, absolutely necessary to state the exceptions in writing;¹⁰ but if no exceptions be taken, or if exceptions

¹ Estate of Halleck, 49 Cal. 111, 115; Keene's Appeal, 60 Pa. St. 504, 510 (holding that the bare possibility of interest, under a will dependent upon the death of the first taker without issue, is not sufficient to authorize a citation to an executor to account); Succession of Cabouret, 9 La. An. 520. As to what interest is sufficient to authorize a citation to an administrator to account, see *ante*, § 501.

² Cathey v. Kerr, 15 La. An. 228.

³ Poulson v. Bank of Frenchtown, 33 N. J. Eq. 618, 620.

⁴ Owens v. Thurmond, 40 Ala. 289.

⁵ Succession of Bofenschen, 29 La. An. 711, 712; Shields v. Alsop, 5 Lea, 508, pointing out the effect of a settlement made with the view of obtaining an order to sell real estate for the payment of debts: p. 515; Seabright v. Seabright, 28 W. Va. 412; and see Elder v. Whittemore, 51 Ill.

App. 662. The law does not, however, require the successor of a removed administrator to file written exceptions to his predecessor's accounts: Estate of Glover & Shepley, 127 Mo. 153, 158; *ante*, § 536.

⁶ Conger v. Babcock, 87 Ind. 497, 500; Clarke v. West, 5 Ala. 117, 128, citing earlier Alabama cases.

⁷ Pearson v. Darrington, 32 Ala. 227, 266; Boughton v. Flint, 74 N. Y. 476, 486; Elder v. Whittemore, 51 Ill. App. 662.

⁸ Gardner v. Gardner, 7 Pa. 112; Carter v. Cutting, 5 Munf. 223, 228; Meeker's Estate, 45 Mo. App. 186 (*per* Biggs, J., p. 195).

⁹ Tucker v. Tucker, 28 N. J. Eq. 223, 227.

¹⁰ State v. Knox, 10 Ala. 608, 613; Clark v. Bettelheim, 144 Mo. 258, 274.

taken be not noted in the record by bill of exceptions or otherwise, such objections cannot be heard in the appellate court.¹ The mode of procedure in filing exceptions to the final settlement is essentially equitable and governed by the rules in equity;² hence questions of fact are open to review in the appellate courts.³ Procedure is equitable.

¹ Long v. Easley, 13 Ala. 239, 245; Holcomb v. Holcomb, 11 N. J. Eq. 281, 292; Bowling v. Cobb, 6 B. Mon. 356; see *post*, on Appeals.

² Meeker's Estate, 45 Mo. App. 186; Tanton v. Keller, 167 Ill. 129, 146.

³ Tanton v. Keller, *supra*; Bliss v. Leaman, 165 Ill. 422, 427; Meeker's Estate, *supra*.

* CHAPTER LIX.

[* 1192]

OF APPEALS FROM COURTS OF PROBATE.

§ 542. For convenience of reference, and to avoid repetition in the discussion of questions arising on the subject of appeals from the orders, judgments, or decrees of probate courts, the consideration of all these questions has been deferred, and will now be taken up in connection with appeals from the adjudication of administration accounts by these courts.

§ 543. **Right of Appeal given by Statutes.**—The word “appeal” is used to signify the removal of a cause in litigation from an inferior to a higher jurisdiction;¹ it includes questions of fact and of law, any one of which, or all, comprising the whole case, may be the subject of appeal. As the power of probate courts is derived from statutes,² which point out and determine the force and effect of their judgments and decrees, it follows that the right of appeal, being the right to substitute the judgment of some higher court for that of the probate court, must be likewise conferred by statute.³ Hence it is said that the right of appeal rests solely upon statutory provisions, and that, unless these provisions are complied with, the right cannot be made available;⁴ and that there can be no appeal from any order, judgment, or decree, unless the right to such appeal be given by statute.⁵ The language in which this right to appeal is given differs somewhat in the several States. In most of them, appeal is provided from *any* decree or order,⁶ or from any *final* decree⁷

¹ *Per* Clerke, J., in *People v. Marine Court*, 2 Abb. Pr. 126, 127.

² *Ante*, § 142.

³ *Ross v. Murphy*, 55 Mo. 372, 373; *Smith v. Guerant*, 55 Mo. 584.

⁴ *Dennison v. Talmage*, 29 Oh. St. 433, 435; *Morrow v. Walker*, 10 Ark. 569; *Briggs v. Barker*, 145 Mass. 287, 288. And see *Woerner on Guardianship*, § 112, discussing appeals in matters respecting minors; *Ib.*, § 157, respecting appeals in lunacy proceedings.

⁵ *Peralta v. Castro*, 15 Cal. 511, followed in *Estate of Calahan*, 60 Cal. 232, and *Estate of Moore*, 68 Cal. 394; *Meyer*

v. Steuart, 48 Md. 423, 425, citing Maryland cases.

⁶ For instance, in *Arizona*, Rev. St. 1887, ¶ 1298; *Connecticut*: Gen. St. 1888, § 640; *Illinois*: St. & Curt. St. 1896, ch. 3 (p. 345), ¶ 124; *Rhode Island*: Gen. L. 1896, ch. 248, § 1; *Vermont*: Vt. St. 1894, §§ 2584, 2585. So in other States: *Georgia*: *Findlay v. Whitmire*, 15 Ga. 334; *Idaho*: Rev. St. Idaho, 1887, § 4838; *North Dakota*: Rev. Code, 1895, § 6254.

⁷ As in *Alabama*: Code, 1896, § 426, 457; *Arkansas*: Dig. of St. 1894, § 1386; *Florida*: McClel. Dig. 1881, p. 328, § 21; *Rev. St. Fla.* 1892, §§ 1280, 1591; *New*

[* 1193] *of the probate court, in addition to, or explanatory of, the enumeration of the several matters in detail as to which appeal is given. Thus, to illustrate, the statute expressly authorizes appeal from the admission of a will to probate, or from its rejection in Alabama,¹ California,² and nearly all other States, but not in Missouri,³ where an action to contest the probate or rejection of a will by the probate court must be brought originally in the circuit court within five years of such probate or rejection.⁴ So an appeal is secured from the decision of the probate court on the question of preference in the right to administer in all the States; but in some of them this right is withheld in the matter of the appointment of a temporary administrator.⁵

Where the right of appeal is given, *mandamus* does not lie against the judge of the probate court,⁶ except to compel the allowance of the appeal when improperly refused.⁷

Mandamus to compel the allowance of appeal.

§ 544. **Who may appeal.** — Where the right to appeal exists, it may be exercised by any person, whether a party to the record or not, who is aggrieved by the judgment or decree pronounced by the probate court. This is usually expressed in the statute; but whether so or not, courts universally hold this doctrine.⁸ The appellant must, however, show the interest in the matter litigated which gives him the right to appeal;⁹ a "grievance" in the

Any person affected by the judgment or decree may appeal therefrom, whether party to the record or not;

Hampshire: (from Commissioners) Publ. St. 1891, ch. 193, §§ 1 *et seq.*; New Jersey: Gen. N. J. St. 1896, p. 2396, §§ 173 *et seq.*; North Carolina: Code, 1883, § 1464; Oregon: Gen. St. 1887, § 536; Pennsylvania: Pep. & L. Dig. 1896, p. 128, § 8; Utah: Rev. St. 1898, § 3300; and most other States.

¹ Code, 1896, § 458.

² Code, Civ. Pr. § 963.

³ Kenrick v. Cole, 46 Mo. 85.

⁴ Rev. St. 1889, § 8888.

⁵ For instance, in Georgia: Code, 1895, § 4454; California: Code, Civ. Pr. § 1413; *In re Carpenter*, 73 Cal. 202; Tennessee: McClanahan v. McClanahan, 12 Heisk. 379; Michigan: How. St. 1882, § 5851; Maine: Rev. St. 1833, ch. 63, § 23.

⁶ *State v. Mitchell*, 3 Brev. 520; *State v. Megown*, 89 Mo. 156, 158.

⁷ *State v. Allen*, 92 Mo. 20; *Gresham v. Pyron*, 17 Ga. 263, 266; *Williams v. Saunders*, 5 Coldw. 60, 80; *Beebe v. Lockert*, 6 Ark. 422; *Eager v. Eager*, 8 Ill. App. 356, 362. The writ should be awarded only where the relator's right is clear and the court bound to act; hence it

will be refused where the party demands the allowance of an appeal from questions theretofore fully passed on in a prior proceeding from which he had not appealed: *People v. Kohlsaatt*, 168 Ill. 37. See also *Patton v. Williams*, 74 Mo. App. 451.

⁸ *In re Storey*, 120 Ill. 244, 252; *Bryant v. Allen*, 6 N. H. 116, 118; *Stevenson v. Schriver*, 9 Gill & J. 324, 335; *Schoul. Ex. § 151*; *Wood v. Johnson*, 13 Ill. App. 548, 552; *Weer v. Gand*, 88 Ill. 490. In such case the appeal may be prosecuted in the name of the actual appellant: *Pfirshing v. Falsh*, 87 Ill. 260; and although prosecuted in the name of the administrator who has not appealed, yet the party appealing has the management and control of the appeal: *King v. Gridley*, 69 Mich. 84; and those not appealing must therefore abide by such disposition of the case as may be procured by the appellant: *Comstock v. Circuit Judge*, 95 Mich. 48. Proof of the refusal of the executor need not be filed in order to permit others interested to appeal: *Schultz v. Brown*, 47 Minn. 255.

⁹ *Pettingill v. Pettingill*, 60 Me. 411,

legal * sense exists only when the judgment, order, or [*1194] decree complained of directly operates upon the property or bears upon his interest.¹ The interest of a devisee in for instance, a devisee; the settlement of an executor's account,² or of a legatee, though under a foreign will, not probated in the State of the forum;³ or of a distributee in the settlement of the administrator's account, though he has assigned or released his share;⁴ or of a devisee in the surety of the executor or administrator; the settlement of his administration account;⁵ or of a creditor of an insolvent estate in the allowance of claims to other creditors;⁶ or of a person nominated as executor in the refusal of probate of a will;⁷ or of an administrator *de bonis non* in the accounting of his predecessor;⁸ or of a foreign administrator in the appointment of an administrator to the ancillary estate;⁹ or of an executor, whenever it is sought to impose a liability on the estate which will diminish the assets,¹⁰ or of a purchaser of land assigned as dower to the widow in the appointment of an administrator *de bonis non*;¹¹ or of a purchaser of land at an administration sale from the rejection of the sale;¹² or of a purchaser from an heir or fraudulent grantee of the intestate, in the order to sell such land for the payment of debts;¹³

419; Cecil v. Cecil, 19 Md. 72, 77; Zumwalt v. Zumwalt, 3 Mo. 269; Murphy v. Murphy, 2 Mo. App. 156, 158; Dickerson's Appeal, 55 Conn. 223, 229.

¹ Deering v. Adams, 34 Me. 41, 44.

² Paine v. Goodwin, 56 Me. 411, 413.

³ Mower's Appeal, 48 Mich. 441, 446.

⁴ Tillson v. Small, 80 Me. 90.

⁵ Dorsey v. Warfield, 7 Md. 65, 75; Elliot v. Elliot, 10 Allen, 357, 359; Northampton v. Smith, 11 Met. (Mass.) 390, 393.

⁶ Ante, § 255; Livermore v. Bemis, 2 Allen, 394; McCartney v. Garneau, 4 Mo. App. 566; Farrar v. Parker, 3 Allen, 556, citing earlier cases. But in Maine it is held that the surety of a guardian or administrator is precluded by the nature of his obligation from questioning, in the probate court, the faithful and correct discharge of his principal's duty, and is not, therefore, allowed to appeal, except in the name of the principal, from a decree settling the administration account: Tuxbury's Appeal, 67 Me. 267, 270; Woodbury v. Hammond, 54 Me. 332, 340. The remedy of a surety against a collusive surcharge of the account is there said to

be in the action on the bond, relying on Baylies v. Davis, 1 Pick. 206.

⁷ Saunders v. Denison, 20 Conn. 521, 524; Mitchell v. Pyron, 17 Ga. 416; Higbie v. Westlake, 14 N. Y. 281, 288.

⁸ Hesterberg v. Clark, 166 Ill. 241. The person so nominated may appeal from the disallowance though all the beneficiaries named in it, and all who would have been interested if the decedent had died intestate, should settle the case among themselves and oppose the appeal: Cheever v. Circuit Judge, 45 Mich. 6; King's Will, 13 Phila. 379.

⁹ Wiggin v. Swett, 6 Met. (Mass.) 194, 197.

¹⁰ Smith v. Sherman, 4 Cush. 408, 411; Martin v. Gage, 147 Mass. 204; Shaw, Appellant, 81 Me. 207, 323.

¹¹ Cassidy's Succession, 40 La. An. 827, 829; In re Heydenfeldt, 117 Cal. 551.

¹² Bancroft v. Andrews, 6 Cush. 493, 496.

¹³ Davis v. Stewart, 4 Tex. 223, 227; Conover v. Walling, 15 N. J. Eq. 167. So the executor may appeal from the rejection of the sale: Warehime v. Graf, 83 Md. 98.

¹⁴ Mowry v. Robinson, 12 R. I. 152;

or of such a purchaser in the allowance of a claim, there being no personalty to satisfy the same;¹ or of a creditor of the [* 1195] deceased in the appointment of an * administrator,²— is such interest as has been held sufficient to authorize the respective parties to prosecute their appeal. It follows from this principle that no person has the right to appeal unless he is interested in the estate as creditor, legatee, heir at law, or in some pecuniary manner; a grievance to his feelings of propriety or sense of justice is not such a grievance as gives him the right to appeal.³ Hence the allegation that the appellant is the brother or other relative of the deceased;⁴ or is a debtor to the deceased,⁵ or garnishee of such debtor,⁶ or creditor of the administrator;⁷ or that he is a donee *causa mortis* of the deceased,⁸ or claims property by title paramount;⁹ or that he is an heir at law, if the whole estate is disposed of by will, or a legatee, if his legacy is not in question;¹⁰ or that he is an heir, in a proceeding after the allotment of dower, if such allotment does not bind him,¹¹ or, it has been held in some States, creditor, if the estate is solvent,¹²— does not show, of itself, the right of the parties so alleging to an appeal. So an administrator has no right to appeal from a decree of distribution, where he, as such, has no interest in the matter determined by the decree;¹³ nor, for the same reason, can an administrator *pendente lite* appeal from an order to sell the per-

Allen v. Smith, 80 Me. 486. So the owner of the reversion in such land: Tilton v. Tilton, 41 N. H. 479, 481.

¹ Nor does the fact that the vendor is solvent, thereby giving the purchaser from such heir a remedy on his covenant of warranty, nor that the vendor agreed to pay the claim for which the allowance is asked, affect the case; but if the purchaser agreed to pay it, and retained a part of the purchase-money for that purpose, he is estopped: Mackey v. Ballou, 112 Ind. 198.

² Mitchell v. Pyron, 17 Ga. 416. And see Shaw, Appellant, 81 Me. 207, 223, in which the court says that if the appointment of an administrator "has no other effect than to send the parties to extensive litigation, the decree will be sufficiently direct in its effect upon the title" to certain property, upon which depended the jurisdiction of the probate court to grant letters, to authorize the appeal.

³ Norton's Appeal, 46 Conn. 527, 528.

⁴ Ib.

⁵ Swan v. Picquet, 3 Pick. 443.

⁶ Veazie Bank v. Young, 53 Me. 555, 560.

⁷ Burke v. Terry, 28 Conn. 414.

⁸ Lewis v. Bolitho, 6 Gray, 137.

⁹ Swackhamer v. Kline, 25 N. J. Eq. 503; Shields v. Ashley, 16 Mo. 471, 473; Raleigh v. Rogers, 25 N. J. Eq. 506.

¹⁰ Labar v. Nichols, 23 Mich. 310.

¹¹ Lowery v. Lowery, 64 N. C. 110.

¹² Henry v. Estey, 13 Gray, 336; Parker v. Reynolds, 32 N. J. Eq. 290, 293.

¹³ Dewar's Estate, 10 Mont. 422; Merrick v. Kennedy, 46 Neb. 264; Webster v. White, 8 S. D. 479; Bates v. Ryberg, 40 Cal. 463, 465, affirmed in Estate of Marrey, 65 Cal. 287, and in Merryfield v. Longmire, 66 Cal. 180, holding that an appeal as administrator will be dismissed, though appellant may have an interest as an individual. But an administrator may appeal from an order of partial distribution, made before final settlement: Phillips' Estate, 18 Mont. 311; and he can appeal in general, unless "his only remaining duty is to deliver the estate over to those designated by the court: *In re Heydenfeldt*, 117 Cal. 551, 553.

sonal estate,¹ nor a creditor from the appointment of commissioners to ascertain whether the estate is solvent or insolvent.² But it is held in Missouri and Arkansas, that the administrator may appeal from an order to pay debts, on the ground that the rule of apportionment adopted by the probate court works injustice among the creditors;³ and in Indiana, that it is the duty of the administrator to appeal, if there is reasonable ground to believe that the court erred in the order of distribution.⁴ In Massachusetts the widow of a testator, notwithstanding she may renounce the will, has a right to appeal from the probate thereof;⁵ but not in Pennsylvania.⁶

* A person who becomes interested in the subject-matter [* 1196] of an appeal after it has been granted, may be made a party in the appellate court;⁷ and so a party may appeal, after a decree of the probate court approving or disapproving a will had been appealed from by another party in interest, and judgment rendered thereon by the appellate court against the appellant, leaving the decree of the probate court in force.⁸ Where an executor as such appeals, the question whether he is aggrieved as an individual cannot be considered.⁹

A party who has accepted satisfaction of a judgment in his favor cannot afterward appeal from such judgment.¹⁰

§ 545. **From what Decisions of Probate Courts Appeals are allowable.** — It is obvious that there can be no appeal from any action of a lower court which would not, but for the appeal, constitute a binding, conclusive, and final determination by order, decree, or judgment, of the rights of the parties affected thereby.¹¹ Whether such order, decree, or judgment constitutes a final judgment, in this sense, is not always clear at first blush; it depends upon the intention of the court, to be ascertained from the language employed.¹² It is not necessary to postpone the appeal from any decision deemed erroneous until the final settlement of the estate, or the discharge of the executor or administrator,¹³ but it may, or must, under the terms of the statutes

¹ *Johns v. Caldwell*, 60 Md. 259, 262.

² *Putney v. Fletcher*, 140 Mass. 596.

³ *Estate of McCune*, 76 Mo. 200, 205; *Jameson v. Comm. Co.*, 59 Ark. 548.

⁴ *Ruch v. Biery*, 110 Ind. 444.

⁵ *Dexter v. Codman*, 148 Mass. 421.

⁶ *McMasters v. Blair*, 29 Pa. St. 298.

⁷ *Cogbill v. Cogbill*, 2 Hen. & M. 467; to similar effect, *Rogers v. Martin*, 58 N. H. 442.

⁸ And this although the party taking the second appeal had knowledge of the first appeal, having been present and testified in behalf of the appellant: *Lancaster's Appeal*, 47 Conn. 248, 255.

⁹ *Swann v. Hansman*, 90 Va. 816.

¹⁰ *RoBards v. Lamb*, 76 Mo. 192, 194.

¹¹ *Mitchell's Appeal*, 60 Pa. St. 502; *McCollister v. Bank*, 171 Ill. 608; *Nally v. Long*, 56 Md. 567, 571; *Brown v. Anderson*, 13 Ga. 171, 178 (allowing the appeal, however, by consent).

¹² *Harvey v. Wait*, 10 Oreg. 117, 121, quoting the words of the Chief Justice in *Rubber Co. v. Goodyear*, 6 Wall. 153, 155; see *Christy's Appeal*, 110 Pa. St. 538, 541.

¹³ *Taylor v. Burk*, 91 Ind. 252, 254.

of most States, be prosecuted upon the rendition of such judgment, if final in its nature;¹ the statutory provisions governing in this respect being distinguishable, in many instances, from those regulating appeals in ordinary legal or equitable proceedings.² But orders or judgments which are merely interlocutory in their nature or effect, deciding definitely no matter of right, are not [* 1197] the subjects of appeal,³ unless *they affect the merits of the cause and constitute a grievance to the party.⁴ It is accordingly held that no appeal lies in favor of the administrator from an order of partial distribution,⁵ or to pay the balance due on an allowed demand;⁶ nor upon partial, annual, or other accounting or settlement not final;⁷ nor from an order to show cause why he should not be ordered to furnish additional security;⁸ nor from an order requiring bond to be given, where it is discretionary with the probate court to order such bond or not;⁹ nor from an order to sell real estate for the payment of debts,¹⁰ or an order awarding an inquest in partition,¹¹ or striking out a widow's withdrawal of her claim against the estate.¹² No appeal lies, where the action of the court is simply negative, declining to pass definitively upon a question or matter presented for adjudication, — for instance, setting aside a decree of settlement and vacating an order of distribution improperly rendered,¹³ or refusing to set aside such settlement,¹⁴ or refusing to

Unless they affect the merits.

No appeal of administrator from order of partial distribution or settlement; or order to show cause why bond should not be given;

or order to sell real estate; or awarding inquest in partition; nor from any merely negative order;

¹ Bell v. Mousset, 71 Ind. 347; Seward v. Clark, 67 Ind. 289, 295.

² Bake v. Smiley, 84 Ind. 212, 214, and Indiana cases, *supra*.

³ Meyer v. Steuart, 48 Md. 423, 425; Succession of White, 2 La. An. 964; McMicken v. Maxent, 6 La. An. 213, 218; Timothy v. Farr, 42 Vt. 43, 46, citing earlier cases.

⁴ Green v. Tunstall, 5 How. (Miss.) 638, 649, relying on Beach v. Fulton Bank, 2 Wend. 225; Matter of Gilbert, 104 N. Y. 200, 205.

⁵ Johnston v. Fort, 30 Ala. 78, 80. But he may appeal from a decree of partial distribution among creditors in an insolvent estate: Lehman v. Robertson, 84 Ala. 489.

⁶ Webb v. Stillman, 26 Kans. 371, 374.

⁷ Jones v. Jones, 42 Ala. 218, 221; Cook v. Horton, 129 Mass. 527; North v. Priest, 81 Mo. 561, 563; Turner v. Johnson Co., 14 Bush, 411.

⁸ Succession of Labauve, 38 La. An. 235. But see Fite v. Black, 85 Ga. 413.

⁹ Felton v. Sowles, 57 Vt. 382. But the executor may appeal from an order removing him for failure to comply with such order to give bond: *In re Bellows*, 60 Vt. 224.

¹⁰ Snodgrass's Appeal, 96 Pa. St. 420, reversing former cases to the contrary and following Gesell's Appeal, 84 Pa. St. 238. The reason given is, that the order to sell was interlocutory, and would become final only after approval of the sale. (But in most States this is held differently: see *infra*, p. * 1199.)

¹¹ Gesell's Appeal, 84 Pa. St. 238; Wistar's Appeal, 115 Pa. St. 241.

¹² Catterson's Appeal, 100 Pa. St. 9.

¹³ Estate of Dean, 62 Cal. 613, relying on Estate of Calahan, 60 Cal. 232.

¹⁴ Lutz v. Christy, 67 Cal. 457. These California cases are all decided on the ground that the statute does not enumerate the cause appealed from as being appealable.

revoke letters granted;¹ or refusing to rescind a previous order,² nor for dismissing a citation to account issued by the court;³ nor for revoking an order extending the time for filing exceptions to claims,⁴ or refusing to receive what purports to be the report of commissioners.⁵ Appeal is likewise denied from decisions rendered by the probate judge in the exercise of a discretion intrusted to him,⁶ unless it has [* 1198] been palpably and grossly abused.⁷ Thus there is, generally, no right of appeal from the appointment of an administrator *pendente lite* where no preference is given by statute, and the fitness of the appointee is not questioned,⁸ although, where the statute excepts such action of the probate court from appeal, *certiorari* is allowed to correct errors in the contested appointment of an administrator *pendente lite*,⁹ or to review jurisdictional questions in the appointment of a special administrator,¹⁰ or where the probate court has proceeded without jurisdiction in other respects.¹¹ It is to be remembered, however, that the writ of *certiorari* is not a writ of right at common law, but issues at the discretion of the court for good cause shown where no other remedy exists, and that the decision of the probate court on an issue of fact cannot, on *certiorari*, be reviewed, if there was any competent evidence to support it.¹² So where it is discretionary with the court which of several applicants for letters, all of whom are equally entitled, shall be appointed, the appellate court will not interfere with the exercise of such discretion.¹³ So, it has been held, appeal does not lie from the judgment of the county court affirming the order of the court of insolvency dismissing a petition;¹⁴ nor from an order commanding the administrator to account;¹⁵ or directing him to inventory certain realty and apply for an order of sale;¹⁶ nor from an order of allowance for the maintenance of the widow and minor children,¹⁷ where the discretion is

¹ Estate of Keane, 56 Cal. 407; Hebb v. Hebb, 5 Gill, 506; Ebersole v. Schiller, 50 Oh. St. 701; but see *contra*, Owens v. Link, 48 Mo. App. 534.

² Megary v. Shipley, 72 Md. 33.

³ Robinson v. Gholson, 8 Sm. & M. 392, 396.

⁴ King v. Rockhill, 41 N. J. Eq. 273.

⁵ Hodges v. Thatcher, 23 Vt. 455, 462.

⁶ King v. Rockhill, 41 N. J. Eq. 273, 275; Crawford v. Blackburn, 19 Md. 40; Estate of Halsey, 93 N. Y. 48, 53; Brigel v. Starbuck, 34 Oh. St. 280; Collyer v. Collyer, 110 N. Y. 481.

⁷ Bowers's Appeal, 84 Pa. St. 311, 313. But in several States such discretion is subject to revision in all cases; so, for instance, in Connecticut: O'Neill's Appeal,

55 Conn. 409, 412; Vermont: Adams v. Adams, 21 Vt. 162, 164; Whitcomb v. Davenport, 63 Vt. 656; Woerner on Guardianship, § 112.

⁸ Pratt v. Kitterell, 4 Dev. 168.

⁹ Redd v. Dure, 40 Ga. 389.

¹⁰ State v. Judge, 10 Mont. 401; *In re* Ming, 15 Mont. 79.

¹¹ Durham v. Field, 30 Ill. App. 122, 124.

¹² *Re* Henriques, 5 N. M. 169, 177.

¹³ *Ante*, § 242.

¹⁴ *In re* Sowles, 57 Vt. 385.

¹⁵ Succession of Carrière, 34 La. An. 1056.

¹⁶ McCollister v. Bank, 171 Ill. 608.

¹⁷ *Ante*, § 79. But in most States appeal is given.

lodged in the probate court; but appeal may be given by statute on the question of allowance, and in such case appeal lies if the order of allowance be final in its nature.¹ It is deducible from the decisions on this subject, as a general principle, applicable to most cases in the absence of statutory provisions directing otherwise, that any order, judgment, or decree of the probate court capable of being enforced, or taking effect without further order, may be

Appeal lies, as a general rule, from all orders, etc., capable of enforcement without further order.

But from no decision requiring further action to give it effect.

appealed from; and that no action of the probate court can be appealed from which requires a subsequent order or judgment to give it effect.² Thus appeal is granted where a public administrator takes charge of an estate, and the probate court refuses to vacate the administration;³ from an order to sell the realty;⁴ and from an order disapproving the sale of real estate;⁵ or refusing an order to sell,⁶ or an order to publish notice to heirs preliminary to such order of sale;⁷ from an order approving such sale;⁸ setting aside a sale of realty made under the will;⁹ approving the assignment of dower;¹⁰ approving the report of commissioners to set out homestead;¹¹ directing the conveyance of the decedent's real estate.¹² So also from the refusal of the probate judge to extend the time for creditors to prove their claims;¹³ and from a decree fixing an administrator's bond;¹⁴ from an order removing an administrator, and after such appeal, from an order appointing his successor;¹⁵ from an order admitting or refusing to admit to probate a will,¹⁶ from the refusal of a new trial on the contest of a will,¹⁷ and from an order refusing to compel final settlement.¹⁸

§ 546. **How Appeal is taken.**—It has already been stated,¹⁹ that the right of appeal is dependent upon compliance with all the requirements of the statute from which it originates. The appeal should be granted by the probate court, and it is held in some States, that, unless the record show affirmatively such grant, the appellate court does

Appeal is granted by the court whose judgment is complained of,

¹ *Swayze v. Wade*, 25 Kan. 551, 558; *Cooper v. Judge*, 19 Me. 260; *Wood v. Johnson*, 13 Ill. App. 548, 552 (minor child).

² Thus no allowance of a claim can be appealed from until there is a judgment of allowance and classification; *Cohen v. Atkins*, 73 Mo. 163, 166.

³ *Donaldson v. Lewis*, 7 Mo. App. 403, 406.

⁴ *Ante*, § 467, p. *1032; § 473, p. *1049.

⁵ *Henry v. McKerlie*, 78 Mo. 416, 430.

⁶ *Ferguson v. Carson*, 13 Mo. App. 29, 31.

⁷ *Ferguson v. Carson*, 86 Mo. 673, 677.

⁸ *Wilson v. Brown*, 21 Mo. 410.

⁹ *Bagger's Estate*, 78 Iowa, 171.

¹⁰ *Husted's Appeal*, 34 Conn. 488.

¹¹ *Estate of Burns*, 54 Cal. 223; *Byram v. Byram*, 27 Vt. 295; *True v. Morrill*, 28 Vt. 672.

¹² *Estate of Corwin*, 61 Cal. 160.

¹³ *Walker v. Lyman*, 6 Pick. 458; see also § 400, p. *841, note.

¹⁴ *In re Rochon*, 15 La. An. 6.

¹⁵ *Succession of Bedford*, 38 La. An. 244.

¹⁶ See authorities, § 227, p. *499; § 215, p. *469.

¹⁷ *Doyle's Estate*, 68 Cal. 132.

¹⁸ *Bellinger v. Ingalls*, 21 Oreg. 191.

¹⁹ *Ante*, § 543.

not obtain jurisdiction.¹ Nor has the court from whose judgment upon compliance with the statutory requirements; the appeal is taken power, by its order or otherwise,² to dispense with the statutory requirements as to the time of appeal, the bond, and affidavit of grievance. Thus, if the statute requires bond to be given before the appeal takes effect, and the appeal bond is not approved by the probate court within the time allowed by law for appealing, the appellate court has no power to remedy the defect, and the appeal must be dismissed.³ But it is also held that the allowance of an appeal from the probate court is a matter of right secured by the statute, and does not depend upon allowance by the probate judge,⁴ and that the validity of the appeal is determined by the appellate court.⁵ So it is held in Missouri, that an appeal from a probate court will be presumed to have been taken within the time allowed by law, when the record shows nothing to the contrary.⁶

* The time within which appeal must be taken is fixed [*1200] by the statute.⁷ If the statute contain no saving clause, the right to appeal after the period allowed by the statute is barred,⁸ even to married women⁹ and infants;¹⁰ and the appeal will be dismissed in the appellate court *ex mero motu*.¹¹ Parties are not, however, to be deprived of their right to appeal in consequence of a mistake or the delay of the judge,¹² register,¹³ or clerk.¹⁴ But in several States provision is made for the allowance of appeal, in the appellate court, after the expiration of the statutory period, in cases where important questions of fact and of law arose in the probate court, the right to investigate which in a superior court has been lost by accident or misfortune, without fault or neglect on part

¹ Neale v. Peay, 21 Ark. 93. To similar effect is Estate of Boyd, 25 Cal. 511, 514.

² Dennison v. Talmage, 29 Oh. St. 433; Heckert's Appeal, 13 Serg. & R. 48; Claypool v. Norcross, 36 N. J. Eq. 524; Morrow v. Walker, 10 Ark. 569.

³ Van Slyke v. Schmeck, 10 Pai. 301, 303; Brown v. Hinman, Brayt. 20; Lambert v. Merrill, 56 Vt. 464. To similar effect, cases *supra*; also *infra*, p. *1201, note 2.

⁴ Fox v. Probate Judge, 48 Mich. 643. In Minnesota the probate court simply certifies the application to the appellate court; and a notice of appeal is held a sufficient application: Lake v. Albert, 37 Minn. 453.

⁵ Hynes v. McCreery, 2 Dem. 158; 1308

similar in effect, Bazzo v. Wallace, 16 Neb. 293, citing earlier Nebraska cases.

⁶ Feurth v. Anderson, 87 Mo. 354, 356, relying on City of Kansas v. Clark, 68 Mo. 588.

⁷ Mount v. Slack, 39 N. J. Eq. 230; Webb v. Simpson, 105 Ind. 327.

⁸ *In re Fisher*, 75 Cal. 523; Hooper's Estate, 185 Pa. St. 172; appearance of the appellee gives the court no jurisdiction: Kenyon v. Probate Court, 17 R. I. 652.

⁹ Merrills v. Adams, Kirby, 247.

¹⁰ Arterburn v. Young, 14 Bush. 509.

¹¹ Holtzclaw v. Ware, 34 Ala. 307.

¹² Mount v. Van Ness, 34 N. J. Eq. 523.

¹³ Biddison v. Mosely, 57 Md. 89, 92.

¹⁴ Bensley v. Haeberle, 20 Mo. App. 648.

of the appellant, and where injustice would result from the denial of the appeal.¹ But in the absence of fraud, and where the errors complained of might have been discovered with reasonable diligence in time for correction or appeal, no relief will be afforded under these statutes.² Where the statute allows an appeal "to the next superior court, and not afterward," an appeal taken after the beginning of a term which began subsequent to the rendition of the judgment complained of is too late, and will be dismissed.³ In Mississippi, under a statute allowing appeals "on petition to the clerk of the probate court," appeals allowed in open court were held irregular, and dismissed by the appellate court.⁴

[* 1201] * The party appealing is always required to give bond, except in cases where the executor or administrator appeals in the interest of the estate and has given security on his administration bond. An executor is entitled to an appeal without surety where the judgment or decree is to affect only the assets, because the appeal bond would bind him personally and tend to render him liable beyond the assets,⁵ and because he has already given a general bond;⁶ but where he is in a situation in which a personal judgment or decree can be rendered against him which may make him liable out of his own funds, he is no more entitled to appeal without surety than any other person.⁷ And in such case the administrator will not be allowed to appeal *in forma pauperis*, so as to avoid the necessity of giving an appeal bond.⁸ It is the character of the suit

Appellant must give bond unless appeal is in the interest of the estate.

¹ Woodworth v. Wilson, 50 N. H. 220, 222, and Moulton's Petition, 50 N. H. 532, 536, following Matthews v. Fogg, 35 N. H. 289, and disregarding the earlier cases of Buffum v. Sparhawk, 20 N. H. 81, 83; Bean v. Burleigh, 4 N. H. 550; French's Petition, 17 N. H. 472, 475, and others. So in Iowa: Reynolds v. Miller, 6 Iowa, 459; Burns v. Keas, 20 Iowa, 16, 18. Massachusetts: Hale v. Hale, 1 Gray, 518, 522; Capen v. Skinner, 139 Mass. 190; if taken within a year: Briggs v. Barker, 145 Mass. 287. Vermont: Rutherford v. Allen, 62 Vt. 260; Lillie v. Lillie, 56 Vt. 714. Wisconsin: Jameson v. Snyder, 79 Wis. 286. See also Foster v. Foster, 7 Pai. 48, 49. Maine: Rev. St. 1883, ch. 63, § 25. In North Carolina, if a party has lost his appeal without his fault, he may obtain a writ of *certiorari* from the Superior Court: *Ex parte* Barton, 70 N. C. 134, 136, citing earlier cases.

² Ahearn v. Mann, 63 N. H. 330. See the New Hampshire cases, *supra*, note on

this point; Marston, Petitioner, 79 Me. 25, 38; Case v. Bates, 81 Me. 182.

³ Brewster v. Shelton, 24 Conn. 140, 144. But an appeal taken after the statutory time is held, in this State, voidable only, and the defect may be waived by the appellees: Orcutt's Appeal, 61 Conn. 378.

⁴ Ricard v. Smith, 37 Miss. 644.

⁵ Wade v. American Society, 4 Sm. & M. 670, 680; Ruch v. Biery, 110 Ind. 444; Hickman v. Hickman, 74 Ga. 401.

⁶ Pugh v. Jones, 6 Leigh, 299, 302.

⁷ Duntun v. Robins, 2 Munf. 341; Pugh v. Jones, 6 Leigh, 299, 302; Erskine v. Henry, 6 Leigh, 378, 382; Hickman v. Hickman, 74 Ga. 401; Butler v. Jarvis, 117 N. Y. 115; *In re* Danielson, 88 Cal. 480 (appeal from order revoking letters); Mallory v. R. R., 53 Kans. 557 (order revoking letters); *In re* Henriques, 5 N. M. 169, 175.

⁸ Adams v. Beall, 60 Ga. 325; Smith v. Railway, 89 Tenn. 664. The statute of Georgia was so amended as to allow this

which determines the question of the right to appeal without bond, — not the naming of a party as executor or administrator, but the cause of action as developed by the pleadings.¹ The appeal bond need not conform in all minute respects to the form prescribed by statute; it will be sufficient if it substantially comply with the substance, and secure the party for whose benefit it is given in his rights.²

All parties having an interest in the estate are parties to the appeal,³ and where the statute requires notice of the appeal to be given to the adverse party, it must be given to all who have any interest in the controversy; notice to the probate court is insufficient, although no one had attended at the trial in that court.⁴ So notice to the administrator has been held not sufficient if the estate is insolvent;⁵ and where the notice is required to be in writing, oral notice, though given in open court and entered on the minutes, will not sustain the appeal.⁶ The appeal, for the want of such notice, will in some States be dismissed,⁷ in others continued for the purpose of giving the notice;⁸ and the probate judge [* 1202] may direct the manner of serving notice upon a corpora-

Appeal may be taken by attorney.

tion.⁹ Appeal may be taken by an attorney in fact,¹⁰ or by an attorney at law where such authority is not negatived by statute.¹¹ While any one item in an account is a separate claim, demanding a separate judgment from which appeal may be taken,¹² yet a party is entitled to but one appeal from the

to be done: *Fite v. Black*, 85 Ga. 413, 416.

¹ *Pugh v. Ottenkirk*, 3 Watts & S. 170, 172. See also *Kirsch v. Derby*, 93 Cal. 573; and *Meseberg's Estate*, 91 Wis. 399.

² *Foster v. Foster*, 7 Pa. 48, 50; *King v. Gridley*, 69 Mich. 84; in *Riley v. Mitchell*, 38 Minn. 9, a bond with one surety, the statute requiring sureties, was held merely irregular, and amendable in the district court; but in *Bartlett, Appellant*, 82 Me. 210, under similar circumstances, the appeal was dismissed. So in Missouri, the appeal was dismissed because the instrument purporting to be a bond was not under seal: *Corbin v. Laswell*, 48 Mo. App. 626.

³ *Blanchin v. Martinez*, 18 La. An. 699; *Succession of Forsyth*, 20 La. An. 33, relying on earlier Louisiana cases.

⁴ *Sheldon v. Court of Probate*, 5 R. I. 436, 440. Notice in Maine must be to the adverse party, and if served on his attorney is insufficient, though the adverse party be out of the State: *Townshend, Appel-*

lant, 85 Me. 57. But in Texas, an heir may appeal from the allowance of a claim without giving notice: *Glenn v. Kimbrough*, 70 Tex. 147. In Missouri no notice of appeal is required: *Westphalia v. Enright*, 60 Mo. 279.

⁵ *Shaw v. Newell*, 9 R. I. 111.

⁶ *Lambert v. Moore*, 1 Nev. 344, 346.

⁷ *McIntosh v. Wheeler*, 58 Kans. 324; *Bowling v. Estep*, 56 Md. 564; *Succession of Penniston*, 18 La. An. 281; and see *Wilkes v. Cornelius*, 21 Oreg. 341, 344.

⁸ *Meech v. Meech*, 37 Vt. 414. The time when the notice is served affects only the question as to when the appeal shall stand for trial, and not the jurisdictional validity of the appeal itself: *Moore v. Spier*, 80 Ala. 129.

⁹ *Simpson v. Mansfield Co.*, 38 Mich. 626.

¹⁰ *Bohn v. Sheppard*, 4 Munf. 403, referring to earlier Virginia cases.

¹¹ *Spaulding's Appeal*, 33 N. H. 479.

¹² *Morgan v. Morgan*, 83 Ill. 196; *Curts v. Brooks*, 71 Ill. 125, 127.

same decree, although the decree makes disposition of various claims, and it is improper to allow a separate appeal for each claim.¹

§ 547. **Powers of the Probate Court after Appeal.** — Upon compliance with the statutory requirements on the part of the appellant, and the grant of appeal by the probate court, the matter appealed from is removed from such court, and it has no power, pending that appeal, to take further steps in regard thereto.² If the appeal bond is deemed insufficient,³ or another bond is desired to be substituted for it, the appellate court alone has power to apply the remedy.⁴ But the judgment of the appellate court is limited to the particular matter appealed from, the appeal in no wise affecting the jurisdiction of the probate court over all matters not involved in the appeal.⁵

Court from which appeal is taken has no further power over the matter involved in the appeal,

but retains jurisdiction as to all matters not involved in the appeal.

The decision of the appellate court is not carried into effect by that court, but certified to the probate court, which then proceeds with the further administration, conforming its action to the decision of the appellate court.⁶ Where the appeal was from a decree settling an executor's accounts, involving several items, and the appellate court sent back the whole account to be readjusted as to [* 1203] * certain items pointed out, the decree was held conclusive as to all the questions passed upon therein, and not referred back for readjustment;⁷ but in Pennsylvania it was held that the affirmance of a decree on appeal does not preclude the orphan's court from reviewing and vacating the same, if the question involved was not expressly passed on by the appellate court.⁸ So it is held in Massachusetts, that, where an appeal fails on the ground that the appellant does not prove himself entitled to appeal, and is dismissed for that reason, the decree appealed from stands as if not appealed from, and the probate court possesses all the jurisdiction it had in regard thereto before the appeal was granted;⁹ and a petition for the review or rehearing of a decree of the probate court, which has been affirmed on appeal to the supreme court, must be heard in the first instance in the probate court.¹⁰

¹ Roberts's Appeal, 92 Pa. St. 407, 418; *In re Storey*, 120 Ill. 244, 253.

² *Du Bois v. Brown*, 1 Dem. 317, 334; *Waterman v. Ball*, 64 How. Pr. 368, 377; *Halsey v. Van Amringe*, 4 Pai. 279.

³ *Du Bois v. Brown*, *supra*.

⁴ *Blake v. Kimball*, 22 Vt. 632; *Biddison v. Mosely*, 57 Md. 89, 93.

⁵ *Per Metcalf, J.*, in *Dunham v. Dunham*, 16 Gray, 577, 578; *Hinman, J.*, in *Curtiss v. Beardsley*, 15 Conn. 518, 523; *Small v. Haskins*, 26 Vt. 209, 218; *Mathes v. Bennett*, 21 N. H. 188, 202.

But where a decision granting letters was appealed from on the ground that petitioner was not the widow, the court cannot, pending such appeal, make an allowance to the alleged widow: *State v. Lichtenberg*, 4 Wash. 231.

⁶ *Cases supra*; *Green v. Clark*, 24 Vt. 136; *Branson v. Branson*, 102 Mo. 613.

⁷ *Adair v. Brimmer*, 95 N. Y. 35, 39.

⁸ *Young's Appeal*, 99 Pa. St. 74, 83.

⁹ *Cleveland v. Quilty*, 128 Mass. 578.

¹⁰ *Gale v. Nickerson*, 144 Mass. 415, 417.

The effect of an appeal is, generally, to vacate the judgment or decree of the probate court, which is thenceforth of no force or effect;¹ and if such court, notwithstanding the appeal, proceeds to enforce its order, the appellate court will issue a writ of prohibition² or, by way of supersedeas, order the suspension of all further proceedings until the appeal be heard and determined.³ Thus, the appeal from an order admitting a will to probate suspends all further proceedings in the probate court, and while it remains undecided that court cannot grant letters of administration,⁴ nor after affirmance on appeal, can the probate court vacate the judgment establishing the will.⁵ In like manner, the appeal from a decree appointing an administrator suspends his powers to act during the pendency of the appeal, and if anything is to be done * for the estate during its prosecution, [* 1204] it is within the power and duty of the probate court to appoint an administrator *pendente lite* for that purpose;⁶ and when the appeal is discontinued without resulting in a reversal of the order of appointment, the power of the administrator revives and has effect from the original appointment,⁷ without the formality of giving a new bond.⁸ For the same reason, appeal from an order revoking the letters granted to an administrator suspends the order of revocation and leaves the letters in full force, so that new letters cannot be

Generally the appeal vacates the judgment or decree appealed from, so that there can be no administration under a will from the probate of which appeal has been taken.

Appeal from the appointment of an administrator suspends his power;

and appeal from the revocation of letters leaves the letters in force.

¹ Williams v. Robinson, 42 Vt. 658, 662; Tarbox v. Fisher, 50 Me. 236, 237; Vreedenburgh v. Calf, 9 Cal. 128, 131; Brown v. Ryder, 42 N. J. Eq. 356, 358; Calvert v. Williams, 9 Gill, 172, 176; Muirhead v. Muirhead, 8 Sm. & M. 211; Gale v. Nickerson (*per* Morton, C. J.), 144 Mass. 415, 416. Though the appeal be taken by only one of several, the reversal enures to the benefit of all: Yesler v. Hochstetler, 4 Wash. 349, 368; Glenn v. Kimbrough, 70 Tex. 147.

² Ruggles v. Superior Court, 103 Cal. 125.

³ Bruscup v. Taylor, 26 Md. 410, 413.

⁴ Offutt v. Gott, 12 Gill & J. 385, 387.

So also where the appeal is from an order rejecting a will: Hicks v. Hicks, 12 Barb. 322. But by statute of New York appeal from probate does not stay the issue of letters testamentary to the executor named in the will, if deemed necessary by the surrogate, who in such case has all the powers of an executor except to sell real estate, pay legacies, or distribute effects before the termination of the appeal:

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Thompson v. Tracy, 60 N. Y. 174, 177. The appeal from an order rejecting a will propounded for probate does not annul the order, and it is held in Indiana that such order is not set aside or its force in any wise impaired by the appeal; hence the probate court has power to appoint a general administrator before the determination of the appeal: Hayes v. Hayes, 75 Ind. 395, 396.

⁵ Buffum v. Haynes, 68 Vt. 534.

⁶ Arnold v. Sabin, 4 Cush. 46; Fletcher v. Fletcher, 29 Vt. 98, 102; Palms v. Probate Judge, 39 Mich. 302; Crozier v. Goodwin, 1 Lea, 368. In Missouri no such power is given to the court, and it is held that no appeal lies from an order selecting an administrator from among several of a class entitled to administer: State v. Fowler, 108 Mo. 465. But an appeal lies by one having a prior right to administer, where the court has no discretion: *ante*, § 242.

⁷ Fletcher v. Fletcher, 29 Vt. 98, 103; Curtiss v. Beardsley, 15 Conn. 518, 523.

⁸ Dunham v. Dunham, 16 Gray, 577.

granted during the pendency of such appeal;¹ but in taking the appeal bond in such case it is within the discretion of the probate court to require security, not only that the appellant will prosecute the appeal with effect and pay costs, but also for the faithful performance of his duty pending the appeal, which operates as a supersedeas.² It may be remarked here, that the revocation of letters erroneously granted (if the court had jurisdiction to act) in no wise affects the validity of the various acts done under the original grant.³

§ 548. **The Question of Supersedeas under the Statutes.** — The statutes of most States point out in what cases and under what circumstances an appeal from the order, judgment, or decree of the probate court shall operate as a supersedeas.⁴ It is generally enacted that an appeal properly perfected shall work a supersedeas if bond be given, as in Arkansas,⁵ Delaware,⁶ Florida,⁷ Mississippi,⁸ Oregon;⁹ or without expressing the condition of giving bond, which may be involved in the perfecting of the appeal, as in California,¹⁰ Colorado,¹¹ Maine,¹² Massachusetts,¹³ Minnesota,¹⁴ Pennsylvania,¹⁵ [* 1205] * South Carolina,¹⁶ and Texas.¹⁷ In some States the appeal is directed to operate as a supersedeas in all cases, with exceptions named in the statute; thus, the appeal does not work a supersedeas in the case of the removal of an executor or administrator in Massachusetts,¹⁸ New York,¹⁹ or Rhode Island;²⁰ nor, unless bond be given in such case, in Georgia.²¹ That the appeal shall not be a supersedeas in any matter relating to the administration except that from which it is taken, is enacted in Kansas,²² Missouri,²³ and Nebraska.²⁴ In Maine, when

Appeal working supersedeas if bond be given; or without condition of bond expressed.

Supersedeas unless otherwise directed by statute.

¹ *State v. Williams*, 9 Gill, 172, 176; *Shaufler v. Stoeve*, 4 Serg. & R. 202. In California a special, but not general, administrator may be appointed in the interim: *In re Moore*, 86 Cal. 72; and see in connection herewith, *ante*, § 274, p. * 588.

² *Commonwealth v. Judges*, 10 Pa. St. 37; *In re Schedel*, 69 Cal. 241.

³ *Shephard v. Rhodes*, 60 Ill. 301, 305; *ante*, § 274.

⁴ This expression is commonly used to denote a stay or cessation of proceedings; that a certain act (mostly an appeal) has the legal effect of the writ of supersedeas, commanding a ministerial officer to supersede or desist: *Abb. Law Dict.*, *q. v.*

⁵ *Dig. of St.* 1894, § 1151.

⁶ *Rev. St.* 1874, p. 576, § 5.

⁷ *Rev. St. Fla.* 1892, § 1459.

⁸ *Miss. Ann. Code*, 1892, § 49.

⁹ *Code*, 1887, § 538.

¹⁰ *Ex parte Oxford*, 102 Cal. 656.

¹¹ *Mills' Ann. St.* 1891, §§ 1097, 2682.

¹² *Rev. St.* 1883, p. 533, § 27.

¹³ *Pub. St.* 1882, ch. 156, § 12.

¹⁴ 2 *Kelly*, *Gen. St.* 1891, § 5873.

¹⁵ *Pep. & L. Dig.* 1896, p. 128, § 8.

¹⁶ 2 *Rev. St. S. C.* 1893, *Code Civ. Pr.* § 57.

¹⁷ *See Bills v. Scott*, 49 Tex. 430.

¹⁸ *Pub. St.* 1882, ch. 156, § 14.

¹⁹ *Code Civ. Pr.* §§ 2583, 2584.

²⁰ *Pub. St.* 1882, ch. 181, §§ 7, 9. *Mowrie v. Harris*, 18 R. I. 519 (where there was an appeal from the appointment of an administrator). See *Sarle v. Probate Court*, 7 R. I. 270; *Dyer v. Dyer*, 17 R. I. 547.

²¹ *Code Ga.* 1895, § 4454.

²² 2 *Gen. St. Kans.* 1897, ch. 107, § 207.

²³ *Rev. St. Mo.* 1889, § 290. *Branson v.*

²⁴ *St.* 1887, ch. 20, § 45.

appeal is taken from the probate of a will, the probate court may either appoint a special administrator, or permit the executor to administer pending the appeal.¹ In New Hampshire the statute provides that every decision of the probate court, affirmed or not reversed on appeal, shall be considered as in force from the time when made;² in Maryland the appeal does not stay any proceedings which may with propriety be carried on before it is decided;³ while in New York it is within the discretion of the surrogate to permit the executor, after appeal from the decree admitting the will to probate, to proceed with the administration (except to sell real estate under a power, or satisfy legacies or distributive shares until the determination of the appeal); the appeal does not stay the execution of a decree revoking probate, or letters granted, or suspending an executor, or appointing a temporary administrator,⁴ but is a supersedeas to enforce other decrees appealed from.⁵ So in Pennsylvania there is no supersedeas in case of appeal from the validity of the will, or the right to administer, where the executor or administrator has given bond.⁶

It was held in Minnesota, under a statute silent as to the question of supersedeas,⁷ that an appeal from an order of the probate * court does not operate to vacate or suspend the operation [* 1206] of the order appealed from.⁸

§ 549. **Nature of the Trial in the Appellate Court.** — Probate powers are vested, in some of the States, in courts of ordinary jurisdiction for the trial of all cases at law and in equity, while in others they are conferred upon tribunals specially created as courts of probate. Appeals from the former class of courts are necessarily allowed directly to the court of last resort, and are distinguishable, in the method of trial, from those taken from probate courts proper, which are in most States triable *de novo* in some court intermediate between the probate court and court of last resort, before the latter can obtain jurisdiction. To the former class belong Alabama,⁹ California,¹⁰ Illinois,¹¹ Indiana,¹² Iowa,¹³

Appeals directly to the court of last resort.

¹ Rev. St. 1883, p. 533.

² Gen. L. 1881, p. 484, § 12.

³ Pub. Gen. Laws, 1888, p. 40, § 62.

See *Biddison v. Mosely*, 57 Md. 89.

⁴ Code Civ. Proc. § 2583.

⁵ *Ib.* § 2584.

⁶ *Pep. & L. Dig.* 1896, p. 3282, § 31.

⁷ The statutes of 1878 declare that the appeal works a supersedeas: p. 575, § 15.

⁸ *Dutcher v. Culver*, 23 Minn. 415;

whether either the probate or appellate court could direct the stay of proceedings in such case, was expressly left undecided: p. 421.

⁹ Appeal may be to circuit or supreme court: Code, Ala. 1896, §§ 457 *et seq.*

¹⁰ 3 Code Civ. Pr. § 963, pl. 3.

¹¹ In matters of real estate, see *infra*.

¹² 1 Ann. Ind. St. 1894, § 2609.

¹³ Code, Iowa, 1897, § 225.

Branson, 102 Mo. 613, 620. This statute has been construed as working a supersedeas only in case of an appeal from a judg-

ment to pay a debt: *Mullanphy v. St. Louis*, 6 Mo. 563, 567; *Harney v. Scott*, 28 Mo. 333.

Mississippi,¹ Pennsylvania,² and Utah;³ to the latter class (in which appeal is given to the county, circuit, district, superior, supreme, or prerogative court, or court of common pleas, which are all courts of general jurisdiction) belong Alabama,⁴ Arizona,⁵ Arkansas,⁶ Colorado,⁷ Connecticut,⁸ Delaware,⁹ Florida,¹⁰ Georgia,¹¹ Idaho,¹² Illinois,¹³ Kansas,¹⁴ Kentucky,¹⁵ Michigan,¹⁶ Minnesota,¹⁷ Missouri,¹⁸ Nebraska,¹⁹ Nevada,²⁰ New Jersey,²¹ New York,²² North Carolina,²³ North Dakota,²⁴ Ohio,²⁵ Oklahoma,²⁶ Oregon,²⁷ South Carolina,²⁸ South Dakota,²⁹ Vermont,³⁰ Virginia,³¹ West Virginia,³² Wisconsin,³³ [*1207] and Wyoming.³⁴ In some of *the States an appeal is given directly from the probate court, although not of general jurisdiction, to the court of last resort; as, for instance, in Maine,³⁵ Maryland,³⁶ Massachusetts,³⁷ New

Appeals to a court intervening between probate court and court of last resort.

Appeals from special probate courts to court of last resort.

¹ Miss. Ann. Code, 1892, § 37, 464.

² Const., Art. V. § 7; Bright. Purd. Dig. p. 1286, § 62.

³ Rev. St. Utah, 1895, § 3300.

⁴ Appeal may be to circuit or supreme court: Code, 1896, *supra*.

⁵ Rev. St. 1887, ¶ 1298 *et seq.*

⁶ Dig. of St. 1894, § 1149.

⁷ Mills' Ann. St. 1891, § 4681.

⁸ Gen. St. 1888, § 640.

⁹ Gen. St. 1874, p. 543, § 15, p. 575, § 4.

¹⁰ Rev. St. Fla. 1892, §§ 1280, 1591.

¹¹ Code Ga. 1895, § 4454.

¹² Rev. St. Ida. 1887, § 8320.

¹³ St. & C. Ann. St. 1896, p. 345, § 124.

A statute allowing appeals from proceedings for the sale of real estate directly to the supreme court is held to be repealed: *Morris v. Morris*, 12 Ill. App. 68, and unconstitutional: *Dawson v. Eustice*, 148 Ill. 346. But in *Lynn v. Lynn*, 160 Ill. 307, 315, on the other hand, it is held that while in case of allowance or disallowance of a claim the appeal lies to the circuit court, as in case of perhaps "other proceedings of minor importance," yet on application to sell real estate the appeal must be to the appellate or supreme court, "depending on whether a freehold is involved."

¹⁴ Gen. St. Kans. 1897, Const. Art. III, § 10.

¹⁵ Ky. St. 1894, § 978.

¹⁶ How. St. 1882, § 6779.

¹⁷ 2 Gen. St. Minn. 1891 (Kelly), § 5831.

¹⁸ Rev. St. 1889, § 285.

¹⁹ Cons. St. Neb. 1893, § 1100.

²⁰ Gen. St. 1885, § 2996.

²¹ To various courts: 2 Gen. St. N. J. 1895, p. 2396.

²² Code Civ. Pr. 1897, § 2570.

²³ From the clerk of the superior court to the judge: Code, 1883, § 1464. The procedure in this State is elucidated by Merrimon, J., in *Ex parte Spencer*, 95 N. C. 271, 274.

²⁴ Rev. St. N. D. 1895, § 6254.

²⁵ Bates' Ann. St. § 6407.

²⁶ St. Okl. 1893, ¶ 4435.

²⁷ Code, 1887, § 546, pl. 3.

²⁸ *Prater v. Whittle*, 16 S. C. 40, 45, unless a jury is demanded in the appellate court, the cause is not tried *de novo*, but only reviewed by the latter court: *Ex parte White*, 33 S. C. 442, 446.

²⁹ Comp. (Terr.) L., 1887, § 5962.

³⁰ St. 1894, § 2582.

³¹ Va. Code, 1887, § 3453.

³² Code W. Va. 1891, ch. 39, § 47.

³³ 2 Sanb. & B. Ann. St. 1889, § 4031, 4034.

³⁴ Rev. St. Wy. 1897, § 2213.

³⁵ Rev. St. 1883, p. 532, § 23.

³⁶ 1 Publ. Gen. L. Md. art. 5, pl. 58, p. 39. But with the consent of both parties in writing, the appeal may be made to the circuit court for the county, or superior court of Baltimore City: *Ib.*, pl. 63, p. 40. The determination of the circuit court cannot afterwards be impeached, at least by either of the parties to the agreement: *State v. McCarty*, 64 Md. 253, 261.

³⁷ Pub. St. 1882, ch. 156, § 5. But in case of dissatisfaction with the allowance

Hampshire,¹ Rhode Island,² and Washington.³ In Alabama the Appeals to one appeal may be to either the circuit or supreme court;⁴ or other court. in Tennessee,⁵ when there is concurrent jurisdiction between the county court and chancery, as there is, for instance, in regard to the sale of real estate by an executor or administrator, there may be appeal from either court directly to the supreme court; and in Texas, where concurrent jurisdiction over probate matters is given to the district and the probate court, appeal lies from the district court to the supreme court, in cases brought originally in the district court, or appealed from the probate court; but from proceedings in the probate court the appeal lies only to the district court.⁶

Where the appeal is taken to the court of last resort directly, the judgment of the appellate court is naturally confined to the order, judgment, or decree appealed from, which is not carried into execution by it, but is certified to the probate court for further proceedings in conformity therewith.⁷ The error complained of must be affirmatively shown,⁸ — if growing out of facts in evidence, by bill of exceptions,⁹ if as to matters apparent on the face of the proceedings, by the record;¹⁰ otherwise, the objections will not, at the instance of the appellant, be noticed on appeal.¹¹ The appellee is not in all States thus limited, but may himself show error in the decree, and have it corrected.¹² The appellate court may declare the proceedings * below regular to a certain point, and reverse from [* 1208] the point where the irregularity commences, or reverse *in toto*.¹³ It can give only such relief as the court below could have given.¹⁴

§ 550. **Nature of the Trial de Novo.** — On appeal to a court not of last resort, the appellate court proceeds as if it had original

of a claim in an insolvent estate, there may be appeal to the superior court before going to the supreme court of probates: ch. 137, § 11.

¹ Publ. St. N. H. 1891, ch. 200, § 1.

² Publ. St. 1882, p. 468, § 1.

³ From an order of the probate court on an application for specific performance of a contract to sell land: Wash. Code of Procedure, 1893, § 1622.

⁴ 1 Code Ala. 1896, § 457.

⁵ Code, 1884, §§ 3865, 4981.

⁶ Rev. St. 1888, §§ 1118, 1380, 1789, 1790. And see Sayles' Tex. Civ. St. 1897, §§ 1099, 2085.

⁷ *Ante*, § 547, p. * 1202, and cases under notes 5 and 6.

⁸ Henderson v. Renfro, 31 Ala. 101, 106.

⁹ Dunham v. Hatcher, 31 Ala. 483; Forrester v. Forrester, 40 Ala. 557, 560; Taylor v. McElrath, 35 Ala. 330, 333.

¹⁰ Tapp v. Cox, 56 Ala. 553, reviewing the law and citing earlier Alabama cases; Brandon v. Hoggatt, 32 Miss. 335, 342.

¹¹ Crowder v. Shackleford, 35 Miss. 321, 364; Murphy v. Walker, 131 Mass. 341; Estate of McCarty, 58 Cal. 335; Succession of Perret, 20 La. An. 86; Kile's Estate, 72 Cal. 131.

¹² Twitchell v. Smith, 35 N. H. 48, relying on earlier New Hampshire cases; and see cases, *post*, § 550, on this point.

¹³ Jones v. Dyer, 20 Ala. 373, 377; Dexter v. Brown, 3 Mass. 32; Carnochan v. Abrahams, T. U. P. Charlt. 196, 211.

¹⁴ See cases cited next section.

jurisdiction of the matter brought before it by appeal, which vacates and annuls, for the purposes of such trial, the judgment of the court below.¹ Such appeals, removing a cause from an inferior to a superior court, for the purpose of obtaining trials *de novo*, are unknown to the common law, and can only be prosecuted when expressly given by statute.² When so given, the appellate court proceeds in analogy with the civil law.³ The appeal brings up the entire decree appealed from;⁴ new grounds may be taken in the appellate court,⁵ and new evidence introduced;⁶ and generally no bill of exceptions or technical assignment of errors is necessary if the error complained of is indicated or appears from the record.⁷ A trial without pleadings may be an irregularity, but does not go to the jurisdiction.⁸ But in New York⁹ [*1209] * it is held that it is not a matter of course to allow further proofs to be produced; and similarly in New Jersey.¹⁰

It is a settled rule, that the issue tried in the appellate court must be the same, and no other, than that which was tried in the court below,¹¹ and that the appellate court will grant such relief, and

¹ *Williams v. Robinson*, 42 Vt. 658, 662; *King v. Lacey*, 8 Conn. 499, 502; *Moody v. Moody*, 29 Ga. 519, 521; *Cooper v. Armstrong*, 3 Kans. 78; *Moody v. Hutchinson*, 44 Me. 57, 63; *Walsh v. Edmonson*, 19 Mo. 142; *Sechrest v. Edwards*, 4 Met. (Ky.) 163; *Kelly v. Settegast*, 68 Tex. 13; *Wilcox's Appeal*, 54 Conn. 320, 324; *Kirtland v. Davis*, 43 Ga. 318, approved in *Crawford v. Ward*, 49 Ga. 40, 43.

² *Constitution v. Nelson*, 2 Ill. 511; *In re Storey*, 120 Ill. 244, 252; *Will of Donnelly*, 68 Iowa, 126; *Sisters of Visitation v. Glass*, 45 Iowa, 154.

³ *Scribner v. Williams*, 1 Pai. 550.

⁴ *Waterman v. Ball*, 64 How. Pr. 368, 377; *Robinson v. Raynor*, 28 N. Y. 494, 497, citing earlier New York cases.

⁵ *Peoples v. Smith*, 8 Rich. L. 90, 103; *Scribner v. Williams*, 1 Paige, 550; *Clark v. Clark*, 21 Vt. 490; *Schick v. Grote*, 42 N. J. Eq. 352, and if the order allowing the appeal does not specify the order appealed from, the appellate court may allow its record to be amended by filing a new copy of the order: *Brown v. Brown*, 66 Vt. 76.

⁶ *Jacobs v. Morrow*, 21 Neb. 233; *Sullivan v. Deadman*, 23 Ark. 14; *Kelly v. Settegast*, 68 Tex. 13.

⁷ *Moreland v. Gilliam*, 21 Ark. 507.

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⁸ *Smith v. Gill*, 37 Minn. 455.

⁹ *Scribner v. Williams*, 1 Pai. 550; Chancellor Walworth cites *The Euphrates*, 8 Cr. 385, *The Pizarro*, 2 Wheat. 227, and *The St. Lawrence*, 8 Cr. 434, cases in admiralty appealed to the Circuit Court of the United States and thence to the Supreme Court, in which it was held that, if the appellant wishes to have the facts reviewed on new evidence in the appellate court, he should ask leave to produce further proofs, and state his excuse for not having produced them before. To same effect, *Case v. Towle*, 8 Pai. 479. In this State it is also held that a general exception is insufficient; the appeal brings up for review only such questions as were raised by proper exceptions to rulings on law or fact: *Angevine v. Jackson*, 103 N. Y. 470.

¹⁰ *Personette v. Johnson*, 40 N. J. Eq. 173, 175; *Heisler v. Sharp*, 44 N. J. Eq. 167, 169.

¹¹ *Campau's Appeal*, 48 Mich. 236; *Cooper v. Armstrong*, 3 Kan. 78; *Trimmer v. Adams*, 18 N. J. Eq. 505; *Kellogg's Accounting*, 104 N. Y. 648; *Matter of Hood*, 104 N. Y. 103, 106, where Finch, J., says: "It is the duty of the party appealing to procure to be made such findings or refusals as will present, through appropriate exceptions, the questions

No issue is triable in the appellate court not raised below.

Appellant is confined to his statement of grievance; but appellee may interpose any defence.

such only,¹ as the court below should have given; it acquires no jurisdiction of a subject-matter by the appeal of which the court appealed from had none;² but in matters of practice follows its own rules. Within the scope of the subject of appeal, the appellee may oppose and demand correction of any item deemed erroneously decided in the lower court,³ although the appellant is confined to the grounds stated in his petition or bill of exceptions,⁴ and questions affecting jurisdiction may be raised at any time, and in any court.⁵

Trials *de novo* are expressly secured by statute in many of the States. In some of them, where appeal is taken directly to the supreme court, the facts may be retried by a jury, as in Maine,⁶ * Massachusetts,⁷ New Hampshire,⁸ and Rhode [* 1210] Island.⁹ So in courts of common-law jurisdiction in Delaware,¹⁰ Nevada,¹¹ South Carolina,¹² and Vermont.¹³

which he desires to argue. If he suffers this necessary step to be omitted, he will find himself without the means of reviewing the rulings of which he complains."

¹ *Grinell v. Baxter*, 17 Pick. 383. Hence the judgment, on an appeal by a creditor, should not be a common-law judgment against the administrator, but an allowance or disallowance of the claim certified to the probate court: *Tyler v. Gallop*, 68 Mich. 185.

² *Canley v. Truitt*, 63 Mo. App. 356, 359; *Elder v. Whittemore*, 51 Ill. App. 662; *Mallory's Appeal*, 62 Conn. 218; *Graham v. Burch*, 47 Minn. 171, 177; *Vanderheyden v. Reid*, Hopk. Ch. 408; *Kellogg's Accounting*, 104 N. Y. 648, 652; *Miller v. Miller*, 82 Ill. 463, 471; *Grider v. Apperson*, 38 Ark. 388, 392; *Scribner v. Williams*, 1 Paige, 550.

³ *Freeman v. Coit*, 96 N. Y. 63, 65, 70.

⁴ "The plaintiff is restricted to the matters specified in his reasons of appeal; at his instance, no grievance except such as he has assigned will be considered; but the whole record is open to the defendant": *Carpenter, J., in Simmons v. Goodell*, 63 N. H. 458, 460, citing numerous cases. But it is to be remembered that in New Hampshire the appeal lies directly to the supreme court.

⁵ *Fiester v. Shepard*, 92 N. Y. 251, 254.

⁶ Rev. St. 1883, p. 533, § 28.

⁷ Pub. St. 1882, ch. 156, § 19.

⁸ Publ. St. N. H. 1891, ch. 200, § 11.

⁹ Pub. St. 1882, ch. 181, § 4.

¹⁰ Rev. St. 1874, p. 575, § 3.

¹¹ Gen. St. 1885, § 2971.

¹² *Ex parte White*, 33 S. C. 442.

¹³ Vt. St. 1894, § 2595.

OF THE CLOSE OF THE ADMINISTRATION.

PART FIRST.

OF DISTRIBUTION TO LEGATEES AND NEXT OF KIN.

§ 551. **Duty of Probate Courts to order Distribution.**—The subject of distribution is involved in the devolution of property upon the death of its owner; ¹ the rights of the husband and wife, of the representative of the surviving family, of widows and minor children, of next of kin, and of all other persons pointed out by law as heirs or distributees of the estates of deceased persons, are discussed in the chapters devoted to these subjects, as well as also the order of priority in which they are entitled. In the present connection, it is only necessary, therefore, to consider the procedure by which the rights of distributees are judicially ascertained and announced, and how they may be enforced against the executor or administrator.

Rights and priorities of distributees are determined by the devolution of property.

It will be remembered that the English Statute of Distribution ² was enacted to provide a remedy against the harsh feature of the common law which gave the residue of intestate estates in exclusion of the next of kin of the deceased to his administrator. It imposed upon the ordinary, before whom an administrator made complete accounting of his administration of the effects of the deceased, the duty to order distribution of the residue, and to compel payment thereof to those entitled under the statute, saving to any one deeming himself aggrieved the right of appeal. The Court of Probate Act, ³ transferring to the

English Statute of Distribution.

Court of Probate Act,

[* 1212] court thereby created the jurisdiction of the ordinary, * omits to confer upon it the power to enforce distribution, so that in England recourse must now be had to courts of equity for such purpose; ⁴ and it was held in England that an administrator is not

giving jurisdiction over distribution.

¹ *Ante*, ch. viii., §§ 64 *et seq.*

² 22 & 23 Car. II. c. 10; *ante*, § 462.

³ 20 & 21 Vict. c. 77.

⁴ *Wms. Ex.* [2602].

bound by the conditions of his bond given under the Statute of Distribution, to distribute the residue until an order to that effect had been made by the court in which his inventory and account are exhibited.¹

In the United States, where it is made the duty of probate courts to compel accounting by executors and administrators, even in the absence of a motion to that effect by the parties interested,² it is in most States their duty also, when it appears that all debts, legacies, and expenses of administration have been paid, to order the distribution of the residue, and to compel payment of the distributive shares to those who may be entitled thereto.³ Before considering the details of the proceedings before the court, it seems desirable to discuss the subject of advancements, because these constitute an element of distribution themselves, and must necessarily be taken into account in ascertaining the rights of the respective distributees.

¹ *Canterbury v. Tappen*, 8 B. & C. 151, 156.

² *Ante*, §§ 501 *et seq.*

³ *Post*, §§ 561, 569.

[* 1213]

* CHAPTER LX.

OF ADVANCEMENTS.

§ 552. **Definition of Advancements.**—In the absence of testamentary directions touching the distribution of a decedent's property after his death, the law makes such disposition thereof as he, acting rationally, would himself have made.¹ And as a parent is presumed to intend that all his children shall equally share in his estate, — not only in what may remain at his death, but equally in all that came from him,² — the doctrine of advancement is invoked to effectuate equality in the distribution of his estate,³ as auxiliary thereto. Advancements are cognizable exclusively in probate courts,⁴ or such courts as may have jurisdiction of the distribution of estates of deceased persons;⁵ it has been held that, where different courts have exclusive jurisdiction over different kinds of property, advancements in one kind of property cannot be considered in a court having jurisdiction over another kind of property only. Thus, where a court possesses no jurisdiction to partition the real estate of a deceased person, advancements in real estate cannot be brought into hotchpot, or considered by the court having jurisdiction over the distribution of personalty, in ordering such distribution;⁶ and so conversely,⁷ "there being for each a separate hotchpot,"⁸ if not

Doctrine of advancements as auxiliary to just distribution.

Advancements are considered only in connection with distribution.

¹ *Ante*, § 64; Introduction, § 8.

² *Dutch's Appeal*, 57 Pa. St. 461, 465; *Youngblood v. Norton*, 1 Strobb. Eq. 122, 127.

³ *Grattan v. Grattan*, 18 Ill. 167, 169; *Fellows v. Little*, 46 N. H. 27, 37; *Miller's Appeal*, 31 Pa. St. 337, 338; *Kyle v. Conrad*, 25 W. Va. 760, 781; *Edwards v. Freeman*, 2 P. Wms. 435, 440, 444.

⁴ *Springer's Appeal*, 29 Pa. St. 208; *Hughes's Appeal*, 57 Pa. St. 179. But it does not follow, that the power of a court of equity to equalize advancements, where essential to complete relief and justice, is destroyed, when the court has taken jurisdiction under some recognized head of original jurisdiction: *Marshall v. Marshall*, 86 Ala. 383.

⁵ *Key v. Jones*, 52 Ala. 238; *Grattan v. Grattan*, *supra*.

⁶ *Stewart v. Pattison*, 8 Gill, 46, 58; *Hayden v. Burch*, 9 Gill, 79, 82; *Jones v. Jones*, 2 Murphy, 150. In Missouri this doctrine was announced in *Elliott v. Wilson*, 27 Mo. App. 218 (overruling *St. Vrain's Estate*, 1 Mo. App. 294) but was in turn overruled by the supreme court, as will appear, *infra*.

⁷ *Lawrence v. Rayner*, Busb. (L.) 113, 116.

⁸ *South v. Hoy*, 3 T. B. Mon. 88, 93; *Quinn v. Stockton*, 2 Lit. (Ky.) 343, 348; *Stone v. Hallev*, 1 Dana, 197; *Williams v. Stonestreet*, 3 Rand. 559, 561; *Knight v. Oliver*, 12 Gratt. 33, 43; *Haden v. Haden*, 7 J. J. Marsh. 168, distinguishing also between slaves and personal property.

* otherwise directed by statute.¹ On the other hand, it is [* 1214] maintained, that since the probate court does not deal with the land advanced, but only with its value, it makes no difference, so far as the jurisdiction of the probate court is concerned, whether the advancement be by way of land, money, or specific personal property.²

Advancements are described as gifts by a parent, *in presenti*, of a portion or all of the share of his child in his estate which would fall to it under the Statute of Distribution or Descent; ³ or, as a giving by anticipation, during the intestate's lifetime, of the whole or part of what the child ⁴ would be entitled to on the donor's death.⁵ The gift, in order to constitute an advancement, must be irrevocable,⁶ divesting entirely all of the ancestor's interest,⁷ and forming no part of the property to be administered; ⁸ hence, the donee can in no case be compelled to refund what he has received.⁹ But

Advancements are irrevocable as gifts, and form no part of the estate;

but will be deducted, on distribution, from the donee's distributive share.

Hotchpot.

into hotchpot does not mean that the party advanced shall return the property received *in specie* or in kind, or even that he shall relinquish his interest therein; but only that its value shall be reckoned against him in the distribution.¹² And

¹ See whether and where the doctrine of advancements applies to real estate as well as personal, *post*, § 559; Terry v. Dayton, 31 Barb. 519, 523.

² Elliott's Estate, 98 Mo. 379, 384, reversing Elliott v. Wilson, *supra*; see also West v. Beck, 95 Iowa, 520, 523.

³ Johnson v. Patterson, 13 Lea, 626, 633. See Rickenbacker v. Zimmermann, 10 S. C. 110, 114, for a collection of cases giving definitions.

⁴ The word "donee" or "party advanced" is sometimes used instead of child: Grattan v. Grattan, *supra*; Harley v. Harley, 57 Md. 340, 342.

⁵ Osgood v. Breed, 17 Mass. 355, 358; McMahill v. McMahill, 69 Iowa, 115, 118; Ruch v. Bierly, 110 Ind. 444, 447; Christy's Appeal, 1 Grant's Cas. 369; Wallace v. Reddick, 119 Ill. 151, 156; Darne v. Lloyd, 82 Va. 859.

⁶ Herkimer v. McGregor, 126 Ind. 247, 253; Harly v. Harly, 57 Md. 340, 342; Dugan v. Gittings, 3 Gill, 138, 156; Miller's Appeal, 31 Pa. St. 337; Fellows

v. Little, 46 N. H. 27, 35; Darne v. Lloyd, 82 Va. 859, 861.

⁷ Joyce v. Hamilton, 111 Ind. 163; Manning v. Manning, 12 Rich. Eq. 410, 420.

⁸ Miller's Will, 73 Iowa, 118, 123; *per* Bradley, J., in Ritch v. Hawxhurst, 114 N. Y. 512, 516; Black v. Whitall, 9 N. J. Eq. 572, 586; Barrett v. Morris, 33 Gratt. 273, 276; Metcalfe v. Colles, 43 N. J. Eq. 148, 152.

⁹ Marston v. Lord, 65 N. H. 4.

¹⁰ A term borrowed to express the casting several portions or shares into a common stock for the purpose of an equal or just division of the whole: Abb. Law Dict.

¹¹ Grattan v. Grattan, 18 Ill. 167, 170; Warfield v. Warfield, 5 Har. & J. 459, 467; Phillips v. McLaughlin, 26 Miss. 592; Taylor v. Reese, 4 Ala. 121; Hamer v. Hamer, 4 Strobb. Eq. 124, 132; St. Vrain's Estate, 1 Mo. App. 294; Powell v. Powell, 5 Dana, 168, 169; Hicks v. Gildersleeve, 4 Abb. Pr. 1.

¹² Grattan v. Grattan, *supra*; Jackson

since the party advanced has his election whether to keep what he has and relinquish his claim to [* 1215] further distribution, or to come *into hotchpot, he may wait, before electing, until the value of the estate is determined.¹ In Rhode Island it is held that the statute by implication precludes one who has been advanced from coming into hotchpot; but the course prescribed for the action of the court seems to lead to the same result, except that it is obligatory upon the probate court to deduct advancements in ordering distribution,² thus precluding the party from the right of election. The election, where allowed, must be by some plain and unequivocal act; the mere intention is not sufficient;³ if the donee has no capacity to elect, as where he is an infant, equity will act for him,⁴ or the probate court with the aid of a guardian *ad litem*.⁵

Donee may elect whether to share in the distribution by coming into hotchpot, or keep his gift and waive any share.

Election for an infant may be in equity or by probate court.

§ 553. **Advancements in Testate Estates.**—A testator, in providing for the disposition of his estate after death, is presumed to have in mind the claims upon his bounty of those to whom he leaves legacies, as well as of those whom he excludes;⁶ hence, as a general rule, the doctrine of advancements is held not to apply where the deceased left a will, although there be a residue of the estate undisposed of.⁷ Advancements made by a testator prior to the making of the will, and not referred to therein, cannot be reckoned against the donee, although they would have been deducted if there had been no will;⁸ nor can parol evidence be received to show that the contrary was intended.⁹ The testator may, however, provide that his estate shall descend as if he had died intestate, in which case advancements are reckoned as though there were no will;¹⁰ and so if he direct certain gifts, loans, or grants to be deducted as advancements to equalize

Doctrine of hotchpot does not apply if the deceased left a will;

unless the testator so direct.

v. Jackson, 28 Miss. 674, 680; *Ray v. Loper*, 65 Mo. 470, 472; *Elliott's Estate*, 98 Mo. 379, 384; *Robinson v. Moseley*, 93 Ala. 70, 76; *Blockley v. Blockley*, L. R. 29 Ch. Div. 250; *Wilson v. Miller*, 1 Pat. & H. 353, 420. The Code of Louisiana permits the recipient to return in kind, or to take so much less: Civ. Code, 1870, art. 1251 *et seq.*

¹ *Earnest v. Earnest*, 5 Rawle, 213, 220; *Knight v. Oliver*, 12 Gratt. 33, 44.

² *Law v. Smith*, 2 R. I. 244, 250.

³ *Key v. Jones*, 52 Ala. 238, 244.

⁴ *Grattan v. Grattan*, *supra*.

⁵ *Andrews v. Hall*, 15 Ala. 85.

⁶ *Arnold v. Haronn*, 43 Hun, 278, 280.

⁷ *Vachell v. Jeffereys*, Prec. Ch. 170;

Marshall v. Rench, 3 Del. Ch. 239, 254; *Thompson v. Carmichael*, 3 Sandf. Ch. 120; *Snelgrove v. Snelgrove*, 4 Desaus. 274, 292; *Lawrence v. Mitchell*, 3 Jones L. 190, 193; *Greene v. Speer*, 37 Ala. 532; *Cawfield v. Brown*, 45 Ala. 552; *McFall v. Sullivan*, 17 S. C. 504, 512; *Huggins v. Huggins*, 71 Ga. 66; *Biedler v. Biedler*, 87 Va. 300, 304.

⁸ *Camp v. Camp*, 18 Hun, 217; *In re Lyon*, 70 Iowa, 375; *Turpin v. Turpin*, 88 Mo. 337.

⁹ *In re Lyon*, *supra*.

¹⁰ *Raiford v. Raiford*, 6 Ired. Eq. 490, 499; *Stewart v. Stewart*, L. R. 15 Ch. D. 539, 544.

the shares of legatees or devisees, they must be treated as advancements and distributed accordingly,¹ even though they would *not constitute advancements had the testator died [*1216] intestate.² In this connection the distinction

Distinction between advancements and ademption of legacy. between the doctrine of advancements and the ademption of legacies³ should not be overlooked. Where one

in loco parentis gives a legacy as a portion, and afterwards advances in the nature of a portion to the same person, such advancement is presumably an ademption of the legacy; but a gift before the making of the will, not charged therein as an advancement, cannot be so treated in the distribution of the estate.⁴

§ 554. To whom the Doctrine of Advancements applies. —

Whether any persons but children of the intestate are affected by

Gifts to grandchildren having parents living are not advancements. the doctrine of advancements depends, of course, upon the various statutes.⁵ Gifts to grandchildren during the lifetime of their parents are not treated as advancements either to the grandchildren or to their parents, nor do they become so by the death of their parent before that of the grand-

Whether gifts to parents dying before the intestate constitute advancements is generally determined by statute, and depends upon the capacity in which they take.

parent;⁶ but whether gifts to parents dying before the intestate constitute advancements to be reckoned against the grandchildren of the intestate is also determined by statute in a number of States.⁷ A sound rule seems to be, that in all cases where grandchildren take *per stirpes*, or in right of their parents, they take subject to advancements to the parents;⁸ but not so when they take *per capita*, or in their own right.⁹ This principle applies to debts as well as to advancements.¹⁰ Whether

¹ Porter's Appeal, 94 Pa. St. 332, 337; Hall v. Davis, 3 Pick. 450; Fox v. Fox, L. R. 11 Eq. 142, 145; Manning v. Manning, 12 Rich. Eq. 410; Krebs v. Krebs, 35 Ala. 293; Nelson v. Wyan, 21 Mo. 347; Black v. Whitall, 9 N. J. Eq. 572, 582; Manning v. Thruston, 59 Md. 218, 224; Nolan v. Bolton, 25 Ga. 352; Hoak v. Hoak, 5 Watts, 80; Johnson v. Belden, 20 Conn. 322, 325.

² Darne v. Lloyd, 82 Va. 859; Bacon v. Gasset, 13 Allen, 334, 337; Green v. Howell, 6 W. & S. 203; Lewis v. Lundy, 9 Atl. Rep. 883. A testamentary direction for the deduction of a debt from a legacy cannot be avoided by the legatee by showing that the testator was mistaken as to the existence or amount of such debt: Eichelberger's Estate, 135 Pa. St. 160.

³ As to which see *ante*, § 446.

⁴ Strother v. Michell, 80 Va. 149, 153, *et seq.*; Lyon's Estate, 70 Iowa, 375, 378.

⁵ As to which see *post*, § 559.

⁶ Stevenson v. Martin, 11 Bush, 485, 493.

⁷ See *post*, § 559.

⁸ Williams' Estate, 62 Mo. App. 339, 348; Parsons v. Parsons, 52 Oh. St. 470, 485; Coffman v. Coffman, 41 W. Va. 8, 12; Earnest v. Earnest, 5 Rawle, 213, 219; Smith v. Smith, 59 Me. 214; Quarles v. Quarles, 4 Mass. 680; Simpson v. Simpson, 114 Ill. 603; Person's Appeal, 74 Pa. St. 121, 123; Proud v. Turner, 2 P. Wms. 560; McRae v. McRae, 3 Bradf. 199, 207.

⁹ Person's Appeal, 74 Pa. St. 121, 123; Skinner v. Wynne, 2 Jones Eq. 41; Calhoun v. Crossgrove, 33 La. An. 1001, 1004; Destrehan v. Destrehan, 4 Mart. n. s. 557, 567.

¹⁰ *Ante*, §§ 71, 435, and authorities there cited; Girard v. Wilson, 57 Pa. St. 182, relying on Hughes's Appeal, 57 Pa. St. 179; Martin v. Martin, 56 Ohio St. 333;

[* 1217] gifts to grandchildren, after * the death of their parents, constitute advancements or not, depends upon the grandfather's intention at the time of making the gift.¹ So of debts.

The widow of an intestate does not, as a general rule, participate in the advancements to the children which these bring into hotch-pot,² except where real estate had been advanced in which she has a dower interest.³ But it may be provided by statute,⁴ that children having been advanced in the decedent's lifetime shall account therefor to the widow, in ascertaining her child's share in the same manner as they are required to account among themselves. So, on the other hand, as the doctrine of advancements does not affect her, she is not bound to account for or deduct from her distributive share, dower, or other provision in her favor, any property she may have received from her husband, unless accountable therefor upon some other principle.⁵ Widow not entitled to compel hotch-pot.

Nor is she bound to account for what she has received from the husband.

§ 555. **What constitutes an Advancement.**—Whether a gift or conveyance, is to be regarded as an advancement or not, is of course determined by the intention of the donor⁶ at the time the gift is made,⁷ and not to be changed in its character by subsequent acts or declarations not satisfactory and unequivocal in their significance.⁸ Hence, where a testator directed that all property given to his children should be charged against them as advancements, and subsequently conveyed property, in consideration of love and affection, with the proviso that it should not be regarded as an advancement, it could not be so charged against the donee.⁹ In Kentucky¹⁰ and Louisiana,¹¹ the statutes disregard the intention of the testator, requiring an equal * distribution. The intention of the donor determines whether a gift constitutes an advancement;

unless otherwise provided by statute.

Kendall v. Mondell, 67 Md. 444; *Esterly's Appeal*, 109 Pa. St. 222, 231; *Brown v. Taylor*, 62 Ind. 295; *Succession of Misses Morgan*, 23 La. An. 290.

¹ *Holliday v. Wingfield*, 59 Ga. 206, 209; *Storey's Appeal*, 83 Pa. St. 89, 95, 98. See also *McLure v. Steele*, 14 Rich. Eq. 105, 110.

² *Ruch v. Biery*, 110 Ind. 444, 450; *Grattan v. Grattan*, 18 Ill. 167, 170; *Jackson v. Jackson*, 28 Miss. 674, 682; *Knight v. Oliver*, 12 Grat. 33, 39; *Miller's Will*, 73 Iowa, 118; *Kircudbright v. Kircudbright*, 8 Ves. 51, 64; *Stearns v. Stearns*, 1 Pick. 157, 161; *Richards v. Richards*, 11 Humph. 429; *Logan v. Logan*, 13 Ala. 653.

³ *Andrews v. Hall*, 15 Ala. 85, 90.

⁴ As it is in North Carolina: Code, 1883, § 1483; *Hunter v. Husted*, Busb. Eq. 97;

Credle v. Credle, Busb. 225; *Arrington v. Dortch*, 77 N. C. 367.

⁵ *Matter of Morgan*, 104 N. Y. 74, 82.

⁶ *Matter of Morgan*, 104 N. Y. 74, 83; *Ruch v. Biery*, 110 Ind. 444, 448; *Watkins v. Young*, 31 Grat. 84, 88; *Roberts v. Coleman*, 37 W. Va. 143; *Kiger v. Terry*, 119 N. C. 456; *Christy's Appeal*, 1 Grant's Cas. 369, 371; *Comer v. Comer*, 119 Ill. 170, 180.

⁷ *Melvin v. Bullard*, 82 N. C. 33, 37, citing and approving the earlier cases of *James v. James*, 76 N. C. 331, 333, and *Braidsher v. Cannady*, 76 N. C. 445, 447; *Foltz v. Wert*, 103 Ind. 404, 410.

⁸ *Dudley v. Bosworth*, 10 Humph. 9, 14.

⁹ *Aden v. Aden*, 16 Lea, 453.

¹⁰ *Bowles v. Winchester*, 13 Bush, 1, 11.

¹¹ Civ. Code, §§ 1234, 1237.

bution of the estate, to defeat which there must be a full disposition thereof by will.

Presumptions of what the intestate's intention was are raised by the law, which, however, are rebuttable by competent evidence reasonably definite.¹ As between a loan, a gift, and an advancement, the presumption is in favor of an advancement, because of its tendency to equalize.² Thus if the amount in question is substantial, the presumption in most States is that it was intended as an advancement,³ but this is not universally recognized.⁴ Where a father pays a child's debt without taking a note or security therefor,⁵ or advances him money for that purpose,⁶ or buys land in the name of,⁷ or makes a voluntary conveyance of land to the child,⁸ it will be held, in the absence of contravening evidence, an advancement. So where a marriage portion is given,⁹ or a sum or thing to be used for profit or setting up in business.¹⁰ An advancement to a son-in-law in consideration of the existing marriage relation is *prima facie* chargeable to the married daughter,¹¹ but not if made before the rela-

¹ *Bogy v. Roberts*, 48 Ark. 17; *Watson v. Murray*, 54 Ark. 499, 506; *Johnson v. Patterson*, 13 Lea, 626, 634; *Clark v. Warner*, 6 Conn. 355.

² *Patterson's Appeal*, 128 Pa. St. 269.

³ *Wolfe v. Kable*, 107 Ind. 565, 566; *Dilley v. Love*, 61 Md. 603, 612; *Harper v. Harper*, 92 N. C. 300; *Kintz v. Friday*, 4 Dem. 540, 543; *Storey's Appeal*, 83 Pa. St. 89, 97; *Holliday v. Wingfield*, 59 Ga. 206, 208; *Proseus v. McIntyre*, 5 Barb. 424, 432.

⁴ *Johnson v. Belden*, 20 Conn. 322, 325, holding an unexplained gift of household furniture of the value of \$538.51 to a daughter, and of \$1100 to a son to set him up in business, not to constitute advancements chargeable against them. In *Watkins v. Young*, 31 Gratt. 84, 88, a doubt is expressed as to this presumption, but the decision turned upon evidence clearly inconsistent with it. In *Hatch v. Straight*, 3 Conn. 31, 34, the consideration of five dollars mentioned in a deed of conveyance by a father to a son was held insufficient to exclude the consideration of love and affection also therein expressed, and that a conveyance upon such consideration raises the presumption of an intended advancement.

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⁵ *Johnson v. Hoyle*, 3 Head, 56; *Steele v. Frierson*, 85 Tenn. 430; *West v. Beck*, 95 Iowa, 520.

⁶ *Blockley v. Blockley*, L. R. 29 Ch. D. 250.

⁷ *Bogy v. Roberts*, *supra*; *Eastham v. Powell*, 51 Ark. 530; *Higham v. Vanosdol*, 125 Ind. 74; *Kelly v. Karsner*, 72 Ala. 106, 111; *Dudley v. Bosworth*, 10 Humph. 9, 13; *Brown v. Burke*, 22 Ga. 574.

⁸ *Culp v. Wilson*, 133 Ind. 294; *Scott v. Harris*, 127 Ind. 520; *Phillips v. Phillips*, 90 Iowa, 541; *Ray v. Loper*, 65 Mo. 470; *Hattersley v. Bissett*, 51 N. J. Eq. 597; *Jakolet v. Danielson*, 13 Atl. (N. J.) 850.

⁹ *Dugan v. Gittings*, 3 Gill, 138.

¹⁰ *Ison v. Ison*, 5 Rich. Eq. 15; *Osgood v. Breed*, 17 Mass. 355, 358; *St. Louis Trust Co. v. Rudolph*, 136 Mo. 169.

¹¹ *Dilley v. Love*, 61 Md. 603, 612; *Stevenson v. Martin*, 11 Bush, 485, 490; *Bruce v. Slemph*, 82 Va. 352, 357; *Bridgers v. Hutchins*, 11 Ired. L. 68; *Roberts v. Coleman*, 37 W. Va. 143, 154, 156. It is held in South Carolina that a gift to a daughter-in-law does not by operation of law become an advancement to her husband; *Ex parte Middleton*, 42 S. C. 178, 181. Money spent in trying to obtain the release of a son-in-law from prison is not

tion existed,¹ or if the conveyance is not made on account of the relationship, being absolute and unconditional.² A gift, although it must be made in the donor's lifetime, may take effect at the donor's death, and still constitute an [* 1219] advancement,³ by way of an insurance * policy,* or to take effect on a contingency within a reasonable time,⁵ or on a contingency which has happened.⁶

Gift taking effect upon death may be an advancement.

The circumstances under which a gift is made are often decisive of the question of the intestate's intention,⁷ and the presumption that a gift was intended as an advancement does not arise when it is repelled by the nature of the gift;⁸ as in case of trifling presents,⁹ no account thereof being kept;¹⁰ or money expended in a child's education, whether general or professional,¹¹ or merely for amusement or pleasure.¹² So where a parent takes a note or other security for the repayment of the property given, with or without interest, it is *prima facie* a debt and not an advancement,¹³ although he declare that he will not collect the same.¹⁴ But if he takes the notes merely as memoranda of amounts, and not as evidence of debts, his intention must prevail, and the amounts be charged as advancements.¹⁵ And so where a father signs notes as surety for his son, with the understanding that, if compelled to pay same, the amount should be deducted from his son's share of the estate, the sums paid by the father or his administrator are advancements.¹⁶ Where the transaction assumes the form of a conveyance for value, there is obviously no presumption of advancement,¹⁷ even where the price is

Advancement is not presumed from trifling presents, where no account thereof is kept,

or where money is expended for a child's education, or for mere amusement,

or where a note is taken for the money advanced,

or where there is a conveyance for value;

prima facie an advancement to the daughter: Booth v. Foster, 111 Ala. 312.

¹ Dilley v. Love, *supra*.

² Rains v. Hays, 6 Lea, 303.

³ Hook v. Hook, 13 B. Mon. 526; Palmer v. Culbertson, 143 N. Y. 213 (in both these cases the testator gave a remainder, reserving a life estate in himself).

⁴ Rickenbacker v. Zimmermann, 10 S. C. 110; Cazassa v. Cazassa, 92 Tenn. 573, 580.

⁵ Clark v. Willson, 27 Md. 693, 700.

⁶ Edwards v. Freeman, 2 P. Wms. 435, 442.

⁷ McCaw v. Blewit, 2 McCord Ch. 90, 102; Dilley v. Love, 61 Md. 603, 605; Ruch v. Bierly, 110 Ind. 444, 448; Malone v. Malone, 106 Ala. 567.

⁸ Fennell v. Henry, 70 Ala. 484, 487.

⁹ Mitchell v. Mitchell, 8 Ala. 414.

¹⁰ Holliday v. Wingfield, 59 Ga. 206, 209; Bruce v. Griscom, 9 Hun, 280.

¹¹ White v. Moore, 23 S. C. 456, 460; Riddle's Estate, 19 Pa. St. 431; Miller's Appeal, 40 Pa. St. 57; Fennell v. Henry, 70 Ala. 484.

¹² Ison v. Ison, 5 Rich. Eq. 15.

¹³ High's Appeal, 21 Pa. St. 283; Dawson v. Macknet, 42 N. J. Eq. 633; Mann v. Mann, 12 Heisk, 245; White v. Moore, 23 S. C. 456, 460.

¹⁴ House v. Woodard, 5 Coldw. 196, 201.

¹⁵ Dilley v. Love, *supra*; Buscher v. Knapp, 107 Ind. 340, 342; Cutliff v. Boyd, 72 Ga. 302, 314.

¹⁶ Estate of Pickenbrock, 102 Iowa, 81.

¹⁷ Miller's Appeal, 107 Pa. St. 221. The presumption is *prima facie* against an advancement: Kiger v. Terry, 119 N. C. 456.

although the price be inadequate. ¹ So where the intestate has permitted a child to occupy land without paying rent, ² although with the express intention to permit the heir to use it for life, and that it shall then go to the heir's children. ³

It is a presumption of law, that where a parent, being a debtor to his child, makes an advancement to such child, it is in satisfaction *pro tanto* of such debt. ⁴

§ 556. **Rights of Donees in Respect of Advancements.**—The donor can so alter the character of a gift or conveyance as to enlarge the rights and privileges of the recipient, but not so as to restrict them. Hence a father has the *undoubted right to change a debt owing him [* 1220] into an advancement ⁵ and an advancement into

a gift; ⁶ but not, without the donee's consent, ⁷ an absolute gift into an advancement, ⁸ nor, since it is irrevocable, ⁹ the advancement into a debt. ¹⁰ But, as we have seen, ¹¹ a testator may direct

certain gifts or grants to be deducted as advancements, so as to equalize the shares of the legatees or devisees, and thus convert a prior absolute gift into an advancement, which will be deducted from what the donee might otherwise take under the will.

An advancement by a parent to a child is a good consideration, and will support a contract or conveyance, except as against other children, creditors, or subsequent purchasers without notice. ¹² Hence, when made by deed with warranty, the donee may recover against the estate for a breach thereof if encumbered by mortgage, he contributing, however, his share toward satisfying it. ¹³ So one who is induced to enter and improve

¹ *Merriman v. Lacefield*, 4 Heisk. 209, 216; *Walker v. Brooks*, 99 N. C. 207. But in *Barbee v. Barbee*, 109 N. C. 299, it was held that where the consideration is less than the value, it may be shown that the father intended to treat the difference as an advancement; so in *Roberts v. Coleman*, 37 W. Va. 143.

² *Ison v. Ison*, 5 Rich. Eq. 15.

³ *Joyce v. Hamilton*, 111 Ind. 163.

⁴ *Glover v. Patten*, 165 U. S. 394, 406. *Pomeroy*, in his work on *Equity Jurisprudence*, quoted as authority by *Justice Brown* in the above case, takes occasion, in stating this rule, to criticise it as being difficult to reconcile with sound principle or solid reason.

⁵ *Kirby's Appeal*, 109 Pa. St. 41; *Snider v. Snider*, 149 Pa. St. 362; *Taylor v. Taylor*, 145 Mass. 239, 241. "The testator could, if so disposed, by his will

have converted this indebtedness into an advancement": *per Bradley, J.*, in *Ritch v. Hawxhurst*, 114 N. Y. 512, 516.

⁶ *Sherwood v. Smith*, 23 Conn. 516, 521; *Lawrence v. Lawrence*, 4 Redf. 278, 285; *Wallace v. Owen*, 71 Ga. 544, 547; *Wheeler v. Wheeler*, 47 Vt. 637.

⁷ *Wallace v. Owen*, *supra*.

⁸ *Lawson's Appeal*, 23 Pa. St. 85, 87; *Sherwood v. Smith*, *supra*.

⁹ See *ante*, § 552.

¹⁰ *Buscher v. Knapp*, 107 Ind. 340, 342; *Higham v. Vanosdol*, 125 Ind. 74; *Brook v. Latimer*, 44 Kans. 431, 434.

¹¹ *Ante*, § 553, p. * 1215, second note; *Darne v. Lloyd*, 82 Va. 859.

¹² *Patterson v. Mills*, 69 Iowa, 755, 758.

¹³ *Polley v. Polley*, 82 Ky. 64; *per Olds, J.*, in *Herkimer v. McGregor*, 126 Ind. 247, 254.

lands by a parol promise that he shall receive the same as an advancement will not be evicted until compensated for the betterment.¹ But where an heir, who has entered into an agreement for an advancement, elects to take a full distributive share with the other heirs, equity will not enforce the agreement to convey.² An advancement is not always controlled by the same defences as prevent the recovery of debts.³

An heir may release his expectancy in his father's estate in consideration of a present grant, and such agreement will be enforced,⁴ so that he cannot bring what he has received into hotch-

pot and get more in the distribution.⁵ Such [* 1221] * agreement may be by deed, or in writing whether sealed or not,⁶ or even by parol; but the mere making and delivering of a quitclaim by a person affords no evidence of an intention to release an expected inheritance.⁷ And so the heir apparent may assign or convey, in most of the States at least, his expected inheritance;⁸ the interest so assigned will be subject to the repayment of advancements to the assignor, but not mere debts due by him to the intestate which have not been made liens on his interest in the estate by the administrator.⁹ A purchaser from an heir, after the ancestor's death,

Heir's expectancy may be released, so as to bar him from coming into hotchpot;

or it may be assigned.

¹ *Hedgepeth v. Rose*, 95 N. C. 41.

² *McMahill v. McMahon*, 69 Iowa, 115, 118.

³ *Hughes's Appeal*, 57 Pa. St. 179.

⁴ *Kershaw v. Kershaw*, 102 Ill. 307; *Green v. Hathaway*, 36 N. J. Eq. 471, 472; *De Witt v. Brands*, 10 Atl. R. 181; *Quarles v. Quarles*, 4 Mass. 680; *Havens v. Thompson*, 26 N. J. Eq. 383; *Nesmith v. Dinsmore*, 17 N. H. 515, 517; *Brown v. Brown*, 139 Ind. 653; *Roberts v. Coleman*, 37 W. Va. 143, 155; *In re Garcelon*, 104 Cal. 570. The heir cannot thereafter contest the will: *Gore v. Howard*, 94 Tenn. 577.

⁵ *Simpson v. Simpson*, 114 Ill. 603, 609, explaining *Kershaw v. Kershaw*, *supra*; *Coffman v. Coffman*, 41 W. Va. 8 (enforcing such agreement against the heirs of the child advanced who had died before the testator).

⁶ *Bishop v. Davenport*, 58 Ill. 105, 110; *Galbraith v. McLain*, 84 Ill. 379, 382.

⁷ *Glover v. Condell*, 163 Ill. 566, 593; *Long v. Long*, 118 Ill. 638, 643, affirming 19 Ill. App. 383, 387.

⁸ See authorities *supra*, and an extensive collection of cases on this subject in the reporter's note to *Bartle's Case*, 33

N. J. Eq. 50. So held in *Clendening v. Wyatt*, 54 Kans. 523 (where there was only a quitclaim); *Crum v. Sawyer*, 132 Ill. 443, applying the doctrine to the husband as heir to his wife; 17 Am. & Eng. Enc. of L. p. 336; *Fritz's Estate*, 160 Pa. St. 156 (case of a legacy); *Hale v. Hollan*, 90 Tex. 427 (citing the authorities *pro* and *con* on the point whether the ancestor's consent to such assignment be necessary in order to uphold it). But see to the contrary: *McCall v. Hampton*, 98 Ky. 166, and also *McClure v. Raben*, 133 Ind. 507, affirming *McClure v. Raben*, 125 Ind. 139, and the cases therein referred to, holding such a conveyance to be void. And such conveyance will not affect those who, upon his death before that of the ancestor, through him become heirs in his stead: *Habig v. Dodge*, 127 Ind. 31, 39; *Bohon v. Bohon*, 78 Ky. 408. And it is held that even when such assignments are recognized, they must be based on a valuable consideration, a good consideration being insufficient: *Lennig's Estate*, 182 Pa. St. 485.

⁹ *Steele v. Frierson*, 85 Tenn. 430; see *Scobee v. Bridges*, 87 Ky. 427, to same effect.

stands in the same relation to the estate as did the heir; hence he may set up advancements to the other heirs.¹

It is self-evident that the property received by way of advancement is taken subject to the donor's antecedent debts.²

§ 557. Computation of the Value of Advancements. — When not

otherwise directed by statute,³ the value of advancements is reckoned as of the time when made,⁴ unless a contrary intention appears from the terms of the conveyance.⁵ Although the statute requires the value of the advancement to be estimated as of the time of the gift, yet it follows from this principle that the value of a gift to take effect in the future is to be computed from the time when it is completed by enjoyment in the donee.⁶ Thus where the advancement consists of a life insurance policy taken out for the benefit of a son, he should be charged with the net proceeds paid to him on the policy after the father's death.⁷

The statute of South Carolina is construed as requiring the advancement to be charged "at what it is worth at the time of the death, relation being had to its situation at the time of the gift."⁸ It was held under this statute that the value of a policy of life insurance in favor of the child is what it was worth on the day of the insurer's death, which sum, increased by the annual premiums paid by the father, constitutes the * advancement;⁹ also, that [* 1222] slaves advanced cannot be reckoned as advancements where the intestate died after the abolition of slavery, because it is impossible to ascertain their value under the statute;¹⁰ otherwise where the ancestor died while slaves were still property, although settlement of the estates was not had until after emancipation.¹¹ The sounder reason seems to require the computation of value of slaves as well as other property as of the time of the gift, by which the ownership to the thing given is changed, and the loss, if any sub-

¹ *Duncan v. Henry*, 125 Ind. 10.

² *Light v. Kennard*, 11 Neb. 129.

³ Collection of statutes, *post*, § 559.

⁴ *Cawthon v. Coppedge*, 1 Swan, 487, 489; *Ray v. Loper*, 65 Mo. 470, 472; *Jackson v. Jackson*, 28 Miss. 674, 680; *Lamb v. Carroll*, 6 Ired. L. 4; *Oyster v. Oyster*, 1 Serg. & R. 422; *Law v. Smith*, 2 R. I. 244, 250; *Porter's Appeal*, 94 Pa. St. 332, 337.

⁵ *Kean v. Welch*, 1 Gratt. 403; *Turner v. Kelly*, 67 Ala. 173, 176; *Ladd v. Stephens*, 48 So. W. (Mo.) 915.

⁶ *Hook v. Hook*, 13 B. Mon. 526, approved in *Stevenson v. Martin*, 11 Bush, 485, 488; *Palmer v. Culbertson*, 142 N. Y.

213; *Clark v. Willson*, 27 Md. 693, 703; *Figg v. Carroll*, 89 Ill. 205.

⁷ *Cazassa v. Cazassa*, 92 Tenn. 573, 583, distinguishing the South Carolina case below referred to which adopts a different method, as being conditioned by the South Carolina statute.

⁸ *McCaw v. Blewit*, 2 McCord Ch. 90, 104; *Rickenbacker v. Zimmermann*, 10 S. C. 110, 119.

⁹ *Rickenbacker v. Zimmermann*, *supra*.

¹⁰ *Hughey v. Eichelberger*, 11 S. C. 36, 52, affirmed in *Ex parte Glenn*, 20 S. C. 64, 68, and *Wilson v. Kelly*, 21 S. C. 535.

¹¹ *Manning v. Manning*, 12 Rich. Eq. 410, 428; *McLure v. Steele*, 14 Rich. Eq. 105, 110.

sequently happen, can justly fall on the owner alone. *Res peret Domino*.¹

Owing to the nature of advancements, which implies that the gift is an irrevocable one, and that therefore all loss or profit thereon accruing between the time of the gift and the donor's death must belong to the donee, he is not accountable for interest on nor for the increase of the advancement,² unless expressly given on such terms;³ but this rule does not apply after the intestate's death, for it may be just to charge interest on distributive shares, to produce equality between the distributees, from the intestate's death,⁴ or from the distribution of the estate.⁵

Advancements bear no interest,

unless so stipulated, until the death of the donor.

§ 558. **How the Existence of Advancements may be shown.** — Where, as is the case in many States, the statutes provide in what manner and by what evidence advancements shall be established, the mode so pointed out must self-evidently be pursued.⁶ Unless inhibited by statute, the declarations of the grantor at the time of making, and the admissions of the donee at and after receiving the donation, are competent evidence to show whether an advancement was intended or not.⁷ So also book entries made or caused to be made by the father, although the child charged had no knowledge thereof,⁸ and contemporaneous

Declarations of the donor at the time of, and of the donee after the grant, are admissible to show intention to advance.

So book entries of the donor.

¹ In Louisiana, where real estate is given to a child or descendant, and destroyed while in the possession of the donee without his fault, *previous to the opening of the succession* it is not subject to collation; but slaves were held not included in this provision, and liable to collation, whether their loss occurred before or after the opening of the succession, because title to the slaves vested absolutely in the donee from the time of the donation: *Ventress v. Brown*, 34 La. An. 448, 457; *Succession of Haile*, 40 La. An. 334; to similar effect in Virginia: *West v. Jones*, 85 Va. 616, 619; Georgia: *Ezell v. Head*, 99 Ga. 560, 567, — all of these cases arising out of the emancipation of slaves during the rebellion.

² *Osgood v. Breed*, 17 Mass. 355; *Jackson v. Jackson*, 28 Miss. 674, 678; *Moale v. Cutting*, 59 Md. 510, 524; *Nelson v. Wyman*, 21 Mo. 347; *Krebs v. Krebs*, 35 Ala. 293; *Miller's Appeal*, 31 Pa. St. 337; *Farnum's Estate*, 176 Pa. St. 366. So where debts are made advancements by will: *Wilkins v. Wilkins*, 43 N. J. Eq. 595; *Taylor v. Taylor*, 145 Mass. 239,

241; *Patterson's Appeal*, 128 Pa. St. 269. See also *Davies v. Hughes*, 86 Va. 909, 912. But the will may so influence the case as to make interest allowable from testator's death: *Clark v. Helm*, 130 Ind. 117.

³ *Fickes v. Wiseman*, 2 Watts, 314; *Porter's Appeal*, 94 Pa. St. 332, 336; *Ladd v. Stephens*, 48 So. W. (Mo.) 915, 918.

⁴ *Kyle v. Conrad*, 25 W. Va. 760, 781; *Stewart v. Stewart*, L. R. 15 Ch. D. 539, 545; *Steele v. Frierson*, 85 Tenn. 430; *Dixon v. Marston*, 64 N. H. 433; *Patterson's Appeal*, 128 Pa. St. 269 (from one year after death) 282. See also *Clark v. Helm*, 130 Ind. 117, 119.

⁵ *Barrett v. Morriss*, 33 Gratt. 273; *Yundt's Appeal*, 13 Pa. St. 575; *Cabells v. Puryear*, 27 Gratt. 902.

⁶ See next section for statutory provisions and authorities bearing thereon.

⁷ *Christy's Appeal*, 1 Grant's Cas. 369, 371; *Riddle's Estate*, 19 Pa. St. 431, 433; *Graves v. Spedden*, 46 Md. 527, 533; *Watkins v. Young*, 31 Gratt. 84; *Bruce v. Slemp*, 82 Va. 352, 354.

⁸ *Hengst's Estate*, 6 Watts, 86; see *Mengel's Appeal*, 116 Pa. St. 292.

Parol evidence admissible, though the advancement was by deed. memoranda and book accounts.¹ Parol evidence is *admissible to show the true character [* 1223] and design of the transaction in question,² even where the advancement is by deed or note,³ or evidenced by an account;⁴ not to contradict, explain, or modify the written instrument, but to explain the transaction, and show what was done and said, in order to arrive at the intentions of the parties, and to show the value of the property conveyed.⁵ Thus, it is held proper to prove all facts and circumstances tending to show the donor's intention, or from which it might be inferred;⁶ such, for instance, as the amount and value of the property conveyed as compared to the whole estate, the number of children,⁷ and whether advancements have been made to other children.⁸ So where a testator has provided that such sums as were charged to his children in his books should be deducted, it was allowed to be shown that charges so made had been repaid before the testator's death,⁹ or were false.¹⁰

On the other hand, declarations or book entries of the donor subsequent to the transaction are inadmissible,¹¹ unless they are of the *res gestae*,¹² or against interest;¹³ so declarations by the parent to third parties, in the absence of the child and not communicated nor agreed to by the latter, must likewise be excluded,¹⁴ but are competent when made in the presence of or to the child, and not at the time controverted.¹⁵ And where a plaintiff relies on *admissions [* 1224]

¹ Nelson v. Nelson, 90 Mo. 460.

² Clark v. Willson, 27 Md. 693, 700.

³ Harper v. Harper, 92 N. C. 300, 302; Buscher v. Knapp, 107 Ind. 340, 342; Cutliff v. Boyd, 72 Ga. 302, 314; Dilley v. Love, 61 Md. 603, 611; Bruce v. Slemp, 82 Va. 352; Brook v. Latimer, 44 Kans. 431; Hattersley v. Bissett, 51 N. J. Eq. 597, 601; Palmer v. Culbertson, 143 N. Y. 213; Finch v. Garrett, 102 Iowa, 381, 384; but see cases *contra*, cited in note 4, *infra*.

⁴ Mitchell v. Mitchell, 8 Ala. 414.

⁵ Kershaw v. Kershaw, 102 Ill. 307, 314. In Fennell v. Henry, 70 Ala. 484, 492, it was held that parol evidence could not be received to show that a note was intended as an advancement, on the ground that, where a written instrument is perfect in itself, it must be the sole expositor of the intention of the parties to it. And so in Pennsylvania: Frey v. Heydt, 116 Pa. St. 601, 610.

⁶ Dille v. Webb, 61 Ind. 85; Ramsay v. Abrams, 58 Iowa, 512; McClintock's Appeal, 58 Mich. 152, 156.

⁷ Ruch v. Biery, 110 Ind. 440, 449, *et seq.* 1332

⁸ Christman v. Siegfried, 5 W. & S. 400, 403; Gunn v. Thruston, 130 Mo. 339; Brock v. Brock, 92 Va. 173.

⁹ Musselman's Estate, 5 Watts, 9.

¹⁰ Hoak v. Hoak, 5 Watts, 80.

¹¹ Mildred v. Morris, 9 Heisk. 814, 818; Mason v. Holman, 10 Lea, 315, 318; Nelson v. Nelson, 90 Mo. 460; McClintock's Appeal, 58 Mich. 152, 155. But see McDearman v. Hodnett, 83 Va. 281, 284.

¹² Harness v. Harness, 49 Ind. 384; Dilley v. Love, 61 Md. 603, 611; West v. Beck, 95 Iowa, 520.

¹³ Nelson v. Nelson, 90 Mo. 460, 464; Phillips v. Chappell, 16 Ga. 16; Johnson v. Belden, 20 Conn. 322, 327; Wallace v. Owen, 71 Ga. 544, 548; Wheeler v. Wheeler, 47 Vt. 637, 645.

¹⁴ Miller's Appeal, 107 Pa. St. 221, 228; Ray v. Loper, 65 Mo. 470, 473; Hicks v. Forrest, 6 Ired. Eq. 528.

¹⁵ Declarations by the deceased, under such conditions, are inadmissible, it seems to be held in Missouri, to prove an advancement, but are admissible to prove an absolute gift, on the ground that in

by the ancestor to various persons at various times to prove an advancement, the defence may introduce conversations in which the ancestor made different statements.¹ While declarations may be sufficient to prove the *intention* to advance in reference to certain property, this is not evidence of the *fact* of payment, or delivery, which must be proved as any other fact.² Whether heirs are competent to testify in proceedings affecting the question of advancements, is necessarily determined by the statutes of each State. It has been held affirmatively in Michigan,³ negatively in Indiana;⁴ and Missouri.⁵ In Iowa a voluntary conveyance from a parent to a child is presumed to be an advancement, and the burden of showing that it is not is upon the person who claims that it was not so intended.⁶

Whether heirs can testify for themselves.

§ 559. **Statutory Provisions as to Advancements.** — The doctrine of advancements is of purely statutory origin, being unknown to the common law.⁷

Advancements to children only are mentioned in the statutes of Arkansas,⁸ Colorado,⁹ Florida,¹⁰ Missouri,¹¹ New York,¹² North Carolina,¹³ Ohio,¹⁴ Pennsylvania,¹⁵ Tennessee,¹⁶ and Wyoming,¹⁷ to children or representatives, in Georgia;¹⁸ to children or issue in Arizona,¹⁹ Delaware,²⁰ Maryland,²¹ New Jersey,²² South Carolina,²³ and Texas;²⁴ to children or lineal descendants in Alabama,²⁵ California,²⁶ Connecticut,²⁷ Idaho,²⁸ Illinois,²⁹ Indiana,³⁰ Louisiana,³¹ Maine,³² Massachusetts,³³ Michigan,³⁴ Mississippi,³⁵ Mon-

the latter case it is a declaration against the interest of the donor, in the former not. *Gunn v. Thruston*, 130 Mo. 339.

¹ *Joyce v. Hamilton*, 111 Ind. 163.

² *Dilley v. Love*, 61 Md. 603, 615;

McClintock's Appeal, 58 Mich. 152, 154.

³ *McClintock's Appeal*, 58 Mich. 155.

⁴ *Wolfe v. Kable*, 107 Ind. 565.

⁵ Evidence of the heir is inadmissible in his own favor, but not in support of his co-heirs; *Gunn v. Thruston*, 130 Mo. 339, 344.

⁶ *Phillips v. Phillips*, 90 Iowa, 541, 543, citing earlier Iowa cases; *Finch v. Garrett*, 102 Iowa, 381, 385.

⁷ *Marshall v. Rench*, 3 Del. Ch. 239, 253; *Thompson v. Carmichael*, 3 Sandf. Ch. 120, 127; *Beebe v. Estabrook*, 79 N.Y. 246, 249; *Power v. Power*, 91 Mich. 587; *Malone v. Malone*, 106 Ala. 567; *Kiger v. Terry*, 119 N. C. 456, 458.

⁸ Dig. of St. Ark. 1894, § 2484.

⁹ 1 Mills' Ann. St. 1891, § 1527.

¹⁰ Rev. St. Fla. 1892, § 1826.

¹¹ Rev. St. 1889, § 4470.

¹² Banks & Br. Code Civ. Pr. 1897, § 2733.

¹³ Code, 1883, §§ 1483 *et seq.*

¹⁴ Bates' Ann. St., § 4169.

¹⁵ Bright. Purd. Dig. p. 933, § 35.

¹⁶ Code, 1884, § 3282.

¹⁷ Rev. St. Wyom. 1887, § 2224.

¹⁸ Code, 1895, § 3474.

¹⁹ Rev. St. Arizona, 1887, ¶ 1465.

²⁰ Rev. St. 1874, p. 517, § 6.

²¹ 2 Publ. Gen. L. 1888, p. 814, § 31.

²² Gen. St. N. J. 1895, § 4465.

²³ Rev. St. S. C. 1893, § 1983.

²⁴ Sayles' Tex. Civ. St. 1897, § 1694.

²⁵ Code Ala. 1896, § 1463.

²⁶ Civ. Code, § 1395.

²⁷ Rev. St. 1888, § 2479.

²⁸ Rev. St. Idaho, 1887, § 5706.

²⁹ St. & C. Ann. Ill. St. 1896, ch. 39, § 4.

³⁰ Ann. St. Rev. 1894, § 2563.

³¹ Civ. Code, 1870, art. 1235.

³² Rev. St. 1883, p. 611, § 5.

³³ Publ. St. 1882, ch. 128, § 1.

³⁴ How. St. 1882, § 5777 a.

³⁵ Miss. Ann. Code, 1892, § 1550.

tana,¹ Nebraska,² North Dakota,³ Oklahoma,⁴ Oregon,⁵ Rhode Island,⁶ South Dakota,⁷ Utah,⁸ Vermont,⁹ Virginia,¹⁰ Washington,¹¹ West Virginia,¹² and Wisconsin;¹³ to descendants of parent and grandparent* in Kentucky;¹⁴ and the word "heir" is used [* 1225] in the statutes of Iowa,¹⁵ Kansas,¹⁶ Nevada,¹⁷ and New Hampshire.¹⁸ In some of these States it is enacted, that a surviving de-

scendant takes subject to advancements made to the ancestor as if made to the descendant himself.¹⁹ Under the New York statute it is held that children of deceased children may claim the benefit of advancements to other children of the intestate.²⁰

The statutes mostly extend to both real and personal estate.²¹ In some of them it is provided that, if the advancement be in realty or personalty, it shall be considered as so much distributed in that kind of property respectively; if the advancement in the real or personal estate exceeds the share in that species respectively, the donee shall not refund, but shall receive so much less of the other kind as will equalize the shares.

Such provisions exist in Alabama,²² Illinois,²³ Iowa,²⁴ Maine,²⁵ Massachusetts,²⁶ Michigan,²⁷ Minnesota,²⁸ North Carolina,²⁹ Ohio,³⁰ Oregon,³¹ Tennessee,³² Vermont,³³ and Wisconsin.³⁴ Statutes providing that, in order to constitute an advancement, the donor so charge in writing, or the gift be acknowledged in writing by the donee, or provisions similar in effect, exist in California,³⁵ Georgia,³⁶ Illinois,³⁷ Maine,³⁸ Massachusetts,³⁹ Michi-

Advancements charged to descendants. Advancements in real or personal property. Statutes requiring that, in order to constitute an advancement, the donor shall so express.

¹ Mont. Const., Codes & St. 1895, § 1865.

² Cons. St. Neb. 1893, § 1128.

³ Rev. Code, N. Dak. 1895, § 3752.

⁴ St. Oklahoma, 1893, § 6271.

⁵ Code, 1887, § 3104.

⁶ Publ. St. 1882, p. 492, § 18.

⁷ Comp. L. Terr. Dak. 1887, § 3411.

⁸ Rev. St. Utah, 1898, § 1694.

⁹ Vt. St. 1894, § 2560.

¹⁰ Code, Va. 1887, § 2561.

¹¹ Code, Wash. 1896, § 5683.

¹² Code, W. Va. 1891, ch. 78, § 13.

¹³ 2 Sanb. & B. Ann. St. 1889, § 3956.

¹⁴ Ky. St. 1894, § 1407.

¹⁵ Code of Iowa, 1897, § 3383.

¹⁶ Gen. St. 1897, ch. 109, § 25.

¹⁷ Gen. St. 1885, § 2942.

¹⁸ Gen. St. N. H. 1891, ch. 196, § 9.

¹⁹ Among which may be mentioned Alabama, California, Illinois, Indiana, Maine, Massachusetts, Michigan, Minnesota, Oregon, Vermont, and Wisconsin.

²⁰ Beebe v. Estabrook, 79 N. Y. 246.

²¹ In Delaware the doctrine applies to 1334

real estate only; *Marshall v. Rench*, 3 Del. Ch. 239, 253.

²² Code, Ala. 1896, § 1465.

²³ St. & C. St. Ill. 1896, ch. 39, §§ 5, 6.

²⁴ The term "property," employed in the statute of Iowa, is held to include all property, whether real or personal: *West v. Beck*, 95 Iowa, 520.

²⁵ Rev. St. 1883, p. 611, § 7.

²⁶ Pub. St. 1882, ch. 128, § 2.

²⁷ How. St. 1882, § 5779.

²⁸ Gen. St. Minn. 1891, § 5854.

²⁹ Code, 1883, § 1281, rule 2.

³⁰ 2 Bates, Ann. St. 1897, § 4171.

³¹ Code, 1887, § 3106.

³² In effect: Code, 1884, § 3281.

³³ Vt. St. 1894, § 2562; unless the heirs consent to a different arrangement.

³⁴ Sanb. & B. Ann. St. 1889, § 3958.

³⁵ Civ. Code, § 1397.

³⁶ Code, Ga. 1895, § 3475.

³⁷ St. & C. St. 1896, p. 1432, § 7.

³⁸ Rev. St. 1883, p. 611, § 5.

³⁹ Pub. St. 1882, ch. 128, § 3.

gan,¹ Minnesota,² Oregon,³ New Hampshire,⁴ Rhode Island,⁵ [* 1226] Vermont,⁶ and Wisconsin.⁷ In Louisiana, on the * contrary, such evidence is required if the gift is *not* to be charged as an advancement.⁸ Under statutes of this kind, such evidence and no other can be introduced;⁹ and an advancement not evidenced in the manner required by statute is, in legal effect, no advancement at all, however clearly it was so intended,¹⁰ even if made prior to the statute, in case of subsequent distribution.¹¹ But while, for instance, oral testimony is not admissible where the statute requires a writing,¹² yet other testimony higher in its nature than that required by the statute is not intended to be excluded.¹³

Ordinarily, as heretofore stated,¹⁴ the value of advancements is determined by the value of the property when given; but in Iowa¹⁵ and Kansas¹⁶ the statute provides that the value shall be computed, at the time of the intestate's death, of the gift as it was when given; and so in South Carolina,¹⁷ expressly forbidding improvements on real estate and the increase of personalty from being computed.¹⁸ In Louisiana the value is fixed according to its value at the time of the donor's decease, in the condition of the property at the time of the donation.¹⁹

Maintenance, support, or money given, without intending it as a portion or settlement in life, is not an advancement under the statutes of Alabama,²⁰ Colorado,²¹ Georgia,²² Indiana,²³ Kentucky,²⁴ Louisiana,²⁵ Maryland,²⁶ Missouri,²⁷

No evidence admissible except as provided by statute.

Time of valuation.

Statutes providing what shall not con-

¹ How. St. 1882, § 5780.

² Gen. St. Minn. 1891, § 5849.

³ Code, 1887, § 3107.

⁴ Gen. St. N. H. 1891, ch. 196, § 11.

⁵ Pub. St. 1882, p. 492, § 20. This statute requires different evidence in case of the advancement of real and of personal property: *Mowry v. Smith*, 5 R. I. 255.

⁶ Vt. St. 1894, § 2560.

⁷ Sanb. & B. St. Wis. § 3959.

⁸ Civ. Code, 1870, art. 1233.

⁹ *Bigelow v. Poole*, 10 Gray, 104; *Wheeler v. Wheeler*, 47 Vt. 637, 640; *Pomeroy v. Pomeroy*, 93 Wis. 262.

¹⁰ *Long v. Long*, 118 Ill. 638, 650; but will be treated as an absolute gift: *Wheeler v. Wheeler*, *supra*.

¹¹ *Wallace v. Reddick*, 119 Ill. 151, 158.

¹² *Barton v. Rice*, 22 Pick. 508; *Porter v. Porter*, 51 Me. 376, 380; *Weatherhead v. Field*, 26 Vt. 665; *Law v. Smith*, 2 R. I. 244; *Power v. Power*, 91 Mich. 587; *Bartness v. Fuller*, 170 Ill. 193.

¹³ *Law v. Smith*, *supra*; *Sayles v. Baker*,

5 R. I. 457, 460. The statutory writing may be waived by the heirs: *Long v. Long*, 132 Ill. 72.

¹⁴ *Ante*, § 557.

¹⁵ Code, 1886, § 2459.

¹⁶ Comp. L. 1885, ch. 33, § 26.

¹⁷ Rev. St. 1873, p. 440, § 7.

¹⁸ See *ante*, § 557, as to the effect of the emancipation of slaves on the value of advancements.

¹⁹ C. C. 1870, art. 1505; *Moore's Succession*, 40 La. An. 531.

²⁰ Code, Ala. 1896, § 1468.

²¹ If the child be under majority: *Mills' Ann. St. 1891*, § 1528.

²² Although past majority: *Code, 1895*, § 3474.

²³ *Ann. Ind. St. 1894*, § 2564.

²⁴ *Ky. St. 1894*, § 1407.

²⁵ Civ. Code, 1870, art. 1244, 1245.

²⁶ 2 *Publ. Gen. L. 1888*, p. 1356, § 125.

²⁷ If under majority: *Rev. St. 1889*, § 4471.

stitute advancement. and New York.¹ Portions given in trust are treated as if given directly to the beneficiary according to the statutes of Georgia,² Michigan,³ Minnesota,⁴ and, in effect, Tennessee.⁵

¹ Code, Civ. Pr. 1897, § 2733.

⁴ Gen. St. Minn. 1891.

² Code, 1882, § 2581.

⁵ Code, 1884, § 3283.

³ St. 1882, § 5643.

[* 1227]

* CHAPTER LXI.

OF THE DECREE OR ORDER OF DISTRIBUTION.

§ 560. **Refunding Bonds.** — The inconsistency of paying legacies, or making distribution of an estate, before the expiration of the time within which creditors are allowed to prove their claims and participate in the assets for their payment, has already been pointed out.¹ It is evident, however, that the retention of the estate for the whole period of administration may become onerous and inconvenient, both to the executor or administrator and to the legatee or distributee; and where there is no other hindrance to a distribution but the possibility of claims being proved, the inconvenience may be obviated by providing for the payment of such debts in some other manner. To this end, the English Statute of Distributions² and the statutes of most of the United States enable distribution to be made upon the execution by the distributees of refunding bonds, with sufficient sureties, conditioned to refund to the administrator so much of the assets received as may be necessary to pay debts and costs lawfully proved against the estate. The same principle is applicable to the payment of legacies; hence, a residuary legatee may compel the payment of a legacy upon giving a sufficient bond for the protection of the executor, administrator, or any person interested, although it remains undecided as to one of the legatees whether he takes an estate or a power.³

Distribution upon giving refunding bond.

In a number of States, the statutes seem to require refunding bonds in all cases, before the executor or administrator can be compelled to pay a legacy or distributive share, among which may be named Arkansas,⁴ Colorado,⁵ Connecticut,⁶ Georgia,⁷ Illinois,⁸ Indiana,⁹ Kentucky,¹⁰ New

¹ For the common-law rule, see *ante*, § 379; for the American rule, *ante*, § 451; and as to payments to heirs without or before an order of distribution, *ante*, § 519, and *post*, § 562.

² 22 & 23 Car. II. c. 10, § 3.

³ *Chandler v. Batchelder*, 61 N. H. 370, 381.

⁴ Dig. of St. Ark. 1894, § 160.

⁵ Mills' Ann. St. 1891, § 4800.

⁶ Gen. St. 1888, § 633.

⁷ Code, 1895, § 3482 (distribution in

kind). Also when litigation is threatened: § 3500.

⁸ St. & Curt. St. 1896, p. 342, § 117.

⁹ Ann. Ind. St. 1894, § 2566. This bond, however, is only in favor of persons under disabilities. Persons *sui juris* seem only to be required to give a bond when their shares are paid before final settlement, in the discretion of the court: § 2380; *Chandler v. Morrison*, 123 Ind. 254, 259.

¹⁰ Ky. St. 1894, § 3843; *Duncan v. Mizner*, 4 J. J. Marsh. 443, 446.

Jersey,¹ North Dakota,² * Pennsylvania,³ South Dakota,⁴ [* 1228] Tennessee,⁵ Virginia,⁶ and West Virginia.⁷ But even in

unless the time has expired within which claims may be proved.

these States there seems to be no necessity to require a refunding bond from a legatee or distributee, where the time within which debts may be proved has expired, or where the presumption of their payment has arisen,⁸ or where it appears that there are no debts.⁹ In others, the language of the statute requires the bond only where distribution is desired before the time limited for the presentation of creditors' claims has expired, or before final settlement is made, as in Alabama,¹⁰ Arizona,¹¹ California,¹² Florida,¹³ Idaho,¹⁴ Iowa,¹⁵ Kansas,¹⁶ Maine,¹⁷ Massachusetts,¹⁸ Michigan,¹⁹ Minnesota,²⁰ Mississippi,²¹ Missouri,²² Nebraska,²³ Nevada,²⁴ Ohio,²⁵ Oregon,²⁶ Rhode Island,²⁷ Utah,²⁸

¹ Gen. St. N. J. 1896, p. 2369, § 67; *Coddington v. Bispham*, 36 N. J. Eq. 224, 227; *Ordinary v. White*, 43 N. J. L. 22.

² Rev. Codes, N. D. 1895, § 6507.

³ Bright. *Purd. Dig.*, p. 553, § 222; *Simpson's Appeal*, 109 Pa. St. 383, 389; *Musser v. Oliver*, 21 Pa. St. 362, 366. The statute directs the deduction of a sufficient amount to cover all known demands, and where this is done creditors can resort only to the refunding bonds of the residue unaccounted for: *Schaeffer's Appeal*, 119 Pa. St. 640. Where distribution is voluntarily made before settling the executor's account, and without taking a refunding bond, the omission amounts to a devastavit so far as the creditors are concerned, and the executor is liable, but not the legatees, to the creditor: *Robins' Estate*, 180 Pa. St. 630.

⁴ Comp. L. Terr. Dakota, 1887, § 5922.

⁵ Code, 1884, § 3158; *Willeford v. Watson*, 12 Heisk. 476, 478. In this State refunding bonds inure to the benefit of creditors: *Murgitroyde v. Cleary*, 16 Lea, 539, 544; and take the place of the assets, exonerating the administrators and the heirs: *Maxwell v. Smith*, 86 Tenn. 539.

⁶ Code, 1887, § 2706; *Kirkpatrick v. Gibson*, 2 Brock. 388; *Edmunds v. Scott*, 78 Va. 720.

⁷ Code, 1891, ch. 87, § 30; *Harris v. Orr*, 42 W. Va. 745.

⁸ *Davis v. Vansands*, 45 Conn. 600; *Roberts v. Dale*, 7 B. Mon. 199; *Graffenreid v. Kundert*, 34 Ill. App. 483, 487; *Grigsby v. Wilkinson*, 9 Bush. 91, 96. See also *Ferguson v. Yard*, 164 Pa. St. 586, holding that an order to pay will

protect the administrator, though no refunding bond is given.

⁹ *Murgitroyde v. Cleary*, 16 Lea, 539, 545; *Chambers v. Wright*, 52 Ala. 444, 451. Nor where the giving of the bond becomes impossible: *People v. Admire*, 39 Ill. 251, 255; *Weir v. People*, 78 Ill. 192, 195.

¹⁰ Code, Ala. §§ 263, 271.

¹¹ Rev. St. Arizona, 1887, §§ 1243 *et seq.*

¹² Code, Civ. Pr. §§ 1658, 1661; the creditors should not be deprived of their lien on the assets and given a bond in lieu thereof. The court should see that sufficient assets to pay debts remain, as the bond is only to provide against unforeseen liabilities: *In re Painter*, 115 Cal. 635, 641.

¹³ Rev. St. Fla. 1892, p. 632, § 2; *Sanderson v. Sanderson*, 17 Fla. 820, 832.

¹⁴ Rev. St. Ida. 1887, § 5624.

¹⁵ Code, Iowa, 1897, § 3357.

¹⁶ Gen. St. Kans. 1897, ch. 107, § 161.

¹⁷ Rev. St. 1883, p. 553, § 30.

¹⁸ Pub. St. 1882, ch. 136, § 20.

¹⁹ How. St. 1882, § 5966.

²⁰ Gen. St. Minn. 1891, § 5866.

²¹ Miss. Ann. Code, 1892, § 1961; *Packwood v. Elliott*, 43 Miss. 504.

²² Rev. St. Mo. 1889, § 238.

²³ Comp. St. 1887, ch. 23, § 291.

²⁴ Gen. St. §§ 2922 *et seq.*

²⁵ Bates' Ann. St. 1897, § 6128.

²⁶ Code, 1887, §§ 1194 *et seq.*

²⁷ Gen. L. 1896, p. 734, § 10. In this State a legatee may bring an action at law within three years without tendering a refunding bond, but not a distributee: *Steere v. Wood*, 15 R. I. 199.

²⁸ Rev. St. Utah, 1898, §§ 3948 *et seq.*

Vermont,¹ Washington,² and Wisconsin;³ after the expiration of such time, distribution will be ordered without the requirement of bond from the distributee.⁴ That the court may order a partial distribution when the rights of creditors or of the executor are not jeopardized thereby, and the effect thereof, is mentioned later on.⁵

Partial distribution.

A distinction is drawn between legatees or distributees who need the legacy or distributive share for their support, and those who do not, in District of Columbia,⁶ Iowa,⁷

Distribution to legatees in needy circumstances.

Maryland,⁸ and New York,⁹ where distribution [* 1229] or payment of * residuary legacies is allowed, before the regular distribution, to persons or families in necessitous circumstances, provided they give a refunding bond.¹⁰ In Delaware, if the administrator knows of any outstanding demand against the estate, a refunding bond must be given before he pays distributees.¹¹ In North Carolina, the court may order distribution, before the end of two years, on such terms as it may deem proper;¹² and the refunding bond authorized by statute is for the benefit of creditors solely.¹³

The omission to take a refunding bond on voluntary payment of legacies or distributive shares is held to bar the executor or administrator from his remedy for contribution or reimbursement,¹⁴ unless the deficiency arose from unexpected occurrences, or by debts and claims not known at the time;¹⁵ it has been held that a mistake as to the value of the assets is not a sufficient equity to make the legatee or distributee liable to refund.¹⁶ In some States the rule as

Liability of executor for overpayment when omitting to take a refunding bond.

¹ Vt. St. 1894, § 2554.

² Code, Wash. 1896, § 5593.

³ Sanh. & B. Ann. St. § 3941.

⁴ *Fort v. Battle*, 13 Sm. & M. 133, 140; *Keith v. Jolly*, 26 Miss. 131, 134; *Chambers v. Wright*, 52 Ala. 444, 451; *In re Crocker*, 105 Cal. 368.

⁵ *Post*, § 566, p. * 1242.

⁶ By force of the Maryland statute: *Sterrett v. Trust Co.*, 10 Dist. Col. App. 131, *per Alvey, C. J.*, on p. 139.

⁷ Code of Iowa, 1897, § 3365.

⁸ *McLane v. Cropper*, 5 Dist. Col. App. 276, 295.

⁹ Code, Civ. Pr. § 2719; *Matter of Selling*, 5 Dem. 225.

¹⁰ In Pennsylvania, if the distributee cannot give such bond, the amount of his share is to be invested on approved security, and the interest paid him annually, until bond be given, "or the orphan's court, on application, shall order it to be

paid to the person entitled to it": *Estate of Bahnert*, 12 Phila. 27.

¹¹ Rev. St. 1874, p. 548, § 37.

¹² Code, 1883, § 1512; *Hobbs v. Craige*, 1 Ired. 332, 337; *Turnage v. Turnage*, 7 Ired. Eq. 127, 129. See *Andres v. Powell*, 97 N. C. 155, 165.

¹³ *State v. McAleer*, 5 Ired. L. 632.

¹⁴ *Musser v. Oliver*, 21 Pa. St. 362, 366; *Montgomery's Appeal*, 92 Pa. St. 202, 206. In the absence of a contract, the distributee is not bound to refund a voluntary overpayment: *Miller v. Hulme*, 126 Pa. St. 277; particularly if the executor in his final settlement claims and receives credit for such payment as a just charge against the estate: *Matter of Hodgman*, 140 N. Y. 421, 430.

¹⁵ *Moore v. Lesueur*, 33 Ala. 237, 247; *Alexander v. Fisher*, 18 Ala. 374, 379; *Lowery v. Perry*, 85 N. C. 131, 134.

¹⁶ *Davis v. Newman*, 2 Rob. Va. 664, 667, and cases cited.

to voluntary payments is held not to apply to legacies or distribution, and the omission to take a refunding bond in such case does not release the legatees or distributees from liability to refund, when necessary for the payment of debts, legacies, or claims proved against the estate.¹ It is sometimes held that there is no inflexible rule, but the executor in order to recover for an over-payment must show that he acted with prudence and caution² and a legacy overpaid under a mistake of fact can be recovered.³ The subject of the marshalling of assets between legatees, creditors, devisees, &c., has been discussed in preceding sections.⁴

§ 561. **Parties to the Order of Distribution.** — It is the duty of probate courts in most States to order the distribution of the residue found, on final accounting, to remain in the hands of the executor or administrator, after payment of all debts and expenses of administration, to those who may be entitled thereto, provided that all parties interested had notice of such final accounting.⁵ The principle, that every party entitled to distribution must necessarily be before the court when distribution is decreed in equity, or have the * oppor- [* 1230] tunity to be present,⁶ is equally applicable in probate courts.⁷ When the statutory provisions are complied with, the distribution is said to partake of the nature of a proceeding *in rem*, and is conclusive upon all persons having any interest in the estate, whether appearing or not,⁸ and whether under disability or not, or whether then in being or

¹ *Smith v. Smith*, 76 Ind. 236; *Cutright v. Stanford*, 81 Ill. 240, 244. See also *Miller v. Stark*, 29 S. C. 325.

² *McEndree v. Morgan*, 81 W. Va. 521, citing English and American authorities.

³ *Lyle v. Siler*, 103 N. C. 261, 265; *Stokes v. Goodykoontz*, 126 Ind. 535 (where the overpayment was occasioned by subsequent depreciation of the estimated assets); but the probate court has not the jurisdiction to compel the legatee to restore the amount overpaid: *Re Lang*, 144 N. Y. 275.

⁴ *Ante*, §§ 496, 497.

⁵ *Harrison v. Harrison*, 9 Ala. 470, 476; *Brazeale v. Brazeale*, 9 Ala. 491; *Arnold v. Smith*, 14 R. I. 217 (distinguishing between testate and intestate estates); *Estate of Pritchett*, 51 Cal. 568.

⁶ *Turley v. Young*, 5 J. J. Marsh. 133; *Noland v. Turner*, 5 J. J. Marsh. 179; *Murff v. Frazier*, 41 Miss. 408; *Sheppard v. Starke*, 3 Munf. 29, 41; *Sillings v. Baumgardner*, 9 Grat. 273; *Rexroad v. McQuain*, 24 W. Va. 32, 35.

⁷ *Boyett v. Kerr*, 7 Ala. 9, 15; *Bresee v. Stiles*, 22 Wis. 120, 125; *Neal v. Robertson*, 55 Ark. 79; *Morris v. Virden*, 57 Ark. 232; *Shriver v. State*, 65 Md. 278, 282, with citation of Maryland cases; *Glessner v. Clark*, 140 Ind. 427; *Lilly v. Menke*, 126 Mo. 190 (both the latter cases applying the principle to a case of partial distribution under the statute). Hence a decree of the probate court fixing the pedigree and distributing the personalty accordingly is not evidence of heirship against one not a party to such probate proceeding, in a subsequent suit affecting the title to the decedent's realty, the issue being who the heirs are: *Shores v. Hooper*, 153 Mass. 227; see also next section, p. * 1234.

⁸ *William Hill Co. v. Lawler*, 116 Cal. 359; *Goad v. Montgomery*, 119 Cal. 552; and see *McFarlane, J.*, in *Bramell v. Cole*, 136 Mo. 201, 210; also *State v. Blake*, 69 Conn. 64. As to the conclusiveness of judgments of probate courts generally, see *ante*, § 145.

not.¹ If the distributee be an infant, it is necessary, in some States, to appoint a guardian *ad litem* to represent him in the final settlement, otherwise such infant is not bound by the judgment rendered;² and so if he is a non-resident, it is required, in some States, that an agent be appointed for him.³ When one of the distributees dies before the order of distribution, his personal representative is a necessary party; a decree rendered in his absence will be reversed on error or appeal, although no objection was raised on account of it in the probate court.⁴ It has already been mentioned in connection with the payment of legacies, that legatees and distributees who are abroad and unheard from for a long time may be presumed to be dead and distribution made accordingly.⁵

Infants to be represented by guardians *ad litem*.
Agents for non-residents.

Personal representatives of deceased distributees.

But actual notice is not, generally, required to be given by the administrator of the presentation of the final account; it is sufficient if notice be given in the mode pointed out by statute;⁶ and when such final account has been settled, the heir or devisee is entitled to distribution, although the will may yet be contested.⁷ Of course, there can be no distribution, under this theory, so long as the assets are liable for debts,⁸ or have not been recovered

Statutory notice sufficient.

No distribution of assets not in hand, and not clear of liability for debts.

¹ Ladd v. Weiskopf, 62 Minn. 29.

² Sankey v. Sankey, 6 Ala. 607, 610; Conwill v. Conwill, 61 Miss. 202, following Cason v. Cason, 31 Miss. 578, 595.

³ Smith v. Rice, 11 Mass. 507, 510.

⁴ McMullen v. Brazelton, 81 Ala. 442; Morris v. Virden, 57 Ark. 236. See as to distribution to deceased legatee, *post*, § 565, and authorities there cited.

⁵ *Ante*, § 460, p. *1015.

⁶ Steen v. Steen, 25 Miss. 513, 531; Daly v. Pennie, 86 Cal. 552. But the notice of the application for probate of the will is not sufficient: Ruth v. Oberbrunner, 40 Wis. 238, 272. And the legislature has no power, after the court has made a valid decree of distribution and the proceedings have long ceased to be *in fieri*, to give the court jurisdiction to open the same, and make a different decree, without personal notice anew to residents to be affected thereby; notice to resident persons by publication in such case is insufficient, and their rights under the first decree remain unaffected: McNamara v. Casserly, 61 Minn. 335.

⁷ Estate of Pritchett, 51 Cal. 568, 570. In Pennsylvania, if a creditor dismiss his claim against an estate in the Orphan's

Court with the view of establishing it in another forum, the final settlement will not be postponed to await the determination in the other forum, and he may lose all recourse on the fund under the jurisdiction of the Orphan's Court: Estate of Thomson, 12 Phila. 36, 41; but distribution will be postponed if the creditor uses due diligence: Estate of Hulse, 12 Phila. 130.

⁸ Coddington v. Bispham, 36 N. J. Eq. 224; Freret v. Freret, 31 La. An. 506 (in this case it is held that heirs may be put in possession of the assets although the debts are not paid, if the creditors do not object; in which case each distributee is liable to the creditors to the extent of the assets received); *In re Kittson*, 45 Minn. 197 (where a claim was pending against the estate in a federal court); Swift v. Miles, 2 Rich. Eq. 147, 155; Brown v. Bell, 58 Mich. 58, 60; Fleece v. Jones, 71 Ind. 340. An order of distribution and discharge where there are unpaid debts, or pending litigation against the estate, is invalid, and no protection to the administrator: See, on this point, *post*, § 562, p. *1234.

by the administrator,¹ or so long as questions affecting the distribution remain unsettled.² The decree should be a final distribution of the funds in the hands of the representative, and not made to depend on possible future contingencies.³

* Where action is taken by a legatee or distributee [* 1231] against the executor or administrator to compel distribu-

In actions for distribution all persons affected by the decree must be parties. tion, not only the executor or administrator against whom the proceeding is directed, but all other parties who may be affected by the decree or judgment to be rendered must be parties, either as plaintiffs or defendants.⁴ This is true of proceedings in equity, as well as

in the probate court;⁵ *a fortiori*, where the distributee seeks his remedy in equity before there has been an order of distribution in the probate court, as he may do in some States.⁶

The question whether the probate court or a court of chancery, or either, is the proper forum in which to obtain an order for the payment of legacies or distributive shares, has been fully discussed elsewhere.⁷ An action at law for a specific legacy lies only when the executor has assented thereto.⁸

§ 562. Nature and Scope of the Decree. — Since the order or decree

Decree must set out name of person entitled and the specific thing or sum given by it.

If married woman, also the husband.

of distribution is the judicial ascertainment of the right of the next of kin or legatees to their respective shares in the estate under administration,⁹ it is obvious that it must set out the name of each person entitled, and also the amount, sum, or specific thing due to each.¹⁰ If a married woman is the distributee, her share will be properly assigned to her in the name of herself and her

¹ Estate of Ricand, 57 Cal. 421, 423; Ham v. Kornegay, 85 N. C. 119, 121.

² Estate of Wistar, 13 Phila. 242; Ordinary v. Smith, 15 N. J. L. 92; Estate of Goldsmith, 13 Phila. 387; State v. Roth, 47 Ark. 222, 226, citing earlier Arkansas cases; Cummings v. Cummings, 143 Mass. 340, 343. But the distribution need not be delayed because of pending litigation as to the construction of the will, where the decision cannot possibly affect the assets in the hands of the executor, nor affect him in any way; Merrick v. Kennedy, 46 Neb. 264, 271.

³ See on this point authorities in the next section.

⁴ Porter v. Porter, 7 How. (Miss.) 106, 111; Shattuck v. Young, 2 Sm. & M. 30, 36. But see Benoit v. Brill, 7 Sm. & M. 32, 37, holding that co-distributees need not be joined if refunding bond be given for their protection.

⁵ Harrison v. Harrison, 9 Ala. 470, 480. It is so provided by statute, for instance, in Missouri: Rev. St. § 248.

⁶ Frey v. Demarest, 16 N. J. Eq. 236, 239; Dorsheimer v. Rorback, 23 N. J. Eq. 46; Dobbins v. Halfacre, 52 Miss. 561, 564.

⁷ Ante, § 503. See also §§ 508, 150, et seq., and post, §§ 568, 569.

⁸ Ante, § 453.

⁹ And as such conclusive upon all the world: see preceding section.

¹⁰ Loring v. Steinemann, 1 Met. (Mass.) 204, 210; Roberts v. Dale, 7 B. Mon. 199; Sankey v. Sankey, 8 Ala. 601; Davis v. Davis, 6 Ala. 611, 615; Petty v. Wafford, 11 Ala. 143; Oakes v. Buckley, 49 Wis. 592, 598; Grant v. Bodwell, 78 Me. 460, 462; Lowry v. Newsom, 51 Ala. 570, 572; Woelfel v. Evans, 74 Md. 346.

husband;¹ if an infant, the decree should be in favor of the infant, and not of the guardian.² If the infant distributee or legatee have a guardian, payment to such guardian of the amount decreed in favor of the infant will discharge the executor or administrator,³ unless it be the duty of the latter to keep the [*1232] *legacy or distributive share for a specified period, and then pay it over; in such case, payment to the guardian will not protect the executor or administrator against liability to the distributee, if the guardian has squandered the money.⁴ Where the amount is small, the court will, for the purpose of avoiding the expense of official guardianship, sometimes direct payment to a relative, or to the custodian of the infant's person;⁵ and in the absence of bad faith, payments made by an executor or administrator to or for the benefit of infants, under circumstances which would have induced a court of equity to sanction them, should protect him against liability to the minor for the amounts so disbursed.⁶

If a minor, to him, and not to the guardian.

Payment to the guardian is sufficient.

Small amounts to minors appropriated for their support.

This subject, so far as it affects the payment of legacies, to infants, married women, assignees, personal representatives, absent persons, &c., has been fully discussed in an earlier chapter,⁷ and the rules and statutes there mentioned have a general application, *mutatis mutandis*, to the distribution of the residue.

Rules as to legacies apply to distribution.

Where the estate consists of articles of different kinds and values, as of bonds, notes, stocks, or choses in action, of which some are good and others doubtful or desperate, so that a division cannot be effected giving each distributee his equal portion of the whole estate, it is sometimes necessary to order the assets to be sold, so that the proceeds of the sale may be distributed according to the rights of the parties entitled,⁸ unless the parties are willing and competent to agree upon a division.⁹ But a sale will not be ordered unless it be the only mode convenient under the circumstances, nor where it will injure minor distributees,¹⁰

Sale of assets for distribution.

¹ Mitchell v. Mitchell, 8 Ala. 414, 423; as to payment of legacies to married women, see *ante*, § 460.

² Sankey v. Sankey, 6 Ala. 607, 610.

³ Henry v. State, 9 Mo. 778, 781; Young v. Suggs, 1 Sm. & M. Ch. 393, 398. See also Woerner on Guardianship, § 55.

⁴ Hinckley v. Harriman, 45 Mich. 343.

⁵ Reed, J., in Rogers v. Traphagen, 42 N. J. Eq. 421, 427, relying on Farrance v. Viley, 21 L. J. Ch. 313, and Ker v. Ruxton, 16 Jur. 491.

⁶ Rogers v. Traphagen, 42 N. J. Eq. 421, 427.

⁷ *Ante*, § 460.

⁸ Teat v. Lee, 8 Port. 507.

⁹ Per Scott, J., in Waterman v. Alden, 115 Ill. 83, 86; Murff v. Frazier, 41 Miss. 408.

¹⁰ Holliday v. Holliday, 38 La. An. 175; Rochereau v. Maignan, 32 La. An. 45, 47. Paige, J., in Kuykendall v. Devecmon, 78 Md. 537, 543, quotes from an earlier Maryland case: "Executors under the policy and provisions of our testamentary system are required to divide specifically, or, in other words, in kind, between the legatees and distributees, except so

nor where the residuary legatees are willing to take their share in the stocks, bonds, or other securities held by the executor.¹ The appraisement is not conclusive, but if necessary to a just and equal distribution among the legatees or distributees, a new appraisement or revaluation of the assets may be ordered;² and any inequality in the value of specific property allotted may be adjusted by money payments.³

* In connection with this subject it must be remembered [* 1233] that, for the purposes of succession, property converted

Distribution retains the character it had at the time of the owner's after equitable death;⁴ hence the surplus of the proceeds of land sold conversion for the payment of debts, either under a power given by will, or by order of the probate court, not needed for the purpose of the sale, goes to the persons to whom the real estate would have gone if not converted.⁵ It goes, however, as personalty, that is, the conversion becomes complete when it reaches the one who is entitled to it; and if he dies before coming into actual possession, it will pass to his personal representative and not to his heir.⁶ It has been held, however, that if the person to whom such surplus goes be an infant or lunatic, the conversion is not complete on reaching him, because he has no capacity to elect to change the nature of the estate, and that on the death of such person it will pass as real estate.⁷ So an agreement for the sale of land converts it into personalty; and a recovery of the land by the vendor's widow and heirs, under a clause of forfeiture in the contract, will not reconvert it, so as to change the rights of the parties.⁸

It is a settled doctrine of equity jurisprudence, that, where personal estate is given by will to a trustee upon a trust which does

Property upon not exhaust the whole estate so given, the trustee does a trust, not not, unless such appears to be the testator's intention,

far as a sale may have been necessary for the security and benefit of the estate, . . . or where they are unable to make a satisfactory distribution without a sale."

¹ Reed's Estate, 82 Pa. St. 428.

² Platt v. Platt, 42 Conn. 330, 346, citing numerous Connecticut cases. In this State the distributors cannot pass upon the validity of a note ordered to be distributed as part of the assets: Cone's Appeal, 68 Conn. 84.

³ Williams v. Holmes, 9 Md. 281, 291.

⁴ See as to constructive or equitable conversion, *ante*, § 342; Craig v. Leslie, 3 Wheat. 563, 577; also *ante*, § 481.

⁵ See authorities cited *ante*, § 481, pp. * 1070 *et seq.*; Parker v. Allen, 4 Atl. R. 300.

⁶ Cronise v. Hardt, 47 Md. 433, 438; Grider v. McClay, 11 Serg. & R. 224, 232; Pennell's Appeal, 20 Pa. St. 515, 517; Large's Appeal, 54 Pa. St. 383, 385, citing earlier Pennsylvania cases; Wentz's Appeal, 126 Pa. St. 541. The limit of the rule "is the first devolution": Scott's Estate, 137 Pa. St. 454, 457.

⁷ Oberle v. Lerch, 18 N. J. Eq. 346, 349; Craig v. Leslie, 3 Wheat. 563, 578; Sweezy v. Thayer, 1 Duer, 286, 301; Matter of Woodworth, 5 Dem. 156; Folger, J., in Matter of Price, 67 N. Y. 231, 234, citing Forman v. Marsh, 11 N. Y. 544.

⁸ Leiper's Appeal, 35 Pa. St. 420; Bender v. Lackenbach, 162 Pa. St. 18. See also *ante*, § 275, p. * 593.

take the surplus to his own benefit, but that he holds such surplus in trust for the benefit of the next of kin.¹ And in equity equitable estates are considered, to all intents and purposes, as legal estates;² hence such surplus is distributable, like any other equitable or legal estate, to those entitled as next of kin.³

needed for the trust, goes to the next of kin.

If the order of distribution is made upon the final settlement of the administration, and no unsettled claims against the estate or contingent liability of any kind exist, the order should extend to and finally dispose of all the assets found to be in the hands of the executor or administrator;⁴ it should not be made contingent upon the establishment at some future time of certain conditions which are guarded against by certain provisos in the decree.⁵ It has elsewhere been stated that the probate court has power only to determine who is the primary legatee entitled to receive payment from the executor, and cannot adjudicate as to the rights of successive legatees among themselves.⁶ It is obvious that no preliminary order of distribution should be made exhausting the assets; there should be a sufficient sum left to meet the possible judgment against the estate in any suit pending against it,⁷ as well as later expenses of administration, or other contingencies.⁸ So the executor must retain a sufficiency of the estate to pay a legacy which is not payable until the legatee's majority,⁹ or to yield a sufficient annuity until the annuitant's death;¹⁰ but the surplus income of the property so retained above the amount of the annuity may be dis-

Distribution should be final, not conditional, and decreed of all property not needed for administration.

¹ 1 Perry on Tr. § 152, and authorities; Wms. Ex. [1475]; Skellenger v. Skellenger, 32 N. J. Eq. 659.

² Cushing v. Blake, 30 N. J. Eq. 689, 695; Skellenger v. Skellenger, 32 N. J. Eq. 659, 661; per Swayne, J., in Croxall v. Shererd, 5 Wall. 268, 281.

³ Skellenger v. Skellenger, *supra*; Nickerson v. Bowly, 8 Met. (Mass.) 424, 430; Buffinton v. Maxam, 152 Mass. 477; McCurdy's Appeal, 124 Pa. St. 99, 114, decreeing the balance remaining, after exhausting the trust, to the next of kin, although the testator expressly declared in his will that he did not intend any of his property to pass under the intestate laws.

⁴ Schmidt v. Stark, 61 Minn. 91.

⁵ *In re Garrity*, 108 Cal. 463, 474. See also McNamara v. Casserly, 61 Minn. 335, in which it was said that there was no authority under the statute for filing a bond by one found by the decree to be the sole heir, conditioned on the distributee in

fact being such heir. The probate court cannot order distribution subject to a lien in favor of the executor for expenditures made by him for the benefit of the estate: *Huston v. Becker*, 15 Wash. 586; nor for his commissions: *Horton v. Barto*, 17 Wash. 675. The effect of the decree is to vest the title in the distributee, and the court loses jurisdiction over the property, and hence cannot subsequently make a different disposition of the property: *Profontaine v. McMicken*, 16 Wash. 16, citing California cases.

⁶ *Ante*, § 155.

⁷ *Bennett's Estate*, 132 Pa. St. 201; *Miller v. Simpson*, 2 S. W. R. (Ky.) 171.

⁸ *Peters v. Clendenin*, 12 Mo. App. 521, 523.

⁹ *Montgomery v. Robertson*, 57 Ga. 258. See also *Calvert v. Boullemet*, 46 La. An. 1132.

¹⁰ *Clement v. Brainard*, 46 Conn. 174. See *Morse v. Macrum*, 22 Ore. 229.

Distribution and discharge before paying debts is invalid.

tributed.¹ An order of distribution and discharge procured by an administrator or executor before paying an established demand, or while a claim is pending against the estate which is subsequently allowed, is invalid and will not protect him from liability to pay such omitted creditor;² and an order of distribution made before the expiration of the time allowed to prove debts is invalid as against creditors proving their claims within that time.³

The question of contingent claims, and of the duty of executors and administrators in reference thereto, as well as the disposition of the residuum on final settlement in such cases, has been considered in an earlier chapter.⁴

To authorize a decree of distribution there must be proof satisfying the court that the parties applying therefor are related to the intestate in the degree of consanguinity entitling them to distribution.⁵ This involves that proof must be made, not only that they *are* next of kin under the statute, but also that there are *no other* next of kin in the same degree; otherwise it will be impossible to determine the amount to which each may be entitled.

Thus, where father, mother, brothers, and sisters are entitled to equal shares, there must be proof whether the father or mother is living or had died before the intestate, and also how many brothers and sisters, or descendants of deceased brothers or sisters, survived him.⁶ In some of the States the statutes point out the method of proof with great minuteness.⁷ It has been held that where the right to administer is contested on the application for letters, the sole issue being the degree of relationship of the parties to the decedent, the determination of the court as to pedigree in such contest is conclusive upon the parties in the subsequent distribution of the

¹ Matter of Tilden, 5 Dem. 230.

² Whitney v. Piney, 51 Minn. 146; Green v. Taney, 16 Colo. 398; Smiley v. Cockrell, 92 Mo. 105. But an order of distribution by the probate court, adverse to one claiming as distributee, is collaterally unassailable, if the statutory notice has been given, though such distributee has filed a suit in the district court, having for its object the determination of the same questions that could have been raised in the probate court: Proctor v. Dicklow, 57 Kans. 119. And if the publication of notice of final settlement has been begun the probate court may proceed with the settlement, although suit had been subsequently commenced in the circuit court by a distributee, on the administrator's bond, charging that assets were omitted from

the inventory: State v. Stuart, 74 Mo. App. 182, 186. See in connection herewith, as to the effect of an order of discharge, *post*, §§ 570-574; and on the status of administrators after final settlement.

³ Browne v. Doolittle, 151 Mass. 595.

⁴ *Ante*, §§ 394, 403. This matter is mostly governed by statute: Ames v. Ames, 128 Mass. 277.

⁵ Robinsons, Appellants, 1 D. Chip. 357; Gibbons v. Shepard, 2 Dem. 247.

⁶ Hopkins v. Claybrook, 5 J. J. Marsh. 234, 236; Delany v. Noble, 3 N. J. Eq. 441; Compo v. Jackson, 50 Mich. 578, 593; Anson v. Stein, 6 Iowa, 150.

⁷ For instance, in California: see Code Civ. Pr. § 1664; Michigan: St. 1882, §§ 5990 *et seq.*

estate;¹ but such decree does not affect parties not cited who did not appear on the application for letters.²

In Connecticut it was held that, where an administratrix [*1235] who * was also a distributee obtained an order of distribution, fraudulently concealing the existence of one of the distributees, such order should be set aside, and that the administratrix was not protected thereby.³

§ 563. **Rights of Assignees of Distributees.**—It has been mentioned, in discussing the subject of jurisdiction,⁴ that probate courts have not the power to adjudicate upon the validity of an assignment by a legatee or distributee of his interest in the estate, unless such power is expressly conferred by statute.⁵ But where such power is vested in these courts,⁶ their judgments are conclusive upon all parties thereto; hence, an order to pay a legacy to an assignee concludes the rights of an attaching creditor against the assignor.⁷ The assignee is, by the assignment, vested with all the rights of the assignor, and may assert them in his own name;⁸ hence, where a legatee dies pending proceedings taken by him to compel an executor to account, having before his death assigned his legacy, the assignee may intervene and continue the proceedings before the surrogate.⁹ But if the assignee (where the court has such jurisdiction) omit to present his claim before the order of distribution is made, he will be bound by the order in favor of the assignor,¹⁰ and he stands in the same rela-

Distribution to the assignee of a legatee or distributee binds the assignor.

¹ *Howell v. Budd*, 91 Cal. 342; *Caujolle v. Ferrie*, 13 Wall. 465.

² *Matter of Paterson*, 146 N. Y. 327; *Shoris v. Hooper*, 153 Mass. 228.

³ *O'Neil's Appeal*, 55 Conn. 409.

⁴ *Ante*, § 151; as to the rights of assignees of claims of creditors: § 412, p. *867.

⁵ *Johnson v. Jones*, 47 Mo. App. 237; *State v. Jones*, 131 Mo. 194, 207. It is held in New York, that where the same share is claimed by the original assignee and by an assignment apparently valid, that the surrogate cannot direct payment to either claimant, but resort must be had to a court of equity to settle the dispute, as the surrogate is without jurisdiction: *Matter of Randall*, 152 N. Y. 508. In Maine it is held that the decree of distribution must be among all entitled by law to a share in the estate to be divided, even though some shares may have been assigned; but payment to the assignee might be required as a compliance with the decree. Hence, where one executed a release of his interest, he could

not, on appeal, attack the decree of the probate court, disposing of his share according to his release: *Tillson v. Small*, 80 Me. 90.

⁶ As to such power in the orphan's court of Pennsylvania, see *Dundas's Appeal*, 73 Pa. St. 474, 479, and cases there cited.

⁷ *Lex's Appeal*, 97 Pa. St. 289, 292; *Otterson v. Gallagher*, 88 Pa. St. 355. Where the assignment is admitted and distribution made to the assignee, it has been said that even then "the assignee should be named as a distributee in the order": *Johnson v. Jones*, 47 Mo. App. 237, 241.

⁸ *Graham v. Abercrombie*, 8 Ala. 552, 559; *Kavanaugh v. Thacker*, 2 Dana, 137; *Estate of Hite*, Myr. 232; *In re Phillips*, 71 Cal. 285.

⁹ *Matter of Fortune*, 14 Abb. N. C. 415.

¹⁰ *Freeman v. Rahm*, 58 Cal. 111. A subsequent California case holds that the probate court has no jurisdiction concerning the contracts or conveyances made by the heirs either among themselves or with

tion to the estate as the heir would if he had not assigned; hence he is estopped from objecting as to any matters to which the heir could not have objected.¹ The assignment or sale of one's interest in the estate of a living person does not pass his distributive share in such person's estate after her death intestate;

* hence such assignee has no interest therein.² Nor is the [* 1236] assignee of a legacy entitled "under the will," or "by the terms of the will," in the sense contemplated by a statute authorizing a legatee to cite the executor to show cause why the legacy should not be paid after the expiration of one year, authorized to proceed against the executor.³ Since the assignee can have no

Right of set-off existing against the assignor is valid against the assignee.

greater right in a legacy or distributive share than the assignor possessed, it is obvious that any right of set-off which existed against the assignor is good against the assignee.⁴ Hence the assignee of an insolvent legatee or distributee is liable in equity to a set-off of his

assignor's indebtedness to the estate against the legacy, although not yet payable;⁵ and where distributees gave their notes to the administrator for property of the estate purchased by them, and then assigned their interest in the estate, the administrator was allowed to set off the amount of the notes against the assignees.⁶

§ 564. **Set-off to Legacies and Distributive Shares.**—The indebtedness of a legatee or distributee constitutes assets of the estate, which it is the executor's or administrator's duty to collect for the benefit of creditors, legatees, and distributees.⁷ Hence such indebtedness may be deducted from any legacy or distributive share of the debtor.⁸ This principle has been extended to allow

others, and that hence the rights of a prior grantee of an heir's share are not affected by a decree of distribution to the heir: *Chever v. Ching*, 82 Cal. 68; but a later case points out that this decision states the law only when the assignment has not been brought to the attention of the court; that where the grantee of an heir asserts his claim at the final distribution; and the same is not contested, he is entitled to have the property distributed to him: *In re Vaughn*, 92 Cal. 192; and it is now held, that all persons claiming ownership, whether directly or through the heirs or devisees, may have their respective rights conclusively ascertained, if not adverse to the estate: *In re Barton*, 93 Cal. 459; and that the order of distribution is conclusive of the rights of all parties, assignees as well as heirs, and whether they appear or not: *William Hill Co. v. Lawler*, 116 Cal. 359.

¹ *Vanhorn v. Walker*, 27 Mo. App. 78.

² *Smith v. Baylis*, 3 Dem. 567. As to the assignment of an heir's expectancy, see *ante*, § 556, pp. *1220, *1221.

³ *Tilden v. Dows*, 3 Dem. 240, relying on *Peyser v. Wendt*, 2 Dem. 221.

⁴ *Keim v. Muhlenberg*, 7 Watts, 79; *Ford v. O'Donnell*, 40 Md. Ap. 51; *Hopkins v. Thompson*, 73 Mo. App. 401, 405.

⁵ *Dixon v. Storm*, 5 Redf. 419, 423; *Gosnell v. Flack*, 76 Md. 423; and see also *Baily's Estate*, 156 Pa. St. 634.

⁶ *Haskin v. Teller*, 3 Redf. 316; *Dull's Estate*, 137 Pa. St. 116.

⁷ *Howland v. Heckscher*, 3 Sandf. Ch. 519, 525. A legacy to the debtor does not extinguish the debt, which may therefore be set off: *Strong v. Bass*, 35 Pa. St. 333; *Waterman on Set-off*, § 209.

⁸ *Howland v. Heckscher*, 3 Sandf. Ch. 526; *Oxsheer v. Nave*, 90 Tex. 568; *Cowen*

the judgment debt of the distributee's husband to the intestate to be set off against her distributive share in the creditor's estate;¹ and to charge against a married daughter a sum of money borrowed by her from the decedent, although she was legally incapacitated by her coverture from contracting a loan;² and where the doctrine of retainer is recognized, the executor or administrator may retain against a legatee or distributee, or the assignee or transferee of such, for any debt due to the deceased, or to the executor or administrator in his fiduciary character.³

[* 1237] *The right of set-off exists whether the legatee or distributee was indebted to the deceased before his death, or contracted a liability to the estate thereafter.⁴ But a debt due the administrator personally cannot be set off.⁵ It is held that a son is not entitled to recover his distributive share of his father's estate, where the father was surety for him in an amount greater than the value of said share, although the executor did not pay the surety debt until after the action brought by the son.⁶ The right of set-off

Whether the debt was owing to the deceased, or to the executor or administrator.

v. Adams, 78 Fed. (C. C. A.) 536, 545; *Batton v. Allen*, 5 N. J. Eq. 99, 105; *Hill v. Bloom*, 41 N. J. Eq. 276; *Blackler v. Boott*, 114 Mass. 24, 26; *Bowen v. Evans*, 70 Iowa, 368; *Armour v. Kendall*, 15 R. I. 193; *Webb v. Fuller*, 85 Me. 443. Although the legatee's property is less than the amount allowed by law as exempt from execution: *Fiscus v. Fiscus*, 127 Ind. 283; where the legatee owes secured and unsecured debts to the testator, equity will apply the legacy first to the unsecured portion of the debt: *Sleeper v. Kelley*, 65 N. H. 206. It is immaterial that the insolvent legatee's indebtedness is secured by a lien on other property: *Oxsheer v. Nave*, 90 Tex. 568; *Willock's Estate*, 165 Pa. St. 522. It is held in Illinois that a legatee's debt cannot be set off against a legacy or devise in a proceeding to partition real estate of the estate: *Jeffers v. Jeffers*, 139 Ill. 368; but the contrary is held in Texas: *Oxsheer v. Nave*, 90 Tex. 568.

¹ *Yohe v. Barney*, 1 Binn. 358 (on the ground that the husband is owner of the wife's share), 364; *Ranking v. Barnard*, 5 Madd. 32, 34. But in *Stewart v. Glenn*, 3 Heisk. 581, it was held that the note of a husband for property bought at an administrator's sale is not a proper set-off against the distributive share of the wife.

² *Bucknor's Estate*, 136 Pa. St. 23. It is immaterial that the money loaned is

secured on realty purchased with it: *Willock's Estate*, 165 Pa. St. 522.

³ *Nelson v. Murfee*, 69 Ala. 598, 605; *Godbold v. Godbold*, 13 S. C. 601; *Denise v. Denise*, 37 N. J. Eq. 163, 165; *Irvine v. Palmer*, 91 Tenn. 462. See further as to the right of a creditor or assignee of an insolvent heir, *infra*, p. *1237, note.

⁴ *Gosnell v. Flack*, 76 Md. 423, 426. Such as purchasing goods from the executor, etc.: *McGee v. Ford*, 5 Sm. & M. 769, 772; *Mahon v. Bower*, 1 How. (Miss.) 275; or borrowing money from the estate: *New v. New*, 127 Ind. 576, 587; or costs made by the distributee and due the estate: *Dray v. Block*, 29 Ore. 347.

⁵ *McLaughlin v. Barnes*, 12 Wash. 373 (refusing to allow an administrator to set off a debt due him by the distributee, incurred prior to his appointment, against the sum ordered on distribution to be paid the distributee); *Dray v. Bloch*, 29 Ore. 347 (holding that the probate court has no jurisdiction to pass on the administrator's individual claim against the distributee, by way of set-off on final settlement); an executor may show a payment on account of a legacy, made after his settlement was drafted and before it was passed on, in defence of an action for the whole amount in pursuance of the order to pay: *Blake v. People*, 161 Ill. 74.

⁶ *Ramsour v. Thompson*, 65 N. C. 628; 1349

includes any sum due the estate on account of surety debts existing at the time of the testator's death.¹ It is doubtful (although the tendency seems to be in favor of the right of set-off) whether an administrator has any prior right to demand payment of a debt due by an insolvent heir to the intestate out of the land in the hands of such heir, or his vendee or attaching creditor.² And if the lands have been sold, and there is a residue of the proceeds for distribution, it has been held, both that the administrator may retain to the extent of the debt due by the distributee,³ and, on the other hand, that, since in equity the converted estate retains its original character, the equitable doctrine of retainer does not extend to the proceeds of real estate.⁴ Where a legacy is given to be applied to the discharge of

Right to set off debt of devisee or heir against realty.

to same effect: *Baily's Estate*, 156 Pa. St. 634. And where, under similar circumstances, the administrator, for whom the testator stood as surety, was in default, the executor was held right in refusing to pay the legacy to such administrator until the contingent liability was discharged: *Sproul's Appeal*, 105 Pa. St. 442.

¹ *Koons v. Mellett*, 121 Ind. 585, 593, two judges dissenting; see also *Taylor v. Jones*, 97 Ky. 201.

² Held doubtful in *Mann v. Mann*, 12 Heisk. 245, 248, deciding, however, that, if the heir had *bona fide* transferred his interest in the estate to an innocent party, the debt cannot be made out of the property so conveyed. In Indiana, for purposes of equalization among the heirs, there exists a lien and right to have such portion as goes to the heirs, whether realty or personalty, applied to the payment of a debt due from the heir to the estate: *New v. New*, 127 Ind. 576, 587. In Texas, likewise, the court holds that this doctrine applies with equal force to real and personal property, and that the heir's debt "is a part of the general mass subject to distribution," and must first be deducted as so much in full or on account of his share as the case may be; and that an execution creditor, or assignee, of such indebted heir can acquire no better right in the property of the estate than that held by the heir himself: *Oxsheer v. Nave*, 90 Tex. 568 and cases cited; so in Missouri: *Hopkins v. Thompson*, 73 Mo. App. 401, 405. The same doctrine is announced in Alabama, where "realty is upon the same footing as personalty in this respect," and the lien in

favor of the estate is paramount to the rights of an alienee of the indebtedted heir: *Streety v. McCurdy*, 104 Ala. 493. So, also, in Kentucky as between the heirs themselves and the indebtedted heir (or his assignee or attaching creditor): *Taylor v. Jones*, 97 Ky. 201; *Brown v. Mattingly*, 91 Ky. 275, holding that the assignee of the indebtedted heir, or the creditor attaching such heir's interest in the realty, had no greater rights than the heir himself; but leaving undecided whether the administrator could set off such heir's indebtedtedness to the estate against his interest in the realty; but in *Thompson v. Myers*, 95 Ky. 597, it is held that a creditor of an heir who buys in the heir's share at his execution sale is entitled to have allotted to him the debtor heir's share in the land, without deduction of the heir's debt to the estate. In New York it was held that a debt, not in judgment, due by a devisee at testator's death, was not a lien on the land devised as against a judgment recovered against the devisee: *Hagadorn v. Hart*, 62 Hun, 94; so in Massachusetts there is no lien against the land of a devisee for his indebtedtedness to the estate: *Dearborn v. Preston*, 7 Allen, 192, 194; and in that State it is held that the heir's or devisee's indebtedtedness cannot be set off against his interest in the real estate: *Jones v. Treadwell*, 169 Mass. 430.

³ *Fiscus v. Moore*, 121 Ind. 547, 552; *Nelson v. Murfee*, 69 Ala. 598, 604; affirmed in *Streety v. McCurdy*, 104 Ala. 493; *Hopkins v. Thompson*, 73 Mo. App. 401, 406.

⁴ *Smith v. Kearney*, 2 Barb. Ch. 533,

the legatee's debt to a third person, it is the executor's duty to apply the legacy to the payment of the debt, and pay the residue, if any, to the legatee.¹

The Statute of Limitations² does not operate the extinguishment of a debt, but bars the remedy only; hence such debts may be set off to legacies or distributive shares,³ notwithstanding the efflux of the statutory period of limitation.⁴ With respect to the analogous subject of discharge in bankruptcy, different conclusions have been reached *in different States. It is held in

Although remedy is barred by limitation or discharge in bankruptcy.

South Carolina, that the discharge operates as a bar to the remedy, but does not extinguish the debt, and that such debt may therefore be set off against his distributive share in the creditor's estate;⁵ while in North Carolina the debt is held to be extinguished by the discharge in bankruptcy, and an administrator is bound to plead such discharge, and if himself the creditor he cannot retain for the debt so discharged.⁶ This doctrine, well established in English courts of chancery,⁷ is not, however, universally followed in America. In Massachusetts, whose statute directs the probate court to "hear and determine" the "validity and amount" of debts due to the estate of a deceased person, which "shall be set off against and deducted from" the claims of legatees, it is held that a debt, barred by the Statute of Limitations at the time of the testator's death, cannot be deducted from a legacy to the debtor, unless the

549; *Sartor v. Beaty*, 25 S. C. 293, 303; *La Foy v. La Foy*, 43 N. J. Eq. 206, denying the executor's right to set off a devisee's debt against, or to make it a charge upon, the realty devised to him. And see dissenting opinion in *Fiscus v. Moore*, *supra*.

¹ *Low v. Low*, 77 Me. 171; and see *Robert's Estate*, 163 Pa. St. 408.

² *Tinkham v. Smith*, 56 Vt. 187, 190.

³ *Tinkham v. Smith*, *supra*; *Holmes v. McPheeters*, 149 Ind. 587; *Wilson v. Kelly*, 16 S. C. 216, 217. It may be observed that the statute here referred to is the general statute of limitations; and that a different effect might be ascribed to the special statute of non-claims applicable in proving claims against the estate of a distributee or legatee who dies before the final settlement of the original estate; and hence it has been held that where one of two executors dies with funds of the estate in his hands commingled with his own, and the surviving executor is obliged to prove the demand against the deceased executor's estate or have the same ac-

counted for, that such debt cannot be collected after the time for proving claims has expired, by setting it off against a legacy due the deceased executor's estate from the original testator's estate: *In re Smith*, 108 Cal. 115.

⁴ *Higgins v. Scott*, 2 B. & Ad. 413; *Jeffs v. Wood*, 2 P. Wms. 128; *Courtenay v. Williams*, 3 Hare, 539, 553. But in Tennessee the bar of the statute may be successfully pleaded against the administrator in such case: *Richardson v. Keel*, 9 Lea, 74. And so in Maine, Pennsylvania, and Massachusetts: see *infra*, p. *1238.

⁵ *Wilson v. Kelly*, 16 S. C. 216; *Sartor v. Beaty*, 25 S. C. 293.

⁶ *Parker v. Grant*, 91 N. C. 338, 342. But in *Lee v. Eure*, 93 N. C. 5, 8, the same court decide that, since the plea is a personal one, the administrator having set it up may withdraw it, affirming the previous decision in 82 N. C. 428.

⁷ *White v. Cordwell*, L. R. 20 Eq. 644.

testator so intended; and so also in Maine,¹ Pennsylvania,² and Tennessee.³ In earlier Massachusetts cases the right of set-off was denied, on the ground that the probate court had no power to adjudicate upon debts due from an heir to the estate, and that an order of distribution deducting such debt from the distributive share of the debtor, and ordering payment thereof to others, was necessarily void.⁴ A similar decision was rendered by the Missouri Court of Appeals,⁵ in a case where such set-off would have involved the ascertainment of the heir's indebtedness by the application of purely equitable jurisdiction. In Pennsylvania the right to set off debts is put upon the ground that such debts may be treated as advancements.⁶

§ 565. The Law vesting the Rights of Legatees and Distributees.

— It has been repeatedly stated that the law of the domicile governs the distribution of personal property,⁷ so that it is unnecessary to cite authorities here in support of this principle. It is maintained to the extent of enjoining executors and legatees from proceeding in foreign courts until the rights of legatees may have been determined by the courts of the domicile,⁸ and of determining the validity of trusts relating to personalty⁹ and governing the interpretation of wills relating to per-

¹ *Allen v. Edwards*, 136 Mass. 138; *Holt v. Libby*, 80 Me. 329.

² *Light's Estate*, 136 Pa. St. 211 (notwithstanding the debt was not barred until after the testator's death), 220.

³ *Richardson v. Keel*, 9 Lea, 74.

⁴ *Hancock v. Hubbard*, 19 Pick. 167; *Procter v. Newhall*, 17 Mass. 81, 93.

⁵ *Ford v. Talmage*, 36 Mo. App. 65.

⁶ *Springer's Appeal*, 29 Pa. St. 208; *Dickinson's Estate*, 148 Pa. St. 142.

⁷ Ch. xvii., "Domiciliary and Ancillary Jurisdiction," see § 167 and cases cited.

⁸ *Hutton v. Hutton*, 40 N. J. Eq. 461, 466.

⁹ *Cross v. U. S. T. Co.*, 131 N. Y. 330 (two judges dissenting) and cases there cited. "But when it is said that such a disposition is invalid everywhere if invalid at the domicile, the rule refers to some defect in the execution of the instrument, the form or object of the disposition, and not to the non-compliance, in framing the terms of the trust, with a local statute or rule of law, regulating the holding of property by the citizens of the State where the will is made, and which had no extra-territorial force": *O'Brien, J.*, in *Hope v. Brewer*, 136 N. Y. 126, 142, where a disposition, invalid under the perpetuity

statute of New York, and also because the beneficiaries of the trust were insufficiently defined, was upheld because the trust was valid in the country where the gift was to take effect; and which governed the trustees and the property when transmitted there; the case of *Sickles v. New Orleans*, 80 Fed. R. (C. C. App.) 868, is to same effect. In *Dammert v. Osborne*, 140 N. Y. 30, it is held that where a gift is valid in a foreign country, where the testator is domiciled, but not under the laws of New York, where the same is directed to be carried out, such gift will be upheld and enforced by the New York courts, on the ground that a gift valid at the place of the testator's domicile is valid everywhere (unless void as against public policy), and that the fund will not be remitted to the domicile; to same effect *Whitney v. Dodge*, 105 Cal. 192 (upholding a trust which was valid at the domicile, but would have been invalid under the perpetuity statute of California). So a legacy void at the domicile will be held void elsewhere, as where a legacy to a religious corporation is by the statute law of the domicile void if the testator dies within a calendar month of executing the will: *Jenkins v. G. T. Co.*, 53 N. J. Eq. 194, 200.

sonalty,¹ and realty² unless the testator manifestly had the law of some other country in view. But as this principle can be enforced by comity only, it must yield to the established policy of the state of the forum, so that, when the law of the domicile is [* 1239] repugnant to *such policy, it will not be recognized in the distribution of the ancillary estate.³ It is also as in force at the time of his death. a general rule, that the law in force at the time of the testator's or intestate's death governs the rights of distributees and legatees;⁴ although in one case it was held that, since the law governing distribution does not take effect until distribution is made, the right of the distributee may be affected by legislation after the intestate's death.⁵

The right of the widow to a share in her deceased husband's estate is not affected by her subsequent marriage before she actually receives such share;⁶ and, on the other hand, her share is determined by the amount of property in the husband's possession at the time of his death, so as to exclude her from any interest in advancements to his children made during his lifetime,⁷ and to relieve her from accountability for property received by her from her husband before his death.⁸

It follows from the doctrine of the vesting of the distributee's interest at the time of the intestate's death, that if a person entitled to distribution die before distribution is made, or his legacy paid to him, his share will go to his legal representative, and not to those who, by reason of his death, have become the next of kin of the intestate.⁹ Such Legacy or distributive share of one dying after intestate's or testator's death goes to

¹ *Bolling v. Bolling*, 88 Va. 524 and cases cited; *Rockwell v. Bradshaw*, 67 Conn. 8, 14.

² *Keith v. Eaton*, 58 Kans. 732 and cases cited.

³ *Mahorner v. Hooe*, 9 Sm. & M. 247, 272; *Miller's Estate*, 3 Rawle, 312, 319. In such case such assets will be transmitted to the domicile for distribution there: *Despard v. Churchill*, 53 N. Y. 192; *Dammert v. Osborn*, 141 N. Y. 564, 568.

⁴ *Brown v. Critchell*, 110 Ind. 31, 36; *Jones v. Dexter*, 8 Fla. 276, affirmed in *Bushnell v. Dennison*, 13 Fla. 77; *Boyd v. White*, 32 Ga. 530, 532; *McGaughey v. Henry*, 15 B. Mon. 383, 393; *Cade v. Davis*, 96 N. C. 139, 147; *Perryman v. Greer*, 39 Ala. 133, 136; *Marshall v. King*, 24 Miss. 85, 90; *Dixon v. Dixon*, 4 La. 188, 191. Statutes not in force on the day of the intestate's death cannot therefore govern the descent of his estate: *Sarver*

v. Beale, 36 Kans. 555, 559; *Remington v. Bank*, 76 Md. 546; a vested remainder descends as determined when the expectant estate vests, though the law be altered before the intervening estate expires: *Curtis v. Fowler*, 66 Mich. 696.

⁵ *Armstrong v. Armstrong*, 1 Oreg. 207.

⁶ *Ralston v. Thornton*, 36 Ga. 546; *Foster v. Fifield*, 20 Pick. 67.

⁷ See on this subject, *ante*, § 554.

⁸ *Matter of Morgan*, 104 N. Y. 74, 82.

⁹ *Thompson v. Thomas*, 30 Miss. 152, 158; *Chafer v. Maker*, 17 R. I. 739, 741; *Rose v. Clark*, 8 Pai. 574, 578; *Nickerson v. Bowly*, 8 Met. (Mass.) 424, 428; *Kingsbury v. Scovill*, 26 Conn. 349, 353; *Bluett v. Nicholson*, 1 Fla. 384; *Puckett v. James*, 2 Humph. 565, 568; *Grant v. Bodwell*, 78 Me. 460, 462; *George v. Elms*, 46 Ark. 260, 266; *Purcell v. Carter*, 45 Ark. 299, 302; *McMullen v. Brazelton*, 81 Ala. 442.

his personal right is not personal, but transmissible.¹ It has been held in California, however, that if no creditor of the deceased distributee has objected, direct distribution of community property to the persons entitled to such share will hold good,² although the general rule is * that such direct distribution is erroneous.³ This principle also involves the proposition, that a divorced wife is not entitled to administration of her former husband's estate, nor to a distributive share therein, if he died intestate.⁴ So, also, an annuity to another's wife "during widowhood" will fail by reason of a divorce.⁵

Posthumous children, as stated in an earlier chapter,⁶ take equally with those born during the ancestor's lifetime and surviving him. Pretermitted children, by virtue of the statutes of most States,⁷ succeed to the same interest in the father's estate as if he had died intestate. But since the will is not revoked or annulled by the omission to provide for the testator's children, but remains in force in every respect save as affected by the rights of these, provision is generally made charging each devisee and legatee with a proportional contribution to make up the necessary portions.⁸ The power to enforce the rights of omitted heirs is held to inhere in chancery courts, who may therefore decree distribution in such case before the legacies have been paid or the estate distributed,⁹ and such heirs may recover from each devisee, or from the purchaser of a devisee, the proportion which such devisee is liable to contribute, without making the other devisees parties.¹⁰ Purchasers from the legatees or devisees are not exempt from liability to contribute by their having purchased without notice of the claim of the pretermitted children.¹¹ Nor is the right of such child affected by the sale of lands of the testator under

¹ Moore v. Gordon, 24 Iowa, 158, 162.

² McClellan v. Downey, 63 Cal. 520, 523. In this case the court seems to base its decision on the fact, that the property distributed directly was community property, that the decree of direct distribution was made in the estate of the husband, who died first, and which had not been settled at the time of the final settlement of the widow's estate, and that her creditors could have objected pending the administration of the widow's estate; the principal ground for departure from the ordinary rule seems to have been because "it cannot be said that the widow's share of the community property is for no purpose the estate of the husband."

³ Estate of Black, Tuck. 145, 147; Estate of Cronin, Myr. 252.

⁴ Estate of Ensign, 103 N. Y. 284; as to her right to administer, see ante, § 237.

⁵ Bell v. Smalley, 45 N. J. Eq. 478, with a collection of cases on cognate points by the reporter.

⁶ Ante, § 74.

⁷ See a collection of the statutes on this subject, ante, § 55.

⁸ Shelby v. Shelby, 1 B. Mon. 266, 268, et seq.; Ward v. Ward, 120 Ill. 111, 116; (both of these cases contain minute directions as to the rights of posthumous and pretermitted children, and the method of determining their interest in the estate).

⁹ Levins v. Stevens, 7 Mo. 90; Alston v. Alston, 7 Ired. Eq. 172.

¹⁰ Haskins v. Spiller, 1 Dana, 170, 175.

¹¹ Armistead v. Dangerfield, 3 Munf. 20, 27.

a power in the will, but it may recover its share from the grantee of the executor.¹ So where the land was sold under order of the court upon the petition of the devisees.² It seems that the doctrine of hotchpot does not apply to children taking under these statutes; but that they are only entitled to their share of the estate left at the time of the father's death.³ In Washington, where as a general rule an heir can assert his rights only by a proper decree of distribution in the probate court, it is held that the proper remedy for a pretermitted heir is to move the proper probate jurisdiction that a speedy termination of the administration may be had and the proper decree of distribution made;⁴ the power conferred by the legislature upon probate courts to make distribution of a testator's estate to his minor children when they were not provided for in his will is held not to be in contravention of the organic law.⁵

[*1241] * § 566. **Voluntary Distribution.** — The doctrine of the common law whereby personal property devolves to the executor or administrator, and not to the distributee or legatee, involves the principle, that no one can obtain a legal title to the property of a deceased person except through an executor or administrator. In an earlier chapter it is shown that a court of equity will, in some States, dispense with administration, upon clear proof that an administrator, if appointed, would have no function to perform but to distribute the estate.⁶ Unless it appear affirmatively that there are no creditors entitled to any of the assets, even a court of equity will refuse to carry into effect an agreement among the children of an intestate to divide the property without administration.⁷ But where the distributees, under an agreement to divide the estate without administration, put an agent in possession of the property for that purpose, one or more of the distributees may file a bill against him without joining the others,⁸ and such distribution, made by the distributees themselves, is binding upon all the parties thereto who act *sui juris*;⁹ *aliter*, as to those who are minors or incapable of assenting.¹⁰ If such distribution is made without satis-

Voluntary distribution will be enforced among the parties thereto.

¹ *Smith v. Robertson*, 24 Hun, 210; s. c. 89 N. Y. 555; *Smith v. Olmstead*, 88 Cal. 582; *Northrop v. Marquam*, 16 Oreg. 173.

² *Massie v. Hiatt*, 82 Ky. 314.

³ *Wilson v. Miller*, 1 Patt. & H. 353, 381, cited in *Wilson v. Fritts*, 32 N. J. Eq. 59, 60.

⁴ *Barker's Estate*, 5 Wash. 390.

⁵ *Webster v. Seattle Trust Co.*, 7 Wash. 642.

⁶ *Ante*, § 201.

⁷ *Allen v. Simons*, 1 Curt. 122, 128. The proposition that an estate owes no

debts is one which it has well been said is not susceptible of proof: see cases referred to *ante*, § 201, p. *434.

⁸ *Moore v. Gleaton*, 23 Ga. 142, 144.

⁹ *Henderson v. Clarke*, 27 Miss. 436, 441; *Martin v. Reed*, 30 Ind. 218, 221; *McCaa v. Woolf*, 42 Ala. 389, 394; *Amis v. Cameron*, 55 Ga. 449, citing numerous Georgia authorities on pp. 451 *et seq.*; *Pool v. Docker*, 92 Ill. 501; *Reed v. Reed*, 56 Vt. 492; *Foote v. Foote*, 61 Mich. 181, 190; *Comer v. Comer*, 120 Ill. 420, 429; *Ledyard v. Bull*, 119 N. Y. 62.

¹⁰ *Kilcrease v. Shelby*, 23 Miss. 161, 166. 1355

Subject to the claims of creditors, fying a debt due to a creditor of the deceased, he may sue for the debt as well as foreclose any lien he may have, making the heirs defendants, without himself administering;¹ but if a creditor accepts, as a substitute for his demand against a decedent, the joint note of all the distributees, he cannot, under a judgment obtained on such note, subject the property so divided, in the hands of one of the distributees, to the satisfaction thereof.² So it is a fraud upon legatees in a will for the heirs to procure a rejection of the will, and then to divide the property among themselves; and a court of chancery will charge the lands so divided with the legacies.³

The administrator will be protected in paying over to a legatee * or distributee his share of the estate, if all the [* 1242] debts allowed against the estate have been paid, and the time has expired within which claims may be presented for allowance, except upon special application to the probate court, although there has been no order of distribution or final settlement.⁴ So where there is an agreement among all of the distributees of an estate, it is binding upon them, although one of them be the administrator.⁵ And it follows from the doctrine allowing voluntary distribution among adult distributees, that one who does not consent to such distribution at the time, but subsequently takes the part allotted to him, whether an equal portion or not, thereby waives his right to object to the division and makes it good.⁶ So where a party acquiesces in the order of distribution made by the probate court, although not strictly legal.⁷ But when not endangering the rights of creditors or of the administrator the court may order a partial distribution of the estate, on the application of a legatee or distributee, before final settlement,⁸ and neither such application,

¹ *Patterson v. Allen*, 50 Tex. 23, 26.

² *Jones v. Swift*, 12 Ala. 144, 147.

³ *Wetherbee v. Chase*, 57 Vt. 347.

⁴ *Brown v. Forsche*, 43 Mich. 492, 497; *Charlton's Appeal*, 88 Pa. St. 476; *Biays v. Roberts*, 68 Md. 510, 513. A creditor, in such case, has no recourse on the executor or administrator: *Crane v. Moses*, 13 S. C. 561, 577. See, however, *Robins' Estate*, 180 Pa. St. 630. And of course the administrator is not excused from making final settlement: *Francez Succession*, 49 La. An. 1732. But if the administrator pays to one whom he erroneously believes to be the heir, and such payment is afterwards allowed in the account, yet he is liable to the true heir if he pays

without an order of court: *Defriez v. Coffin*, 155 Mass. 203. As to the effect of payment by the administrator in advance of the order of distribution, see § 519 and cases there cited.

⁵ *Cutliff v. Boyd*, 72 Ga. 302, 313.

⁶ *Desverges v. Desverges*, 31 Ga. 753, 756; *Smith v. Payne*, 2 Bush, 583.

⁷ *Haden v. Haden*, 7 J. J. Marsh. 168; *Whitman v. Watson*, 16 Me. 461; *Barlage v. R. R. Co.*, 54 Mich. 564, 570; *Grady v. Porter*, 53 Cal. 680.

⁸ *Sankey v. Elsberry*, 10 Ala. 455; *Estate of Dunne*, 65 Cal. 378; *Sterrett v. Trust Co.*, 10 App. Dist. Col. 131; *McLane v. Cropper*, 5 Dist. Col. App. 276. The probate court should exercise great cau-

nor the order based upon it, will be any admission or adjudication that the executor had then no greater amount of assets subject to distribution.¹ If at such preliminary distribution one of the distributees does not appear, and the fund is awarded to those who do appear, the inequality may be corrected on a subsequent distribution of other funds.² The executor may retain out of each legacy which he is ordered to pay the sums already paid to each legatee respectively;³ but he cannot combine with them advancements made by the testator in his lifetime.⁴ Under what circumstances, payment of legacies or distributive shares made by the executor or administrator in advance of the order of distribution will be allowed as valid, is treated of elsewhere.⁵ Where executors overpay some legatees, and by decree of the ordinary are directed to pay the balance due to other legatees "when they have collected the amounts overpaid," such decree creates an absolute obligation upon the executors to pay, whether they collect or not, with a reasonable time given to call in [* 1243] their overpayments.⁶ The * obligation to refund is a personal one, and constitutes no charge upon the distributee's share of the land;⁷ but in some States the statutes seem to provide for equalization in such case out of the realty.⁸

utor has not other assets; and inequality in the distribution may be rectified subsequently.

Voluntary distribution before order of court.

Executor's legacy or distributive share is liable to sureties who have paid for him,

tion and much is left to the judge's discretion in determining whether partial distribution can be made under the statute: *In re Painter*, 115 Cal. 635.

¹ *State v. Berning*, 6 Mo. App. 105, 111.

² *Grim's Appeal*, 109 Pa. St. 391, 398; *Yetter's Estate*, 160 Pa. St. 506; but without interest: *Grim's Estate*, 147 Pa. St. 190. So where, by consent uncollected assets are distributed in kind, and afterwards a debt due the estate, not included in such distribution, is collected, the amount may be distributed with reference to losses under the first distribution, so as to equalize the portions of all: *Foley v. Harrison*, 84 Va. 847, 856.

³ *Lay v. Lay*, 10 S. C. 208, 215.

⁴ *Cawfield v. Brown*, 45 Ala. 552.

⁵ *Ante*, § 519.

⁶ *Adams v. Turner*, 12 S. C. 594, 598.

See as to overpayments to legatees and distributees, *ante*, § 560, p. * 1229.

⁷ *Wilcoxon v. Donelly*, 90 N. C. 245, 248.

⁸ See *ante*, on the subject of advancements, § 551.

⁹ *Stetson v. Moulton*, 140 Mass. 597, 600; *Bauer v. Gray*, 18 Mo. App. 164, 170. Sureties are subrogated to the rights of creditors whose debts they are compelled to discharge: *Pierce v. Holzer*, 65 Mich. 263, 273, in which a surety was subro-

if such sureties have a complete remedy at law, and neglect to pursue the same until barred by limitation, they cannot maintain an action in equity to reimburse them;¹ and it is held that the implied promise to repay on the part of a principal for whom his surety even at law.

pays a debt will support an action at law, which may be proved against the estate of the principal after his death, and will be barred by the Statute of Non-claim if not presented during the time limited by it; and the probate court has no power, in ordering distribution of an estate, to substitute the sureties as distributees, even though the administrator has, in his administration account, credited the estate with the money so paid by the sureties.²

§ 567. **Partition of Real Estate in Courts of Probate.**—Without statutory authorization the power to partition real estate among heirs and devisees does not exist in probate courts.³ In most of the States, however, the power is so conferred; for instance, in Alabama,⁴ Arizona,⁵ California,⁶ Connecticut,⁷ Delaware,⁸ Idaho,⁹ Indiana,¹⁰ Louisiana,¹¹ Maine,¹² Massachusetts,¹³ Michigan,¹⁴ Minnesota,¹⁵ Mississippi,¹⁶

Statutes giving probate courts jurisdiction to partition descended lands.

gated to the rights of a creditor to follow property in the administrator's hands bought with funds of the estate; this doctrine gives no greater right than the creditor had: *Batsell v. Richards*, 80 Tex. 505. It was held that a surety who has been compelled to pay for an executor's default is entitled to be subrogated to the rights of such executor to compensation for his services in administering, and that the executor's statement that he would not charge any commissions, made after he became insolvent, will not bar the surety's right: *Albro v. Robinson*, 93 Ky. 195.

¹ *Bauer v. Gray*, 18 Mo. App. 173.

² *Bauer v. Gray*, 18 Mo. App. 164, 172, relying on *Burckhardt v. Helfrich*, 77 Mo. 381, as showing that probate courts have not such equitable discretion or jurisdiction as to authorize them to depart from the statutory rules in respect of the allowance of claims.

³ *Woerner on Guardianship*, § 92 p 303.

⁴ *Code Ala.* 1896, § 3161. The jurisdiction of the probate court extends to all cases of partition among tenants in common where no adverse claim or title is asserted; and the only claim or assertion of title which can defeat a petition for a sale for division is an actual adverse possession of the land under a claim of exclusive ownership: *Hillens v. Brinsfield*, 108 Ala. 605.

⁶ *Rev. St.* 1887, § 3161. At any time

before, but commissioners for partition cannot be appointed until after, an order of distribution is made.

⁶ *Code Civ. Proc.* 1885. Probate court determines heirship and title to decedent's estate at any time after one year from date of letters; real estate assigned in common may be partitioned in the superior court.

⁷ *Gen. St. Conn.* 1888, § 626. Probate court may partition at any time during settlement of the estate any property not specifically devised; construed to mean the separation of the estate from a common ownership with other persons who are strangers to the estate: *Staples' Appeal*, 52 Conn. 421, 423:

⁸ *Rev. Code Del.* 1874, p. 517, § 7; p. 525, § 1.

⁹ *Rev. St. Ida.* 1887, §§ 5631 *et seq.*

¹⁰ *Burns' Ann. St.* 1894, § 1201.

¹¹ *Civ. Code*, 1870, §§ 1335, 1289.

¹² Unless the shares or titles are in dispute: *Rev. St.* 1883, p. 550, § 8.

¹³ Jurisdiction in partition is concurrent in Massachusetts in the probate, supreme, judicial and superior court if title is not in dispute; if it is, the probate court may order the case to be removed to the superior court: *Publ. St. Mass.* 1882, ch. 178, §§ 45, 46.

¹⁴ *How. St.* 1882, §§ 5964, 5967.

¹⁵ *Gen. St.* 1891, §§ 5857 *et seq.*

¹⁶ *Mississippi Ann. Code*, 1892. Probate

Montana,¹ Nebraska,² Nevada,³ New Hampshire,⁴ New Jersey,⁵ North Dakota,⁶ Ohio,⁷ Oklahoma,⁸ Pennsylvania,⁹ Rhode Island,¹⁰ South Carolina,¹¹ South Dakota,¹² Tennessee,¹³ Texas,¹⁴ Utah,¹⁵ Vermont,¹⁶ Washington,¹⁷ and Wisconsin.¹⁸ And a statute providing that "when real estate given by will is ordered by the testator to be divided [* 1244] among *two or more devisees, and no person is appointed to divide the same, &c., the court of probate before which the will is proved, shall . . . make division thereof according to the will" was construed as vesting the power to partition in such court in cases where the will is silent concerning a division, but devises real estate to several parties in moieties.¹⁹

There is a difference between partition and distribution besides the fundamental one growing out of the difference between real estate, which is the subject of the one, and personal estate, which is the subject of the other. "Distribution," as pointed out in the case of *Robinson v. Fair*,²⁰ "neither gives a new title to property, nor transfers a distinct right in the estate of the deceased owner, but is simply declaratory as to the persons upon whom the law casts the succession, and the extent of their respective interests; while partition, in most, if not in all, of its aspects, is an adversary proceeding, in which a remedial right to the transfer of property is asserted, and resulting in a decree which, either *ex proprio vigore*, or as executed, accomplishes such transfer." But "the connection between the administration, settlement, distribution, and partition of an estate

Distinction between distribution and partition.

jurisdiction is in chancery courts, and partition also, generally in the county where the land lies; but the court having probate jurisdiction of an estate may partition the lands thereof no matter where they lie: § 3097.

¹ Mont. Const. Code & St. 1895, §§ 2840 *et seq.*

² Of lands decreed in final settlement to two or more: Const. & St. Neb. 1893, § 1351.

³ Gen. St. 1885, § 2930.

⁴ If title is not disputed: Publ. St. N. H. 1891, ch. 243, § 18.

⁵ As appears from the case of *Diamant v. Lore*, 31 N. J. L. 220.

⁶ Rev. Code N. D. 1895, § 6517.

⁷ In the counties of Licking, Allen, Richland, Perry, and Defiance, probate courts have concurrent jurisdiction with the court of common pleas in partition; *Bates' Ann. St. 1897*, § 525 —1.

⁸ St. Okl. 1893, § 1450.

⁹ *Pep. & L. Dig. 1896*, p. 3363, § 26. But not where the course of descent is

altered: *Vowinckel v. Patterson*, 114 Pa. St. 21, 27.

¹⁰ Gen. Laws, 1896, p. 735, § 11.

¹¹ The act of legislature conferring jurisdiction in partition on probate courts is held unconstitutional, and therefore void: *Davenport v. Caldwell*, 10 S. C. 317, 347, 354. But a partition ordered before this decision will not be held void for want of jurisdiction in the probate court: *Tederall v. Bouknight*, 25 S. C. 275.

¹² Comp. L. Terr. Dakota, §§ 5929 *et seq.*

¹³ Code, 1884, § 4980.

¹⁴ *Sailes' Tex. Civ. St. 1897*, art. 2164 *et seq.*

¹⁵ Rev. St. 1898, § 3957.

¹⁶ St. 1894, §§ 2566 *et seq.*

¹⁷ *Webster v. Seattle Trust Co.*, 7 Wash. 642, 650.

¹⁸ *Sanb. & B. Ann. St. 1889*, §§ 3942 *et seq.*

¹⁹ *Pinney v. Bissell*, 7 Conn. 21, *Hosmer, C. J.*, dissenting, p. 24.

²⁰ 128 U. S. 53, 84, opinion by Harlan, J.

is such, that the power to make partition may be justly regarded as ancillary to the power to distribute such estate, and, therefore, not alien to the probate system as it has long existed and now exists in many States."

It is accordingly provided, in most of the statutes above cited, that the power to partition lands is possessed by probate courts in connection with the settlement and division of the estates of deceased persons only; and it is held, that the petition for partition should be filed before the order of final distribution determining the rights of the heirs in the estate is made, as the probate court, after this order, has no longer power over the property or rights of the distributees.¹ So it has been said, that "the power of the probate court in regard to partition is limited to very narrow bounds. It only extends to cases of heirs and devisees. And in those cases that court has no jurisdiction of the question of the title of the land, but only of the mode of partition, assuming that the title existed in the intestate or testator. The partition, so far as the court have jurisdiction, is conclusive; that is, to the matter of division among the heirs or devisees, of whatever estate exists, which they have a right to have thus divided." "But beyond that the decree has no effect. . . . The question of estate and title is assumed, and the proceeding is for the purpose of dividing whatever estate or title exists. If none finally exists, the proceeding goes for nothing. . . . If the assumed title fail, the effect of the decree fails also."² But within the scope of the power conferred

upon the court the partition is conclusive; the decree is as conclusive upon the parties to the proceeding in respect of the matter of division among the heirs as the judgment or decree of any other court;³ the recitals in the decree of partition, unless contradicted by the record, will be presumed to be correct, and every intendment will be indulged in its support;⁴ any mistake made by the distributors in describing the lines of the several parcels of land, whereby more land is given to some of the heirs and less to others than they are in fact entitled to, can be corrected by appeal only, and not by bill in chancery.⁵

It may be mentioned here, that independent of statutory authority, that contingent remaindermen or persons to take under an executory

¹ Buckley v. Superior Court, 102 Cal. 6, 10; Schmidt v. Stark, 61 Minn. 91, 92; Cox v. Ingleston, 30 Vt. 258; Branch v. Hanrick, 70 Tex. 731, 734. In Utah the statute allows partition by further proceedings in the estate within two years after distribution: Rev. St. 1898, § 3967.

² Hence a devisee may subsequently insist, in an action of ejectment against him to recover the portion assigned to the

plaintiff, that he owns the estate by paramount title: Grice v. Randall, 23 Vt. 239, 242.

³ Merklein v. Trapnell, 34 Pa. St. 42; Davis v. Durgin, 64 N. H. 51; Grice v. Randall, *supra*.

⁴ Robinson v. Fair, 128 U. S. 53, 87.

⁵ Gates v. Treat, 17 Conn. 388, 392; Grice v. Randall, *supra*.

devise, who may come into being at a future time, are bound by the judgment in partition,¹ on the theory of being virtually represented by the parties to the action, in whom the present estate is vested.²

remaindermen bound, although not *in esse*.

The jurisdiction of probate courts to partition real estate is in most States limited to cases in which the rights of the heirs or devisees have been judicially determined, so that in the partition proceeding there is no dispute or controversy among them;³ but to deprive the probate court of jurisdiction on this ground, there must not be a mere assertion that there is a dispute or controversy, but a real doubt and uncertainty in relation to the legal rights of the parties.⁴ Nor have probate courts, generally, jurisdiction to partition lands claimed adversely by, or in the adverse possession of, parties who do not deraign their title through the estate under administration;⁵ nor, unless so provided by statute,⁶ to try the right of an assignee from the heir.⁷ The administrator, though the estate be insolvent, has no such interest in the land as entitles him to institute proceedings for partition,⁸ unless it is by statute so provided.⁹

Jurisdiction of probate court is not ousted by mere assertion of title;

no jurisdiction to partition lands claimed adversely.

Administrator cannot sue for partition.

The power to partition real estate, when vested in probate courts, has been held to extend to the reversionary interests of heirs after the termination of a homestead, dower, or other life estate;¹⁰ but the current of authorities seems to establish the rule, that in the absence of statutory provision authorizing it, there can be no partition during the existence of the particular estate.¹¹ Nor can there be partition, as a

No partition during existence of particular estate.

No partial partition.

¹ Mead v. Mitchell, 17 N. Y. 210.

² Reinders v. Koppelman, 68 Mo. 482, 501; Sikemeier v. Galvin, 124 Mo. 367, 371. See Woerner on Guardianship, § 75, p. 249; also *ante*, § 74.

³ Marsh v. French, 159 Mass. 469, 471, and see statutes cited *supra*.

⁴ Marsh v. French, *supra*; Dearborn v. Preston, 7 Allen, 192, 195.

⁵ Richardson v. Loupe, 80 Cal. 490; Buckley v. Superior Court, 102 Cal. 6, 8; Snyder's Appeal, 36 Pa. St. 166, 168; Buddecke v. Buddecke, 31 La. An. 572, 574, followed in Crawford v. Binion, 46 La. An. 1261, 1263; Branch v. Hanrick, 70 Tex. 731, 734.

⁶ De Castro v. Barry, 18 Cal. 96, 99; Stewart's Appeal, 56 Pa. St. 241.

⁷ Gage v. Gage, 29 N. H. 533, 546; Hunt v. Hapgood, 4 Mass. 117, 120; Farnham v. Thompson, 34 Minn. 330, 336. But the ordinary evidence of title afforded

by deeds of undisputed validity may be received, when the applicant's title is simply denied: Guilford v. Madden, 45 Ala. 290.

⁸ Throckmorton v. Pence, 121 Mo. 50, 58; Greeley v. Hendricks, 23 Fla. 366.

⁹ For instance, in Indiana; Ann. Code 1894, § 1197; Utah, Rev. St. 1898, § 3957.

¹⁰ Webster v. Merriam, 9 Conn. 225, 228; Brokaw v. Ogle, 170 Ill. 115. In Minnesota partition lies by reversioners in courts of plenary jurisdiction: Smalley v. Isaacson, 30 Minn. 450.

¹¹ Wilkinson v. Stuart, 74 Ala. 198, 205; Schori v. Stevens, 62 Ind. 441, 445; Coon v. Bean, 69 Ind. 474; Merritt v. Hughes, 36 W. Va. 356, 359; Striker v. Mott, 28 N. Y. 82, 90; Rhorer v. Brockhage, 13 Mo. App. 397, 406; Green v. Hardy, 24 Me. 453, 456; Sumner v. Parker, 7 Mass. 79, 82; Ziegler v. Grimm, 6 Watts, 106; Brown v. Brown, 8 N. H. 93.

general rule, of part only of an entire estate.¹ As a general rule, the owner of a life estate in an undivided tract of land may have partition of the property, or a sale and division of the proceeds.² But since the purpose of partition is to enable owners "who before enjoyed in common to each have possession of his share in severalty,"³ the proceeding is applicable only when there is a concurrent holding of property by diverse persons; and the life-tenant has no standing against remaindermen to demand partition.⁴ Conversely, the life tenant is not affected by partition among the reversioners.⁵

The power to partition lands may be conferred upon probate courts concurrently with other courts. In such case the jurisdiction of the probate court, if it attaches first, becomes exclusive, unrestrained by the interference of the concurrent court;⁶ but although the jurisdiction be concurrent as to equity and probate courts, yet the former proceeds on its own established principles.⁷

*The land should be equally divided among the heirs, [*1245] but if this cannot be done, the judge of probate may assign part or the whole to a portion of them to hold as tenants in common, if they consent thereto;⁸ and where the land cannot be equally divided without great prejudice to the whole, more than an equal share may be assigned to one or more, and those receiving less than an equal share may receive compensation in money.⁹

But the authority to settle the land on one or more, to the exclusion of others, does not extend to lands assigned for dower after the expiration of the widow's term.¹⁰ If partition is made by the probate judge without notice to an heir, the latter is

¹ *Wilkinson v. Stuart*, *supra*; *Gore v. Dickinson*, 98 Ala. 363, 370.

² *Shaw v. Beers*, 84 Ind. 528, citing earlier Indiana cases; *McQueen v. Turner*, 91 Ala. 273, holding that the life-tenant may be required to give bond for the forthcoming on the termination of the life estate of the proceeds of a sale ordered where the estate is not susceptible of equal division: see *Mead v. Mitchell*, 17 N. Y. 210.

³ 2 Abb. Law D. 244; *Stevens v. Enders*, 13 N. J. L. 272.

⁴ *Seiders v. Giles*, 141 Pa. St. 93.

⁵ *Smalley v. Isaacson*, 30 Minn. 450.

⁶ *Wilkinson v. Stuart*, 74 Ala. 198, 203; *Marshall v. Marshall*, 86 Ala. 383, 388.

⁷ *Donnor v. Quartermas*, 90 Ala. 164, 170.

⁸ *Thayer v. Thayer*, 7 Pick. 209, 213.

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⁹ *Thayer v. Thayer*, *supra*. But in such case the land does not pass until the money is paid or secured: *Ib.*, p. 214; *Jenks v. Howland*, 3 Gray, 536. A guardian may consent to take a greater part than his ward's share in partition, but is not bound to do so if he has no funds of the ward to pay the owelty charged thereon. *Milligan's Appeal*, 82 Pa. St. 389, 394. In Alabama it is held that the commissioners cannot order that one party shall pay a sum of money to another, nor will the court's confirmation impart validity to such order; but if the parties themselves adopt and act upon such division, they are bound by it, and the money may be recovered by action: *Montgomery v. Gordon*, 51 Ala. 377.

¹⁰ *Hunt v. Hapgood*, 4 Mass. 117, 120.

not bound by the decree,¹ but as against those who consent to it the decree is good.² The jurisdiction of the probate judge is not defeated by a conveyance by, or an execution or attachment against the heir;³ but while he has power to determine to whom the title passed upon the death of the decedent whose estate is under administration, and to what extent the share of such person has been affected by the administration, yet he has no jurisdiction to determine a controversy between the heir and a third party claiming from him, and not as heir or devisee of the

notice, unless they consent.

Probate court has no power to try questions between the heir and those claiming under him.

[* 1246] * decedent.⁴ The description of the land in a decree of distribution by the probate court is not required to be so specific that the land may be identified without extrinsic evidence, and may be good although partly false, if what remains is sufficient for the purpose of identification.⁵ In Alabama every fact necessary to sustain the jurisdiction of the court must appear on the face of the proceedings; but where such proceedings have ripened into a rule, and the averments are sufficient to support the jurisdiction of the court, irregularities will not invalidate the proceedings.⁶

Description sufficient, if it enables the land to be identified.

It is held in States where probate courts have not jurisdiction in partition, and the proceedings are brought in courts of general jurisdiction, that while partitions ought not to be ordered until it be ascertained that the personalty is sufficient to pay the debts, yet the action may be begun before that time; it is only necessary that the entering of the order or decree be postponed until it is determined whether any and if so, what part of the land be required for the payment of the debt.⁷ But the difficulty

Partition before final settlement.

¹ *Procter v. Newhall*, 17 Mass. 81, 91; *Smith v. Rice*, 11 Mass. 507, 509. In this case the heir, to whom the land was assigned in the absence of her brother, paid the sum which had been awarded by the decree to be paid by her, in satisfaction of a judgment against her as trustee for the brother; notwithstanding which the brother recovered his purparty of the land. In Alabama it is held that, if the petition for partition shows on its face that there is a person in interest not made a party, the proceedings founded thereon are void, but not where such fact must be shown by evidence *dehors* the record: *Whitlow v. Echols*, 78 Ala. 206; *Cantelon v. Whitley*, 85 Ala. 247. In South Carolina parol evidence cannot be introduced to show, in a collateral proceeding, that an infant defendant had not been served: *Federall v. Bouknight*, 25 S. C. 275.

² *Rice v. Smith*, 14 Mass. 431, 434. So the conduct of parties may be such that they will be estopped from attacking a partition sale otherwise void because made by an unauthorized person: *Stafford v. Harris*, 82 Tex. 178.

³ By statute of Massachusetts: *Procter v. Newhall*, 17 Mass. 81, 91; *Holcomb v. Sherwood*, 29 Conn. 418.

⁴ See authorities on p. * 1244.

⁵ *Wheeler v. Bolton*, 66 Cal. 83.

⁶ *Whitlow v. Echols*, 78 Ala. 206.

⁷ *Clarity v. Sheridan*, 91 Iowa, 304, 309; *Hendry v. Hollingdrake*, 16 R. I. 477; *Spring v. Sandford*, 7 Paige, 550, 553. See also *Moore v. Moore*, 89 Tex. 29. In Missouri the interest of the parties in the realty, or in the proceeds, if ordered sold, remain subject to the claims against the estate until the court is satisfied that the same will not be needed for

and uncertainty of allowing a partition of lands of a decedent while liable to be sold for the payment of his debts is pointed out by Freeman,¹ and Woerner² and partition under such circumstances is held by the courts in some of the States to be premature.³

Advancements to the heirs are to be charged against them in partition proceedings as part of their respective shares; and if they have not been adjudicated by the probate court having jurisdiction of the estate, the court before which partition is pending may before decreeing partition, require the parties to account for their advancements;⁴ and a purchaser from an heir stands in the same relation to the estate as the heir, and he may show advancements to the other heirs.⁵

§ 568. Enforcing the Order to pay Legacies and Distributive Shares.— Courts of chancery carry into effect their decrees and

orders by the exercise of such equitable powers vested in them as may be necessary to accomplish justice in the cases over which they obtain jurisdiction. Hence, they will decree distribution, in some of the States, even without previous administration,⁶ or where, there being administration, the probate court is without power to grant adequate relief, and recourse must be had to a court of equity.⁷ So courts of equity in some States exercise concurrent jurisdiction in cases of unpaid legacies,⁸ in which case

debts, when the order of distribution takes effect: Rev. St. Mo. § 7143; the executor is a proper party defendant and may be made such on his own application, in order to protect the creditors of the estate: *Budde v. Rebenack*, 137 Mo. 179, 184; but subject to the conditions of the statute the pendency of the administration in the probate court is no bar to the proceeding in the circuit court: *Chrisman v. Divinia*, 141 Mo. 122. So in New Hampshire (where probate and plenary courts have concurrent jurisdiction) it is held that the right of the heirs to partition is not affected by the circumstance that the administrator, if the estate is insolvent, is entitled to the rents and profits, nor by his right, under order of the probate court, to sell for payment of debts; though, as the court suggests, "it could not often be expedient to commence such a proceeding under such circumstances": *Kelley v. Kelley*, 41 N. H. 501.

¹ On Cotenancy and Partition, § 454.

² On Guardianship, § 92, p. 307.

³ *Thomas v. Thomas*, 73 Iowa, 657, 660; *Ex parte Worley*, 49 S. C. 41, 59; *Alex-*

ander v. Alexander, 26 Neb. 68, 73; *Matthews v. Matthews*, 1 Edw. Ch. 565, 571. The action should not be brought within the time allowed for proof of claims; but a petition, brought four years after the testator's death, is not demurrable on the ground that it fails to state that the estate has been finally settled, and is solvent; compliance with the law will be presumed: *Minear v. Hogg*, 94 Iowa, 641, 643.

⁴ *Marshall v. Marshall*, 86 Ala. 383, 387; *Pigg v. Carroll*, 89 Ill. 205.

⁵ *Duncan v. Henry*, 125 Ind. 10, 13.

⁶ *Ricks v. Hilliard*, 45 Miss. 359, 362, citing and commenting on numerous Mississippi cases; *Watson v. Byrd*, 53 Miss. 480, 483; *Murgitroyde v. Cleary*, 16 Lea, 539 (before the expiration of the statutory period of administration); *Mead v. Langdon*, reported in *Adams v. Adams*, 22 Vt. 50, 59.

⁷ *Elliott v. Lewis*, 3 Edw. Ch. 40; *South Western Railroad v. Thomason*, 40 Ga. 408, 411; *Dorsheimer v. Rorback*, 23 N. J. Eq. 46; *Key v. Jones*, 52 Ala. 238, 243; *Townsend v. Radcliffe*, 44 Ill. 446; *Alexander v. Leakin*, 72 Md. 199.

⁸ *Sparhawk v. Buell*, 9 Vt. 41, 74;

all persons materially interested must be made parties, unless there has been a previous order of distribution in the probate court designating the fund out of which the legacy is payable.¹ It appears from the discussion of the executor's assent to legacies,² that an action at law will lie to recover a

Action at law for legacy after assent.

legacy to which the executor has assented.³

[*1247] * The ordinary Statute of Limitations constitutes a bar to actions of this kind, unless otherwise provided by the statute giving the remedy, while the remedy in equity is not subject to the bar by limitation,⁴ nor to the presumption of satisfaction or abandonment applicable in actions at law.⁵ But while the equitable remedy may be

Statute of limitations applicable at law,

but not in equity.

available against the executor as principal, the sureties on his bond may invoke the statute in bar of an action against them.⁶ So, an administrator cannot at common law plead the Statute of Limitation in bar of a suit against him by next of kin for their distributive shares.⁷ Where, however, an action at law lies concurrently with a bill in equity for the legacy or distributive share, the courts of equity will follow the rule at law, and hold the remedy barred by the Statute of Limitation.⁸ But this rule is not followed in Pennsylvania.⁹ Even equity, however, will refuse its aid for the recovery of stale claims, where the party has slept on his rights and acquiesced for a great length of time.¹⁰

Equity follows law when remedy is concurrent.

Adams v. Adams, *supra*. See also *Myers v. Horwitz*, 74 Md. 355.

¹ *Rexroad v. McQuain*, 24 W. Va. 32, 36.

² *Ante*, § 453.

³ Trespass, trover, replevin, debt, ejectment, or the like: see authorities under § 453, p. *993.

⁴ *Perkins v. Cartmell*, 4 Harr. 270, 274; *Nelson v. Cornwell*, 11 Grat. 724, 749; *Jones v. Jones*, 92 Va. 170. *Cartwright v. Cartwright*, 4 Hayw. 134, 135; *Kent v. Dunham*, 106 Mass. 586, 591; *Hedges v. Norris*, 32 N. J. Eq. 192. Under the provisions of many of the American States it is held that the dismissal of the administrator on final settlement terminates his fiduciary relation to the distributees, and his possession from that time is adverse to the *cestui que trust*, so that the Statute of Limitation begins to run: see authorities cited in next section.

⁵ *McCraw v. Fleming*, 5 Ired. Eq. 348, 350; *Salter v. Blount*, 2 Dev. & B. Eq. 218.

⁶ *Winston v. Street*, 2 Pat. & Heath, 169, 175; *State v. Menard*, 8 Mo. 286.

⁷ *Lafferty v. Turley*, 3 Sneed, 157, 170; *Harriet v. Swan*, 18 Ark. 495, 507; *Jones v. Jones*, 28 Ark. 19; *Amos v. Campbell*, 9 Fla. 187, 196; *Smith v. Calloway*, 7 Blackf. 86, 88; *Bushee v. Surles*, 77 N. C. 62, 64; *Woody v. Brooks*, 102 N. C. 334; *Carr v. Lowe*, 7 Heisk. 84, 98. This common law rule is, however, changed in many of the States: see next section and authorities there cited.

⁸ *McDonald v. McDonald*, 8 Yerg. 145, 148; *Kane v. Bloodgood*, 7 Johns. Ch. 89, 127; *Butler v. Johnson*, 111 N. Y. 204, 214; *Tinnen v. Mebane*, 10 Tex. 246, 252; *American Bible Society v. Hebard*, 51 Barb. 552, 569, affirmed in 41 N. Y. 619; *Young v. Cook*, 30 Miss. 320, 331; *Nolasco v. Lurty*, 13 La. An. 100, 102; *Pratt v. Northam*, 5 Mason, 95, 111.

⁹ *Thompson v. McGaw*, 2 Watts, 161, 162.

¹⁰ *Anderson v. Burwell*, 6 Grat. 405, 421; *Okeson's Appeal*, 2 Grant's Cas. 303; *Shearin v. Eaton*, 2 Ired. Eq. 282; *Hamlin v. Mebane*, 1 Jones Eq. 18; *Summerville v. Holliday*, 1 Watts, 507, 513; *Sims v. Aughtery*, 4 Strobb. Eq. 103, 118; 1365

*§ 569. **Enforcement of Distribution under American** [*1248]
Statutes. — The subject of the recovery of legacies and distributive shares is regulated in most States by their own statutes, prescribing simple and efficient, and in some instances very summary remedies, enforceable either in the probate courts or in

courts of law or equity. The question of the executor's or administrator's liability is mostly determined by the probate court, whose order of distribution or payment of legacies now takes the place of the executor's assent,¹ and of the corresponding investiture of title in the distributee, and changes the character of the liability of executors and administrators from an *official* to a *personal* one,² and the beneficial or inchoate title of the legatee or distributee becomes legal or absolute, enabling him to recover, by suit against debtors of the deceased in his own name, upon any cause of action assigned or distributed to him.³ Hence in these States it is generally held that the trust relation of the executor or administrator ceases, and the Statute of Limitations for the recovery of a legacy or distributive share begins to run from the time of final settlement or order to pay legatees and distributees;⁴ and that thereafter the representative is subject to garnishment by a creditor of the legatee or distributee.⁵ Thus an action at law or in equity is given to the legatee or distributee after the order to pay the legacy or distributive share has been made by the probate court, by the statutes of Colorado,⁶ Delaware,⁷

Burkhead v. Colson, 2 Dev. & B. Eq. 77; State v. Blackwell, 20 Mo. 97. In North Carolina the courts raise a presumption of payment after the lapse of twenty years from the time appointed for the settlement with the next of kin, when no claim has been made, no explanation of the delay to claim, nor circumstances showing the trust yet unclosed: Bird v. Graham, 1 Ired. Eq. 196, 198. And that a legatee is a non-resident will not excuse his laches: Cox v. Brower, 114 N. C. 422. See also Montgomery v. Cloud, 27 S. C. 188, 192. And see as to the time within which final settlement will be presumed from lapse of time, *ante*, § 538, p. *1185.

¹ See *ante*, § 453.

² Melone v. Davis, 67 Cal. 279, 282.

³ Pratt v. Pratt, 22 Minn. 148; Humphreys v. Keith, 11 Kan. 108, 111. So in State v. Matson, 44 Mo. 305, and Clarke v. Sinks, 144 Mo. 448, this rule was applied even where it was not shown that there had been an order of distribution, or even a final settlement, but proof that

the debts had all been paid. See in connection herewith Woerner on Guardianship, § 110, treating of the enforcement of the order of the probate court on the guardian to pay the balance due the ward.

⁴ Biays v. Roberts, 68 Md. 510; Hargis v. Sewell, 87 Ky. 63, 70; Robinson v. Elam, 90 Ky. 300; Alvis v. Oglesby, 87 Tenn. 172; Jacobs v. Pou, 18 Ga. 346, 349; State v. Grigsby, 92 Mo. 419 (holding that the trust ceased and the statute began to run from the time that it became the executor's sole duty to pay the residuary legatees), 426; App v. Dreisbach, 2 Rawle, 287, *per* Huston, J.

⁵ See on this point *ante*, § 177, p. *390.

⁶ 2 Mills' Ann. St. 1891, § 4796. (The failure to pay constitutes *devastavit*, and authorizes action on the bond against principal and his sureties. Within thirty days after demand made, the court may also attach a delinquent executor or administrator and imprison him until he shall comply with the order.)

⁷ Rev. St. Del. 1874, p. 550, § 40.

Georgia,¹ Illinois,² Kansas,³ Kentucky,⁴ Maine,⁵ Massachusetts,⁶ Mississippi,⁷ Nebraska,⁸ Nevada,⁹ New Jersey,¹⁰ New York,¹¹ North Carolina,¹² North Dakota,¹³ Ohio,¹⁴ Oklahoma,¹⁵ Pennsylvania,¹⁶ Rhode Island,¹⁷ South Carolina,¹⁸ Tennessee,¹⁹ Texas,²⁰ Utah,²¹ Vermont,²² Washington,²³ Wisconsin.²⁴

A direct remedy by summary process in the probate court is given in others; in some of them in addition to the remedy by action.

Thus it is provided by statute in Alabama,²⁵ Arizona,²⁶ [* 1249] Arkansas,²⁷ California,²⁸ Iowa,²⁹ * Missouri,³⁰ New York,³¹

¹ Code, Ga. 1895, § 3501 (referring to judgments in favor of creditors).

² *Frank v. The People*, 147 Ill. 105.

³ Gen. St. Kans. 1897, ch. 107, § 184.

⁴ *Hargis v. Sewell*, 87 Ky. 63, 70.

⁵ Rev. St. 1883, p. 533, § 31; *Holt v. Libby*, 80 Me. 329.

⁶ *Pinkerton v. Sargent*, 112 Mass. 110. It seems that the legatee may recover without a previous order of the probate court and before final settlement; the plaintiff may prove assets by introducing the inventory, and it is then for the executor to discharge himself or show that the money is needed for other purposes: *Fitch v. Randall*, 163 Mass. 381.

⁷ *Eyrich v. Capital Bank*, 67 Miss. 60; *Worten v. Ashley*, 2 Sm. & M. 527, 530.

⁸ Cons. St. 1893, §§ 1355, 1356.

⁹ Gen. St. 1885, § 2928.

¹⁰ Gen. St. N. J. 1895, p. 2393, § 265 (suits in the orphan's court).

¹¹ Code, Civ. Pr. §§ 2743, 2554. See as to the various remedies a legatee has to obtain payment of his legacy: *Butler v. Johnson*, 111 N. Y. 204, 213.

¹² Code, 1883, §§ 1510, 1511. Exclusively in probate court: *Hendrick v. Mayfield*, 74 N. C. 626.

¹³ Rev. Code, N. D. 1895, § 6512.

¹⁴ *Bates' Ann. Oh. St.* 1897, § 6200 (concurrent jurisdiction in common pleas and probate court); *Yearly v. Long*, 40 Oh. St. 27, 35.

¹⁵ St. 1893, § 1446.

¹⁶ The remedy in this State is exclusively in the orphans' court: *Ashford v. Ewing*, 25 Pa. St. 213, 215, citing earlier cases.

¹⁷ Gen. Laws, 1896, p. 742, § 15. A legatee cannot sue on the executor's bond until it has been ascertained that there are assets; and a distributee cannot sue on the bond until after an order of distribution

and demand thereunder: *Municipal Court v. Henry*, 11 R. I. 563. In this State the probate court is not authorized to order payment of legacies or construe wills, but only to ascertain the surplus in the hands of executors or administrators after payment of debts and expenses of administration, and in case of intestate estates to order distribution: *Arnold v. Smith*, 14 R. I. 217; *Williams v. Herrick*, 18 R. I. 120.

¹⁸ The probate judge may sue the sureties on the administration bond at law, for the benefit of the distributees: *Burnside v. Robertson*, 28 S. C. 583.

¹⁹ Code, 1884, § 3153; *Alvis v. Oglesby*, 87 Tenn. 172.

²⁰ With damages at 10 per cent per month: *Stewart v. Morrison*, 81 Tex. 396, 399, holding the sureties liable.

²¹ Rev. St. 1898, § 3954.

²² Rev. St. 1894, § 2553; *Weeks v. Sowles*, 58 Vt. 696.

²³ Code, 1896, § 5599. But see *McLaughlin v. Barnes*, holding that payment of a distributive share may be enforced in the court having charge of the estate, without sending the parties to another court: 12 Wash. 373.

²⁴ Sanb. & B. St. 1889, § 3940.

²⁵ Code, Ala. 1896, §§ 344, 345. Against a judgment for *devastavit* the executor or administrator is not allowed to claim exemption: *Daugaix v. Laurford*, 112 Ala. 403.

²⁶ Rev. St. Ariz. 1887, § 1249.

²⁷ Dig. of St. Ark. 1894, § 162.

²⁸ Code Civ. Pr. § 1666.

²⁹ Code, Iowa, 1897, § 3361.

³⁰ Rev. St. 1889, § 246, referring to §§ 228, 229.

³¹ If there is no dispute: Code Civ. Pr. §§ 2743, 2554; *Fiester v. Sheppard*, 92 N. Y. 251; *Riggs v. Cragg*, 89 N. Y. 479.

and perhaps other States, that, after order of distribution and demand made upon the executor or administrator and failure to pay over, execution shall issue out of the probate court against the delinquent.

A most summary remedy is given to legatees and distributees in California, Colorado, and Illinois, where the refusal to pay a legacy or distributive share after the order of the probate court to do so is treated as contempt of court, and may be punished by imprisonment of the delinquent executor or administrator until he comply with such order, and it has been so held in New York. The contempt is complete in California, although there was no previous demand, and it was held that such imprisonment is not in conflict with the constitutional inhibition of imprisonment for debt;¹ and that no appeal lies from the order adjudging contempt,² and that until a final discharge, on proof that the order has been complied with, this court may compel the proper disposition of the property, and in a proper case may take an accounting, or award interest, on equitable principles, not being limited to the specific property or amount where the same has been converted by the administrator.³ While in Illinois the delinquent cannot be attached until the expiration of thirty days after demand made upon him.⁴ The Supreme Court of Illinois say that "the power to enforce compliance with an order of court for the mere payment of money by imprisonment is certainly one of the highest powers known to the law;"⁵ hence, the statute must be strictly complied with, and, if the proceedings deviate from its provisions, the court is without jurisdiction, the arrest illegal, and all those assisting in it are liable in trespass for the damages sustained by reason of the imprisonment.⁶ In New York the power is deduced from the general statute vesting power in surrogates to enforce accounting, because the "accounting" is incomplete until * payment of the money ordered to be paid, the [* 1250] whole constituting a "process" enforceable by attachment under the statute; and the commitment is sufficient to protect all concerned in the arrest, if it show on its face a substantial cause

¹ *Ex parte Smith*, 53 Cal. 204, 207.

² *Wittmeier's Estate*, 118 Cal. 255 (on the ground that no appeal is provided for, a reason from which Beatty, J., dissents).

³ *In re Clary*, 112 Cal. 292.

⁴ *Haines v. The People*, 97 Ill. 161, 177. And the executor may in such a proceeding show payments made to the legatee between the time of completing his report and its approval by the court, in reduction of the amount ordered to be paid by him: *Blake v. People*, 161 Ill. 74.

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⁵ *Von Kettler v. Johnson*, 66 Ill. 109, 117, and the appellate court in *Solomon v. Holdorn*, 72 Ill. App. 346, 350, says: "The courts should always jealously guard the liberties of the citizen, and should shrink from depriving any one of his freedom until he has been given every reasonable opportunity of complying with the law certainly and definitely prescribed and made known to him by the orders of the court."

⁶ *Johnson v. Von Kettler*, 66 Ill. 63, 66.

therefor, in a matter in which the surrogate has jurisdiction.¹ But courts are loath to resort to this remedy before all others are exhausted.² While the statute specifies certain cases in which the surrogate's decree may be enforced by imprisonment as for contempt, there is no authority to enforce a decree for payment of costs by such means.³ The general power given by statute to enforce obedience to the orders, sentences, and decrees of probate courts, by warrant directing the apprehension and imprisonment of contumacious persons until they obey, is held not to authorize such imprisonment for the purpose of enforcing a final decree for the mere payment of money.⁴

In Indiana a legatee may present his claim to a legacy for allowance in the probate court, but there can be no order to pay until it is ascertained that there will be assets after payment of all debts.⁵ In Minnesota and Wisconsin, as appears from Gary's work on the probate law and practice in these States, the probate court has no power to enforce its decrees assigning the residue to the persons entitled thereto,⁶ although, he says, a common practice has been to order such payment where the residue consists exclusively of money.⁷ In Florida it was left undecided whether the order to pay over contemplated in the administrator's bond would have the effect to convert the balance due upon his account into a simple debt recoverable at law, so as to subject the same to the bar of the statute of limitation; but it is held that an action at law for a distributive share cannot be maintained against the personal representative, although he may have expressly promised to pay.⁸

It is held in New Hampshire, that, if a legatee does not demand his legacy because he has no knowledge of it, it is the duty of the executor to give him information of the bequest.⁹

Legacies and distributive shares due to persons who, for any reason, do not call for them, are, under statutory provisions of several of the States, to be invested or paid into the

State treasury until called for. In Arkansas,¹⁰

[* 1251] Maine¹¹ and * North Carolina,¹² such legacies and distributive shares are to be invested under order of the probate court. In California¹³ and Nevada,¹⁴ the court

¹ *Seaman v. Duryea*, 11 N. Y. 324, 327, affirming 10 Barb. 523, 531, vindicating the power notwithstanding the statutory abolition of imprisonment for debt.

² Callahan's Guardian, Tuck. 62.

³ *Matter of Humfreville*, 154 N. Y. 115.

⁴ *In re Bingham*, 32 Vt. 328, 335.

⁵ *Fickle v. Snapp*, 97 Ind. 289, 294.

⁶ Gary, § 628; also § 633, and note (28).

⁷ Gary, note (22) to § 628, and Wisconsin cases there cited.

⁸ *Amos v. Campbell*, 9 Fla. 187, 196.

⁹ *Tilton v. Bible Society*, 60 N. H. 377.

¹⁰ Dig. of St. 1894, § 166.

¹¹ Laws, 1891, ch. 49.

¹² Code, 1883, § 1526 (including absentees and infants without guardians).

¹³ Code Civ. Pr. §§ 1691 *et seq.*; *Pyatt v. Brockman*, 6 Cal. 418.

¹⁴ Gen. St. 1885, §§ 2943 *et seq.*

appoints an agent to take possession for absentees, who must give bond and render account. In these States, and also in Missouri,¹ where the administrator may be directed to invest the funds himself, they are to be paid into the State treasury, if at the end of one year the party entitled is not in condition to receive his share, to be there kept and paid to any claimant showing his title thereto by proof in the court having made the order.² In Delaware the legacies to absentees may be deposited in the Farmers' Bank.³ In Maryland any court of equity, or the orphan's court, may order legacies due in the future, or on a contingency, to be invested.⁴ In Indiana, if no proof of heirship or title by will has been made within two years after the final settlement, the court should direct the surplus to be paid to the county treasurer, to be by him paid to the State treasurer, who enters it to the credit of the unknown heirs.⁵ In New York, if the legatee be unknown, the legacy must be paid into the State treasury, and, where it cannot be paid to the person entitled, into the county treasury.⁶ This provision does not apply to cases where it is doubtful who is the legatee, until the doubt has been resolved.⁷ The money so paid into the State treasury may be withdrawn by the legatee on proper proof, but without interest, and on payment of all costs.⁸ Similar provisions exist in Rhode Island, where the legacy is to be paid into the town treasury if it remain unclaimed for five years;⁹ and in Texas,¹⁰ Illinois,¹¹ and * Massachusetts.¹² It is self-evident that an order to pay [* 1252] money into the State treasury before the estate is in a condition to be closed, is inoperative.¹³ The statutes concerning escheats should also be consulted in connection with the subject under consideration.¹⁴

If the executor or administrator making final settlement is entitled to a distributive share in the estate, or legacy, in a fiduciary

¹ Rev. St. 1889, §§ 252 *et seq.*

² In Missouri it is held that the power to order the payment to heirs or legatees of money deposited in the State treasury by order of the probate court, whether in consequence of an escheat, there being no known heirs, or where such heirs or legatees, though known, do not appear within one year after final settlement to claim their shares, resides in the probate court; and that the Statute of Limitations to bar such claims does not begin to run until the publication of the advertisement required by statute in case of unknown heirs: *Estate of Bomino*, 83 Mo. 433.

³ Rev. Code, 1874, p. 550, § 39.

⁴ See *Shriver v. State*, 65 Md. 278, a case touching the return of a legatee who was supposed to be dead.

⁵ *State v. Taggart*, 88 Ind. 269, 273.

But payment into the State treasury cannot be compelled of the distributive shares of heirs being proved, but who do not appear to claim them: *Ib.*, p. 273.

⁶ Code Civ. Proc., 7th ed., §§ 2747, 2748.

⁷ *In re Koch*, 3 Dem. 282; s. c. 15 Abb. N. C. 139.

⁸ *People v. Chapin*, 101 N. Y. 682.

⁹ Gen. Laws, 1896, p. 738, §§ 5 *et seq.*

¹⁰ *Sayles' Tex. St.* 1897, art. 2201 *et seq.* *State v. Wygall*, 51 Tex. 621 (including specific articles as well as funds).

¹¹ St. & Curt. St. 1896, p. 349, ¶ 136.

¹² *Dorr v. Commonwealth*, 1 Mass. 293.

¹³ *Estate of McMahan*, 19 Nev. 241.

¹⁴ *Ante*, §§ 133, 135.

capacity, as guardian, curator, trustee, or the like, the order of distribution operates to vest the share or legacy in him in his new capacity; it is a conclusive presumption of law, as against him, that he has done what he was by law required to do.¹ But as against the executor, it is held that he remains liable as such until he is discharged, and directed to hold the remaining assets in his new capacity.²

¹ *Ruffin v. Harrison*, 86 N. C. 190, affirming s. c. 81 N. C. 208. To similar effect, *United States v. May*, 4 Mack. 4; *State v. Cheston*, 51 Md. 352. See, as to liability of sureties, *ante*, § 255, p. * 551; and as to the transfer of assets from the

fiduciary in one capacity to himself in another capacity, see *ante*, § 177, p. * 391.

² *In re Hood*, 104 N. Y. 103, 107; *Cluff v. Day*, 124 N. Y. 195, and cases cited *ante*, § 177, p. * 391.

OF THE ESTATE AFTER OFFICIAL ADMINISTRATION.

CHAPTER LXII.

OF THE STATUS OF EXECUTORS AND ADMINISTRATORS AFTER FINAL SETTLEMENT.

§ 570. **Res Judicata as a Defence after Final Settlement.** — Executors or administrators having fully administered the estates intrusted to them, made final settlement after such notice to creditors and all others interested therein as the statute requires, and complied with the order of the probate court touching the payment of debts, legacies, or distributive shares, are *ipso facto* discharged from further liability on account of their administration. This exemption from further liability arises not so much in consequence of any order of court directing their discharge of record, but, as was indicated in an earlier chapter,¹ is the necessary consequence of the doctrine of *res judicata*, which forbids the reopening of any question once judicially decided by a court having competent jurisdiction over the subject-matter and over the parties interested therein, except on appeal or writ of error, or in equity on the allegation of fraud or mistake. The necessity of this principle was recognized in England,² but, owing to the multiplicity of courts having jurisdiction over executors and administrators, and the diversity of the rules applied in ecclesiastical, prescriptive, manorial, and other testamentary courts, as well as in common-law and equity courts, it was there fully realized in the courts of the ordinary only; for a court of equity might decree accounting notwithstanding a previous accounting and distribution in the spiritual court,³ and so * a [* 1254] new accounting became necessary whenever the executor was obliged to plead *plene administravit* in a suit at law. But in the United States the tribunals intrusted with jurisdiction over the

¹ *Ante*, §§ 505 *et seq.*

² Swinb. on Wills, pt. 6, § 21; 4 Burns, Eccl. L. 609 (9th ed.); Wms. Ex. [2060]; Toller's Ex. 495.

³ Bissell v. Axtell, 2 Vern. 47, and see a collection of English cases on this point in note (1) to this case in the first American edition of Vernon's Chancery Reports.

estates of deceased persons are clothed with the powers and dignity of courts, whose judgments and decrees are as binding and conclusive as those of other courts.¹ Hence the plea of *res judicata* affords a complete defence to executors and administrators against demands growing out of any matter of administration, in so far as the probate court has lawfully adjudicated thereon.²

Plea of *res judicata* sufficient defence against demands already passed on in the probate court.

And it is equally obvious that that which has not been tried cannot have been adjudicated; the final settlement of an executor or administrator can therefore be conclusive or binding upon nothing which was not either directly before the court, or necessarily involved in that which was before the court and adjudicated. That which is not within the scope of the issues presented cannot be concluded by the judgment.³

Final settlement is no defence against any demand not adjudicated by the court.

§ 571. **Duration of the Office at Common Law.** — At common law the office of executor or administrator does not terminate during his lifetime, unless he be removed by a court of competent jurisdiction. The circumstances under which one named in a will as executor may refuse to accept or renounce the office are mentioned in an earlier part of this work;⁴ but if an executor or administrator have once accepted the trust, he cannot afterward be permitted to renounce or resign the same.⁵ It follows that, without statutory authorization to that effect, probate courts

No cessation of the office of executor or administrator but by death or removal,

have no power to accept the resignation of an [*1255] executor or administrator, and a discharge or removal *for any cause or in any manner except as pointed out by statute is simply void.⁶ It also follows that, unless discharged in accordance with some statutory provision, neither the authority nor the liability of executors or administrators is at all affected by the

except by statutory authority.

¹ *Ante*, §§ 144 *et seq.*

² *Tarver v. Tankersley*, 51 Ala. 309, 312; *Wells's Res Judicata*, § 426, p. 340; *Cecil v. Cecil*, 19 Md. 72, 79; *Lawrence v. Englesby*, 24 Vt. 42, 45; *Loring v. Steineman*, 1 Met. (Mass.) 204, 207; *Garwood v. Garwood*, 29 Cal. 514, 521; *Tate v. Hunter*, 3 Strobb. Eq. 136; *Parcher v. Bussell*, 11 Cush. 107; *Harlow v. Harlow*, 65 Me. 448; *Sanders v. Loy*, 61 Ind. 298, 300.

³ *Ante*, § 506; *Fish v. Lightner*, 44 Mo. 268, 270; *Sparhawk v. Buell*, 9 Vt. 41, 77; *Succession of Schaffer*, 13 La. An. 113; *Henderson v. Henderson*, 21 Mo. 379, 380; *App v. Dreisbach*, 2 Rawle, 287, 301; *Dickinson v. Hayes*, 31 Conn. 417,

423; *Flanders v. Lane*, 54 N. H. 390, 392.

⁴ *Ante*, § 234.

⁵ *Sears v. Dillingham*, 12 Mass. 359; *Haigood v. Wells*, 1 Hill Ch. 59, 61; *Washington v. Blount*, 8 Ired. Eq. 253, 256; *Flinn v. Chase*, 4 Denio, 85, 90; *In re Mussault*, T. U. P. Charlt. 259. See *ante*, § 273 and cases there cited on this point.

⁶ *Sitzman v. Pacquette*, 13 Wis. 291, 306; *Matthews v. Douthitt*, 27 Ala. 273, 276; *Pollock v. Buie*, 43 Miss. 140, 151; *Livingston v. Combs*, 1 N. J. L. 42; *Blanchard v. Williamson*, 70 Ill. 647, 650; *Dunaway v. Campbell*, 59 Il. App. 665, 669.

settlement of a final administration account, except as it may protect them under the doctrine of *res judicata*.¹

If, therefore, property of the deceased is discovered after the final settlement, the existence of which was then unknown and

Property discovered after final settlement must still be administered.

could not for that reason be administered, the administrator and his sureties will be liable therefor, and subject to the same proceedings against them as in respect of the property coming originally to the hands of the administrator.² So their functions in other respects

remain unextinguished after final settlement,³ and an order of discharge made by the probate court can be regarded as a discharge only so far as the particular matters appearing upon the face of the account are concerned.⁴ This feature of the functions of executors and administrators is stated by Surrogate Bradford in the following language: "The formal discharge contained in a decree on final accounting operates only as to the accounts of the parties up to that period. The trust is an enduring one; other assets may be realized, new liabilities incurred, involving a continuance of duty and responsibility. A decree on final accounting does not destroy the relation of an executor, but only discharges him from liability for the past. . . . Even after a final accounting and distribution, an executor continues to be a trustee."⁵

§ 572. **American Theory of the Duration of the Office.**—The tendency of American statutes on the subject of administering the estates of deceased persons has always been in the direction of simplifying the proceedings, securing the end and purpose in view by the most direct means and in the speediest manner compatible * with the rights of creditors of the deceased. In [* 1256] contrast with the common-law theory, that the trust of executors and administrators is terminated only by their removal

Aim in America is to make the office temporary.

for cause or death, it is the aim of American legislation to make the office a temporary one, ceasing with the accomplishment of the purpose for which it was created.

Thus, the statutes of most States require a "settlement," or "final

¹ *Ante*, § 570. See 4 So. L. R. (N. S.) 446.

² *White v. Swain*, 3 Pick. 365; *Dexter v. Arnold*, 3 Mason, 284, 292; *Smith v. Hurd*, 7 How. (Miss.) 188, 200; *Probate Court v. Merriam*, 8 Vt. 234, 237; *ante*, §§ 505, 506.

³ *Norman v. Norman*, 3 Ala. 389; *Simmons v. Price*, 18 Ala. 405; *Wyar v. Watt*, 48 Oh. St. 545 (allowing the representative to bring suit on a note unadministered, after final settlement and discharge). But in Texas the probate court cannot compel an administrator to file an additional in-

ventory after the estate is withdrawn from administration, at least for assets not reported or accounted for by him in his administration; but he is, it seems, liable directly to the heirs: *Davis v. Harwood*, 70 Tex. 71.

⁴ *Henderson v. Winchester*, 31 Miss. 290, 295; *App v. Dreisbach*, 2 Rawle, 287, 301; *Dufour v. Dufour*, 28 Ind. 421, 424. See *State v. Superior Court*, 13 Wash. 25.

⁵ *Paff v. Kinney*, 1 Bradf. 1. See to same effect, 3 Redf. on Wills, 411, pl. 25; *Diversey v. Johnson*, 93 Ill. 547, 558, citing earlier Illinois cases.

settlement," of the administration within a short period, varying in the several States from one to four years; and courts are inclined to compel the complete winding up of the estates within these periods in all cases in which the condition of the estate admits of it. It is obvious, that, if the estate has been fully administered, — i. e. if all its assets have been reduced to possession by the executor or administrator, debts and expenses of administration paid, and the residue, if any, distributed to those entitled to them, — there is nothing more for the executor or administrator to do, and he is necessarily *functus officio*. Courts, in view of the great desirability of relieving these officers from further harassment, their sureties from the anxiety attending continuous liability, and distributees and legatees, heirs, and devisees from the uncertainty of their tenure of the property descended to them, have gone to the extent of declaring the executor or administrator *functus officio* by virtue of his final settlement, or of an order of discharge by the probate court in the absence of a statute authorizing such order.¹ However consistent such ruling may be with the spirit of our system of administration, it is not quite clear that either a final settlement without a discharge by the court, or an order of discharge not authorized by statute, can relieve an executor or administrator of the duty imposed upon him by law of collecting assets discovered after final settlement, and administering them by payment to creditors, legatees, or distributees; or protect him against liability for assets concealed by him and not accounted for in his inventory or settlement. Until a decree is entered by the probate court discharging him [* 1257] from further * liability, in pursuance of a statute authorizing such decree, the trust continues, in contemplation of law, and he remains clothed with the duties and authority of his office.²

Cases declaring the administrator *functus officio* without statutory authority.

§ 573. **Statutory Provisions for the Discharge of Executors and Administrators.** — The subject of resignations by executors and administrators, as authorized by American statutes, is discussed in connection with the law authorizing removal or revocation of the

¹ Willis v. Farley, 24 Cal. 490, 502 (citing Taylor v. Savage, 1 How. (U. S.) 282, as authority, which, however, declared an administrator *functus officio* who had been removed for misconduct); Goebel v. Foster, 8 Mo. App. 443 (citing among other Missouri cases a number in which the administrator had become disqualified to act under the statute, or been removed, or had resigned); Polk v. Schulenburg, 4 Mo. App. 592; Garner v. Tucker, 61 Mo. 427; Modawell v. Holmes,

40 Ala. 391, 404. In Missouri an order of discharge (for which there is no statutory provision) after final settlement severs the connection of the administrator with the estate, and thereafter he has no more to do with the estate than any other individual: Melton v. Fitch, 123 Mo. 281, 289. But not final settlement without discharge: Rogers v. Johnson, 125 Mo. 202.

² McCrear v. Haraszthy, 51 Cal. 146, 151; Dohs v. Dohs, 60 Cal. 255, 260; see authorities, *ante*, § 571.

letters granted them.¹ In both instances, as well where the executor or administrator is removed for cause as where he is permitted to resign, the office continues, and provision is made for filling it by an administrator *de bonis non*, who takes the place vacated by the removal or resignation, as in case of death, of the former incumbent. But no administrator *de bonis non* is necessary or possible after completion of the administration; that is, where all the assets of an estate have been reduced to possession by the executor or administrator, and paid out and distributed to those entitled to receive the same. The *status* of such an executor or administrator is the subject of statutory provisions in many States, determining his rights and liabilities thereafter.

For it is obvious that there may be property of which the executor or administrator had no knowledge, and which is liable to be administered, although he may have made "final settlement" in perfect good faith; or there may be such property, the title to which he honestly believed to be vested in other parties and therefore omits from his inventory and accounts, and which yet may subsequently turn out to belong to the estate; or property may spring into existence after final settlement, the title to which may be in the estate. In all these cases there was in reality no final settlement of the estate in the sense that it included an accounting in respect of all the property liable to administration; and neither the plea of *res judicata* nor that of *plene administravit* can afford protection against creditors or distributees. It is therefore enacted that executors and administrators having made final settlement may relieve themselves of further liability by the order of the probate court granting them a full or partial discharge.

In some instances, the discharge so provided extends only to the protection against liability for assets shown to have been

Statutory provisions for the discharge of executors and administrators. paid or * distributed, as in Arkansas,² Kan- [* 1258] sas,³ Massachusetts,⁴ Ohio,⁵ Oregon,⁶ and Rhode Island;⁷ while in others, proof of full administration with satisfactory vouchers showing payment and delivery to those entitled of all the property of the estate, and performance of all acts lawfully required of him, entitles the executor or administrator to a full discharge from all liabilities thereafter, as

¹ *Ante*, §§ 269 *et seq.*

² Dig. of St. Ark., 1894, § 168.

³ 2 Gen. St. Kans. 1897, ch. 107, § 181.

⁴ Pub. St. 1882, ch. 144, § 12. The executor cannot be sued in this State after the expiration of four years from the date of letters, except there be assets received after the expiration of such time, or retained by order of the probate

court: *Holden v. Fletcher*, 6 Cush. 235; *Holland v. Cruft*, 20 Pick. 321, 335.

⁵ Bates' Ann. Oh. St. 1897, § 6190. See *Weyer v. Watt*, 48 Oh. St. 545, showing that there is no discharge unless the statute is complied with, and that the purpose of the statute is to perpetuate the evidence of payments actually made, as against those signing the receipts.

⁶ Laws, 1887, §§ 378, 1175.

⁷ Gen. Laws, 1896, p. 754, § 27.

in Alabama,¹ Arizona,² California,³ Colorado,⁴ Idaho,⁵ Indiana,⁶ Iowa,⁷ Nevada,⁸ North Carolina,⁹ Oklahoma,¹⁰ Pennsylvania,¹¹ Texas,¹² Utah, Washington. It has been mentioned that a discharge obtained by concealing from the court the existence of unpaid claims, or pending litigation, there being assets, has been held in several States to afford the administrator no protection against claims of such creditors.¹³ In some of the States proof must be made, in addition to proof of the facts above mentioned, of notice given of the intended application for discharge, as in Florida,¹⁴ Georgia,¹⁵ and South Carolina.¹⁶ In Georgia all suits against the executor or administrator are barred from the date of the discharge, saving to minors at such date five years after majority,¹⁷ and fraudulent discharges are void and may be set aside on motion.¹⁸ It is held under these statutes, that the dismissal by judgment of the court of ordinary is a complete bar, both at law and in equity, unless impeached for fraud, the legislature announcing that the discharge is a *release*.¹⁹ But a decree of discharge obtained by consent of parties is no bar to the claim of one who was not a party to

¹ A final settlement is not a discharge from further accounting "unless there is an order discharging him, or unless decrees are rendered distributing the residue of the estate among those entitled, and they have been paid": *Ligon v. Ligon*, 84 Ala. 555 and cases cited.

² Rev. St. Ariz. 1887, § 1276.

³ Code Civ. Pr. § 1697. The administrator must comply with the order of distribution before the court loses jurisdiction over him: *In re Clary*, 112 Cal. 292. The remedies left open against the decree of discharge are appeal and resort to equity; not by motion: *Dean v. Superior Court*, 63 Cal. 473.

⁴ Mills' Ann. St. 1891, § 4804.

⁵ Rev. St. 1887, § 5649.

⁶ Burns' Ann. Ind. St. 1894, § 2557.

By the act of 1891 it is provided that an administrator *de bonis non* may be appointed after final settlement to administer on assets not administered theretofore; this is held to be a cumulative remedy, and that suit may be maintained on a chose in action not theretofore inventoried or administered: *Barnett v. Vanmeter*, 7 Ind. App. 45.

⁷ The discharge becomes conclusive if no application is made within three months to set it aside: *Diehl v. Miller*, 56 Iowa, 313. The order does not avoid the subsequent appointment of an adminis-

trator *de bonis non*, if the record discloses that the estate has not been fully administered: *Crossan v. McCrary*, 37 Iowa, 684, 686. But after the debts are paid and the administrator discharged the probate court has no jurisdiction to reappoint the administrator for the purpose of collecting a note which was distributed in the belief that it would be paid; the heirs are the proper parties to sue: *Jordan v. Hunnell*, 96 Iowa, 234.

⁸ Rev. St. 1885, §§ 2948, 2949.

⁹ Code, 1883, § 1525.

¹⁰ St. Okl. 1893, § 1468.

¹¹ *Pep. & Lew. Dig.* 1896, p. 3286, § 43. See *Estate of Grady*, 14 Phila. 259; *Anderson's Appeal*, 102 Pa. St. 258.

¹² *Sayles' Tex. Civ. St.* 1897, § 2200.

¹³ *Ante*, § 562, p. *1234.

¹⁴ Rev. St. Fla. 1892, § 1876; notice must be published for six months: *Gadsden v. Jones*, 1 Fla. 332, 336; *Anderson v. Northrop*, 30 Fla. 612, 634.

¹⁵ Citation must be published in the gazette for three months before the court can grant the discharge: *Code Ga.* 1895, § 3509. See *Smith v. Oliver*, *Dudley*, 190.

¹⁶ Notice must be published at least one month: 2 Rev. St. S. C. 1893 (*Code Civ. Pr.* § 41).

¹⁷ *Code*, 1895, § 3510.

¹⁸ *Ib.* § 3511.

¹⁹ *Carter v. Anderson*, 4 Ga. 516, 519.

such consent;¹ and, to make an order of discharge available as a protection to the party discharged, all the initiatory steps to obtain the same, as prescribed by statute, should be spread on the record.² The ordinary may vacate a judgment of dismissal obtained by fraud, or for irregularity, or having been improvidently granted;³ and a discharge obtained by fraud on the legatees or on the court may also be attacked collaterally, as a nullity.⁴ In Maryland⁵ and New Jersey⁶ the statute expressly makes the executor or administrator liable for assets or moneys coming into his hands after final settlement and distribution; and in Louisiana his office is by statute directed to continue until the estate shall be finally wound up.⁷ In New York, the statute provides that judicial settlement is conclusive on parties and privies of the following facts and no others: (1) the correctness of items allowed for payments to creditors, legatees, and next of kin, expenses, and services; (2) that all interest for money received and embraced in the account for which he was accountable has been charged; (3) that the money charged as collected was all that was collectible on the debts stated at the time of the settlement; and (4) that the allowances for decrease and the charges for increase of the value of assets were correctly made.⁸ These provisions do not protect an administrator against the claim of the assignee of a debt proved against him, which he had paid to the assignor, who pretended that he had lost the note, although the true owner failed to appear.⁹ So the payment of interest on the note of his intestate was held proof of presentation to and allowance by the administrator, and he was held liable to pay the note and interest, notwithstanding final settlement and * default of appearance by the creditor thereto.¹⁰ Nor is [* 1260] such settlement a bar to an action for any debt not therein accounted for;¹¹ but it is conclusive of an action against the administrator by a judgment creditor to set aside the payment made to another creditor as fraudulently and collusively paid.¹² In Wisconsin the order of distribution has no other legal effect than to pass the legal title to the personal property from the executor or administrator to the distributee.¹³ And the order may, like a final settlement in that State, be set aside by the county court for fraud at any time before

¹ Long v. Mitchell, 63 Ga. 769, 770.

² Loyless v. Rhodes, 9 Ga. 547, 550.

³ Mobley v. Mobley, 9 Ga. 247; Groce v. Field, 13 Ga. 24; Collyer v. Cross, 20 Ga. 1.

⁴ Pass v. Pass, 98 Ga. 791.

⁵ Code, 1878, art. 50, § 220. In the 2 Publ. Gen. L. Md. (1888) a corresponding section has not been found.

⁶ 2 Gen. St. N. J. p. 2385, § 125. The discharge of an executor on his own

motion without notice is error: Vail v. Male, 37 N. J. Eq. 521.

⁷ Rev. L. 1876, § 3698; Civ. Code, § 1673.

⁸ Code Civ. Pr. § 2742.

⁹ Bank of Poughkeepsie v. Hasbrouk, 6 N. Y. 216.

¹⁰ Willcox v. Smith, 26 Barb. 316.

¹¹ Wurts v. Jenkins, 11 Barb. 546.

¹² Rose v. Lewis, 3 Lans. 320.

¹³ Estate of Kirkendall, 43 Wis. 167, 176, 179.

rights are confirmed by limitation.¹ So in Michigan, where executors, after an order of distribution, converted property to the use of one of them, it was held that an action lay on the bond.²

¹ O'Neill's Estate, 90 Wis. 480. As to the representative's duties are not closed setting aside final settlements see *ante*, § 507. until the legatees have been paid and evidence of such payment has been filed:

² Cranson v. Wilsey, 71 Mich. 356. Buss v. Buss, 75 Mich. 163.
When the estate is shown to be solvent

* CHAPTER LXIII.

[* 1261]

OF THE LIABILITY OF THE ESTATE AFTER FINAL SETTLEMENT.

§ 574. **Liability of the Estate at Common Law.**—At common law the heir was liable for the debts by specialty of his ancestor; he was bound to satisfy them to the extent of the value of the land descended to him. But if he had aliened the land before action or proceeding against him for the ancestor's debt, the creditor had no remedy. By statute¹ he was made liable for such debt in an action, as in actions against executors or administrators, and execution issued against him personally, to the value of the descended lands, but the lands themselves, if *bona fide* aliened before action brought, were not liable.² The personal property, descending to the executor or administrator, was liable for all debts; hence as to simple contract debts of the ancestor the creditor had recourse only to the executor or administrator, to the extent of the personalty in his hands; while, as above remarked, the heir's liability was limited to debts by specialty to the extent of lands descended.³ It results from this, that, in the absence of statutes in force in the American States, heirs are in no wise liable for simple contract debts of the ancestor, and for specialty debts only to the extent of the lands descended; and that they may defeat the specialty creditor by aliening the descended lands before action on the bond or other specialty.⁴

Devises are not liable at the common law for either specialty or simple debts;⁵ to remedy which, "and for the maintenance of just and upright dealing," the statute above mentioned⁶ made void all testamentary dispositions in fraud of bond or other specialty creditors, * and giving an action against heirs and devisees jointly. [* 1262] As the statute above mentioned is not in force, *proprio*

¹ 3 & 4 Wm. & M. c. 14, § 5.

² Bingham, Desc. 247; Muldoon v. Moore, 55 N. J. L. 410. It was held that this statute gave an action of *debt* only; hence *covenant* would not lie, under it, against a devisee for the breach by his testator: Wilson v. Knubley, 7 East, 128, 133. See Bartlett v. Ball, 142 Mo. 28, 33.

³ Bellows, J., in Hall v. Martin, 46 1380

N. H. 337, 340; Beasley, C. J., in New Jersey v. Meeker, 37 N. J. L. 282, 295.

⁴ Whittelsey v. Brohammer, 31 Mo. 98, 107; Scholfield, J., in People v. Brooks, 123 Ill. 246; Fisher v. Tuller, 122 Ind. 31, 36.

⁵ Plasket v. Beeby, 4 East, 485, 491.

⁶ 3 & 4 Wm. & M. c. 14, §§ 2 *et seq.*

vigore, in the United States,¹ it requires, of course, statutory authority in each State to make devisees liable for the debts of their testators.² As to legatees, a similar principle places them beyond the reach of creditors: since all personal property descends, not to the next of kin, distributee, or legatee, but to the executor or administrator,³ the creditor is confined to his remedy against the latter; from which it follows that, without some statutory provision in the State under whose laws the property descends, neither legatees nor distributees can be made liable for the debts of the testator or intestate.⁴ Hence, a statute giving an action to creditors against devisees is held not to change the rule of the common law as respects legatees of chattel interests, and creditors cannot proceed against them.⁵

Nor legatees.

A statute giving an action against devisees does not affect legatees.

It will appear from this statement of the common law, that the liability of the estate of a deceased person in the hands of heirs, devisees, next of kin, or distributees is not affected by the question whether such estate is or has been under administration. The liability of the heir and devisee is confined to the real estate descended, with which the executor or administrator has nothing to do; while the next of kin and legatee take the property only after it has passed from the executor or administrator, in whose hands alone, under the ancient common law, it is liable for the debts of the deceased.

It seems self-evident that an heir or devisee takes land subject to any liability or charge resting thereon. If, therefore, a devisee take the reversion of premises leased to a tenant by the deviser, who had reserved the right to re-enter and repair, he takes it with the duty of keeping the premises in repair, and becomes liable to any person injured for the want thereof, although there be no liability to the tenant.⁶ But a devisee of premises upon which there is a nuisance at the time the title passes is not responsible for the nuisance until he has had notice thereof, and, in some instances, until requested to abate the same.⁷

§ 575. **Principle of Liability under American Statutes.**—The changes brought about by statutes, both in England and [* 1263] America, *on this branch of the law, have entirely swept away the common-law rules governing the same.⁸ In England real estate has been subjected to liability for the debts of a

¹ It is held to be adopted by the Constitution of New Hampshire: *Ticknor v. Harris*, 14 N. H. 272, 284.

² *Whittelsey v. Brohammer*, *supra*; *Sauer v. Griffin*, 67 Mo. 654, 657; *State v. Pohl*, 30 Mo. App. 321.

³ *Rogers v. Farrar*, 6 T. B. Mon. 421, 423; *Ticknor v. Harris*, 14 N. H. 272, 285.

⁴ *People v. Brooks*, *supra*.

⁵ *State v. Miller*, 18 Mo. App. 41, 44; *Rogers v. Farrar*, *supra*.

⁶ *Ahern v. Steele*, 48 Hun, 517.

⁷ *Ahern v. Steele*, 115 N. Y. 203, 210, *et seq.*

⁸ See *ante*, § 15; *Bingh. Desc.* 246.

deceased owner by a series of statutes, beginning with the statute against fraudulent devises,¹ and culminating in that of August 29, 1833,² making real estate of deceased debtors assets for the payment of simple contract debts; and in America, by statutes in all of the States, realty has been subjected to the payment of the decedent's debts by proceedings in the probate courts,³ as well as by direct action, in most States, against the heirs or devisees.⁴ A further departure from the rules of the common law in this respect is the consequence of the American system of administration, according to which all testamentary matters, including payment of decedent's debts and legacies, as well as the distribution of the residue of the estate, are placed under the control of a class of courts unknown to the common law.⁵ The general outlines of this theory demand the speedy payment of the decedent's debts, and distribution to legatees and distributees, to accomplish which the executor or administrator is clothed with the legal title to all personalty, and a power in respect of the real property to sell or lease it for the payment of debts if necessary. The management of the property, payment of debts and expenses of administration, and distribution of the property to legatees and distributees, are under the supervision of probate courts, by whose order or decree the rights of heirs, devisees, legatees, and next of kin are determined, and in most States they may also determine whether the property passes to the recipients free from claims of creditors or not, saving to the creditors whose contingent claims have not become absolute before the close of the administration their recourse against the property descended or administered.⁶ Courts of equity refuse to aid creditors who fail to collect their claims, in the mode thus pointed out by law, before final settlement and discharge of the administrator, without satisfactory excuse.⁷

It is to be noted that the chancery jurisdiction of federal courts * is not affected by State legislation,⁸ from which it [*1264] follows that assets distributed or legacies paid by order of the probate court in an ancillary administration may be liable to the satisfaction of the claims of a creditor who brings a bill in equity in the federal court in the State of the domicile to which such assets have been removed after final settlement and discharge of the ancillary administrator.⁹

§ 576. **Extent of Liability of the Heir.** — The recipient of property of a deceased person by descent or distribution, or gift from the

¹ 3 & 4 Wm. & M. c. 14.

² 3 & 4 Wm. IV. c. 104.

³ *Ante*, §§ 463 *et seq.*

⁴ 3 Redf. on Wills, 238, 239.

⁵ *Ante*, ch. xv., xvi.

⁶ *Titterington v. Hooker*, 58 Mo. 593, 597; *Pearce v. Calhoun*, 59 Mo. 271, 274.

⁷ *Collamore v. Wilder*, 19 Kan. 67, 80; *Public Works v. Columbia College*, 17 Wall. 521, 530.

⁸ *Ante*, § 156, p. *357, where the subject of the jurisdiction of federal courts is treated, and see cases there cited.

⁹ *Borer v. Chapman*, 119 U. S. 587, 598.

testator, is self-evidently never liable for more than he has received, unless he has unlawfully intermeddled, so as to make himself liable as executor *de son tort*.¹ Hence a creditor who seeks to hold an heir responsible for the debt of his ancestor must allege and show that the heir has received assets, and to that extent only is he bound;² or the heir may plead *rien per descent*.³ But this principle has no application where a sole legatee gives bond and takes the estate without administration,⁴ or, as the heirs may do in Louisiana, where they accept without inventory.⁵ Since real and personal property are both liable for the ancestor's debts, the heirs are liable to the extent of the personal, as well as of the real, property received.⁶ But the heir or devisee has the right to demand that the debts of the decedent shall be satisfied by the personal representative, if there be sufficient assets for that purpose; hence it must be shown that

Recipient of property from a deceased person is liable for no more than he received,

whether of personal or real property.

Heirs and devisees are not liable unless there was not sufficient personal property.

there was not personalty sufficient to satisfy the [*1265] demand, before the heir can be held.⁷ * In Indiana no action lies against heirs, devisees, legatees, or distributees where there has been no administration,⁸ unless they have made themselves liable as executors *de son tort* by intermeddling,⁹ nor, it seems, in Iowa,¹⁰ Maine,¹¹ Texas,¹² and other States;¹³ and

¹ As to executioners *de son tort*, see *ante*, ch. xxi.

² *Massie v. Hiatt*, 82 Ky. 314, 320; *Bacon v. Thornton*, 16 Utah, 138; *Rinard v. West*, 92 Ind. 359; *Ticknor v. Harris*, 14 N. H. 272, 286; *Schmidtke v. Miller*, 71 Tex. 103.

³ *Crocker v. Smith*, 10 Ill. App. 376; *Mayes v. Jones*, 62 Tex. 365, 366.

⁴ *Ante*, § 202; *Colwell v. Alger*, 5 Gray, 67. See *Thomas v. Bonnie*, 66 Tex. 635, 639.

⁵ *Ante*, § 203. The acceptance creates a personal liability when taken by an heir of full age, and by a married woman with the consent of her husband: *Wadsworth v. Henderson*, 16 Fed. Rep. 447; see *National Bank v. Bohne*, 8 Fed. Rep. 115, 117; although the heir accept with benefit of inventory, if he treats the property as his own, as by offering to sell it, he makes himself liable as unconditional heir: *Benedict v. Bonnot*, 39 La. An. 972.

⁶ *Payson v. Haddock*, 8 Biss. 293, 297; *Hall v. Martin*, 46 N. H. 337, 340; *State v. Lewellyn*, 25 Tex. 797, 798; *Rohrbaugh v. Hamblin* (holding that the "action should be equitable in form to subject the assets received by the beneficiaries to the payment of the debt"), 57 Kans. 393, 397; including the widow where she takes as

heir or distributee: *Lake Phalen v. Lindeke*, 66 Minn. 209.

⁷ *Selover v. Coe*, 63 N. Y. 438, 442; *McClellan v. McBean*, 74 Ill. 134, 137; *Trustees v. Fleming*, 10 Bush, 234, 240; *Tift v. Collier*, 78 Ga. 194; *Glenn v. Sothorn*, 4 Dist. Col. App. 125; *Washington v. Sasser*, 6 Ired. Eq. 336, approved in *Sibley v. Simonson*, 20 Fed. Rep. 784; *Nix v. French*, 10 Heisk. 377; *Laughlin v. Heer*, 89 Ill. 119, 122; *People v. Brooks*, 123 Ill. 246; *Lake Phalen v. Lindeke*, 66 Minn. 209 (holding, however, that where, under the statute, the heirs and next of kin of an intestate are the same persons and take in the same proportions, it is immaterial whether it be shown what each received). An exception to this rule is made in one or two States, as to which see *post*, § 577.

⁸ *Rinard v. West*, 92 Ind. 359, 365; *Leonard v. Blair*, 59 Ind. 510, 513; *Carr v. Huette*, 73 Ind. 378.

⁹ *Universalists v. Meyer*, 36 Ind. 375, 379; *Wilson v. Davis*, 37 Ind. 141, 145.

¹⁰ *Reynolds v. May*, 4 Greene (Iowa), 283, 286; *Postlewait v. Howes*, 3 Iowa, 365, 378.

¹¹ *Baker v. Bean*, 74 Me. 17, 21.

¹² *Schmidtke v. Miller*, 71 Tex. 103, 107.

¹³ See next section.

in Illinois¹ and Kentucky the personal representative must be joined in a proceeding against the heir for the purpose of establishing the

Heirs are not chargeable with interest on the property received, want of sufficient personalty.² The liability being limited to the value of the estate descending, it has been held that the heirs are not chargeable with interest on that value.³ So, also, the extent of the heir's liability in a suit against him on his ancestor's bond is limited, if he has aliened the descended land before suit brought, to its value in the condition it was in when descent was cast; no improvements put on it by the heir will enter into its valuation; and he is not liable for the rents and profits, but he cannot, on his side, claim credit for repairs.⁴

The heirs, devisees, distributees, and legatees are liable to creditors, as already intimated, to the full amount of the property received by them, whether real or personal; but whether a creditor must proceed against all jointly, or may hold each separately for his proportion of the debt, or hold any one or more of them liable for the whole of the debt, not exceeding the amount received by each, so as to compel those from whom he recovers to seek contribution from the other heirs or distributees, is held differently in different States. Thus it is held in North Carolina, * that each [* 1266] devisee or heir is liable for the debt of the deviser or ancestor to the value of the land devised or inherited, and in proportion to their respective values, and that the whole debt, not exceeding that value, may be made out of any one of them, entitling one who pays beyond his proportion to contribution from the others.⁵ So, it seems, in Kentucky⁶ and Kansas.⁷ In Virginia, if one of the heirs has aliened or wasted his part of the estate, and is insolvent, the others must contribute ratably to make up the deficiency to the creditor, according to the value of the lands descended;⁸ yet one of them should not be decreed against and driven to seek contribution

¹ In this State it is held that the creditor may sue the personal representatives and heirs jointly; or, secondly, the personal representatives and devisees jointly; or, thirdly, the personal representatives, heirs, and devisees jointly. The personal representative must be joined (because the personal estate is the primary fund for the payment of debts), except where judgment has already been obtained and there were no personal assets, or where the estate has not been administered on within one year from the debtor's death: *Hoffman v. Wilding*, 85 Ill. 453, 456.

² *Conley v. Boyle*, 6 T. B. Mon. 637, 638; *Hagan v. Patterson*, 10 Bush, 441, 443; *Massie v. Hiatt*, 82 Ky. 314, 320.

³ *Ellis v. Gosney*, 7 J. J. Marsh. 109, 110.

⁴ *Fredericks v. Isenman*, 41 N. J. L. 212. But see *post*, § 579.

⁵ *Badger v. Daniel*, 79 N. C. 372, 382, *Rodman, J.*, stating that such has been the law of England since the time of Coke, in respect of heirs bound by the cognizance of their ancestors, and citing English authorities. *Miller v. Schaaf*, 110 N. C. 319.

⁶ *Rubel v. Bushnell*, 91 Ky. 251.

⁷ *Rohrbaugh v. Hamblin*, 57 Kans. 393, 397.

⁸ *Ryan v. McLeod*, 32 Grat. 367, 374; *Lewis v. Overby*, 31 Grat. 601, 618, citing earlier Virginia cases.

from the others, but the lands of all should in the first instance bear their ratable proportion.¹ So in South Carolina the general rule is said to be, that, where there are several legatees who are liable to contribute for the payment of a debt, they must all be brought before the court, and judgment goes against each for his *pro rata* portion; but where a legatee is insolvent or beyond the jurisdiction of the court, he need not be brought in, and the creditor may require the payment of the whole debt, at least to the extent of the legacy, from a single legatee, leaving the latter to seek contribution from the other legatees.² In Illinois³ the heirs must be joined in a suit by a creditor of the ancestor, and the judgment must be joint against all. In New York, the land descended to each heir is only liable to be charged with his proportionate part of the debt, and each creditor must file his separate bill.⁴ So in Louisiana and Missouri, the creditor can recover against the heirs and widow only in proportion to the share received by each, and not *in solido*,⁵ and in Louisiana minors, who cannot elect to take without inventory, are not bound beyond the amount of their inheritance.⁶

It was held in Kentucky, that payment of money by an [*1267] *administrator to the husband of an heiress, without her knowledge and consent, is no more than payment to a stranger, and does not create against her any liability for the debts of the intestate.⁷

§ 577. Exhaustion of Remedies against Personal Representative before Action will lie against Heirs. — With some exceptions which will be noted below, the rule is that no action can be brought against an heir, devisee, legatee, or next of kin for a liability or debt of the decedent which could not have been maintained against the decedent himself;⁸ nor on a claim or demand against the decedent which the creditor might have recovered from the executor or administrator;⁹ and it is no answer, that there

No action can be maintained against an heir, etc., which might not have been brought against the debtor himself; nor one which might have been brought

¹ Staple, J., in *Ryan v. McLeod*, *supra*; *Mason v. Peter*, 1 Munf. 437, 446; *Foster v. Crenshaw*, 3 Munf. 514, 520.

² *Bermingham v. Forsythe*, 26 S. C. 358, 368.

³ *Vanmeter v. Love*, 33 Ill. 260; *Cutright v. Stanford*, 81 Ill. 240, 244. But this latter case holds that the judgment should be joint against all, requiring each to pay *pro rata*.

⁴ *Butts v. Genung*, 5 Pai. 254, 259.

⁵ *Dirmeyer v. O'Hern*, 39 La. An. 961, 964, 966; *Caire v. Judge*, 43 La. An. 1133; *Walker v. Deaver*, 79 Mo. 664, 679; *State v. Pohl*, 30 Mo. App. 321, 326; *Keen v.*

Watson, 39 Mo. App. 165; *Pearce v. Calhoun*, 59 Mo. 271.

⁶ *Ealer v. Lodge*, 36 La. An. 115, 117.

⁷ *Jones v. Commercial Bank*, 78 Ky. 413, 421.

⁸ *Haynes v. Colvin*, 19 Ohio, 392, 398.

⁹ *Walker v. Byers*, 14 Ark. 246, 253; *Titterington v. Cooker*, 58 Mo. 593; *Grow v. Dobbins*, 128 Mass. 271; *Phelps v. Miles*, 1 Root, 162; *Gilchrist v. Filyan*, 2 Fla. 94; *Lee v. McKay*, 118 N. C. 518, 524; *Hill v. Nichols*, 47 Minn. 382; *Bryant v. Livermore*, 20 Minn. 313; *Hutchinson v. Stiles*, 3 N. H. 404, 407; *Janes v. Brown*, 48 Iowa, 568, 570; *People v.*

against the personal representative. has been no administration.¹ Hence the petition should negative the existence of the circumstances under which the claimant might have obtained satisfaction by proceeding in the probate court,² either by proving the same and participating in the assets under the order to pay creditors; or, if the claim has not accrued within the time allowed by statute for the presentation of claims, but before the estate has been fully administered, by obtaining an order where the statutes so provide that the executor or administrator retain in his hands a sum sufficient to satisfy the same, or a bond from those interested in the estate for its payment.³ In the absence of proof that the administrator and his sureties are insolvent, or have no effects within the jurisdiction of the court, and that the creditor has exhausted all his remedies against them, the creditor is not entitled to recover against the distributees⁴ or heirs;⁵ but the insufficiency of the personalty may be proved by or inferred from circumstances.⁶

But in New Jersey the statute authorizes action against heirs *and devisees where there has been no administration,⁷ or if there has, although the claim has not been presented to the executor or administrator, and although there be sufficient personal property in the estate to pay the debt.⁸ In chancery, however, as was recently held in that State, a creditor who has re-

Brooks, 22 Ill. App. 594, 597; *Armstrong v. Loomis*, 97 Mich. 581; *Woods v. Ely*, 7 S. Dak. 471 (holding that a non-resident creditor who could have established his claim against the domiciliary executor in Illinois, but did not, could not sue the devisee in South Dakota).

¹ *Baker v. Bean*, 74 Me. 17, 21; *Clark v. Winchell*, 53 Vt. 408, 415. See p. *1265 and cases cited in notes 8-12. In Kansas, however, it was held that a creditor of a decedent might in equity subject real estate of the decedent to the payment of his debt, in the possession of the heir at law, where there had been no administration, and where there were no other debts or claims against the estate: *McLean v. Webster*, 45 Kans. 644. In Louisiana it is held that it is erroneous to appoint an administrator when the succession owes no debts; in such case, if the existence of debts should afterwards be discovered, the creditors would have recourse against the heirs, but not against the succession, which has ceased to exist: *Thibodeaux's Succession*, 38 La. An. 716.

² *Brooks v. Rayner*, 127 Mass. 268, 270; *Bacon v. Pomeroy*, 104 Mass. 577, 584;

Sampson v. Sampson, 63 Me. 328, 331; *Prefontaine v. McMicken*, 16 Wash. 16, 24.

³ *Bacon v. Pomeroy*, *supra*; to similar effect, *Cincinnati R. R. Co. v. Heaton*, 43 Ind. 172. But the failure to adopt such proceeding does not in every case exclude the heir's liability, where the contingency of the claim is such that no ultimate liability nor the amount thereof, is to be foreseen: *Bullard v. Moor*, 158 Mass. 418.

⁴ *Tift v. Collier*, 78 Ga. 194; *Hall v. Bumstead*, 20 Pick. 2, 6; *Webber v. Webber*, 6 Me. 127, 137; *Fowler v. True*, 76 Me. 43; *Leake v. Leake*, 75 Va. 792, 808. As to whether there can be a sale of real estate when the administrator has squandered the personalty, see *ante*, p. *1040, § 470,

⁵ *Pearce v. Calhoun*, 59 Mo. 271.

⁶ *Pyatt v. Waldo*, 85 Fed. R. 399.

⁷ *Mutual Life Ins. Co. v. Hopper*, 43 N. J. Eq. 387, 388, but holding the heir's liability to be purely legal, and that a court of equity had no jurisdiction.

⁸ *Stone v. Todd*, 49 N. J. L. 274; *Van Fleet, V. C.*, in *Coddington v. Bispham*, 36 N. J. Eq. 224, 227.

fused to subject his claim to the ordinary course of administration, by presenting it against the executors, cannot have his debt made out of any legacy or devise he may select, in disregard of the equitable rules touching the marshalling of assets in payment of debts and legacies.¹ The statute makes liable the heirs of an indorser of a note who dies before its maturity.² And so the heirs of the heir are liable for the original ancestor's debt, because they took by descent;³ but lands descended, which have been *bona fide* aliened by the heir before suit, cannot be taken in execution on a judgment against the heir for his ancestor's debt.⁴ And in Illinois, if administration is not had within one year after a debtor's death, the statute gives an action against the heirs or devisees on all contracts and undertakings of the decedent; and such action may be brought before a justice of the peace.⁵ In Kentucky, also, the heir or distributee may under the statute be sued to the extent of assets received notwithstanding the claim was not proved against the estate, and without showing that the personal representative has no assets.⁶ And in New York, as we have seen, after three years from the grant of letters, the creditor *must* proceed against the heir or devisee, and a *bona fide* purchaser from the latter is protected; and no real estate can be sold, in the hands of the alienee of the heir or devisee, if administration is not taken out within four years of the decedent's death.⁷ The heir or devisee is made liable to an action for the decedent's debts after a lapse of three years without a grant of letters, or, as above stated, after a lapse of three years after the grant of letters. Under this statute it was held, that if three years elapse without grant of letters, a subsequent grant will not have the effect to further suspend the action against a devisee, for three years from such grant;⁸ and also that the six years' limitation is suspended, as against such action, during the three years after decedent's death, within which the creditor is prohibited from commencing his action, thus giving a creditor, whose remedy is not barred in the debtor's lifetime, nine years in which to bring his action against the devisee or heir.⁹

§ 578. Time within which Claims may be enforced against Heirs.

— It is evident that neither the general Statute of Limitations, nor

¹ Dodson v. Levars, 53 N. J. Eq. 347.

² Dodson v. Taylor, 53 N. J. L. 200.

³ St. Mary's Church v. Wallace, 10 N. J. L. 311, 312. In New York the statute is held not to provide for the liability of the heir of a devisee, for the debts of the original testator: Fink v. Berg, 50 Hun, 211, but the heir of the heir is held liable at the common law: Pyatt v. Waldo, 85 Fed. R. 399.

⁴ Den v. Jaques, 10 N. J. L. 259, 264, approved in Stone v. Todd, *supra*. Post, p. *1271; but judgment for the heir's

own debt, and levy of execution on the descended lands will not of itself be an alienation within the meaning of the statute: Muldoon v. Moore, 55 N. J. L. 410, leaving undecided whether a sale by the sheriff under such execution would be such an alienation.

⁵ Dodds v. Walker, 9 Ill. App. 37, 38.

⁶ Rubel v. Bushnell, 91 Ky. 251.

⁷ Ante, § 465, p. *1023. See Cunningham v. Parker, 146 N. Y. 29, 31.

⁸ Adams v. Fassett, 149 N. Y. 61, 67.

⁹ Adams v. Fassett, *supra*.

Neither the general nor special Statute of Limitation runs against a creditor until his claim has become absolute.

the special statute in favor of executors and administrators, sometimes called the Statute of Non-claim, begins to run against a creditor until his claim has become absolute and enforceable by action. Hence the Statute of Non-claim¹ does not run against a contingent claim until it has ceased to be such and become absolute.² If it ac-

cruce after appointment of an administrator, but before the close of the administration, and before the expiration of the time limited for the presentation of claims against the estate, it must, in some States, be enforced before the statute has run its course,³ or it will be barred as against the heirs, unless it accrued so shortly before the expiration of the time as to make its presentation for allowance impossible.⁴ In Indiana, no action is maintainable against heirs, distributees, or devisees, except where the creditor, six months before final settlement of the administration account, was insane, an infant, or out of the State, in which case he may bring suit within one year after removal of * the disability; ⁵ even then, if such cred- [* 1269] itor be a non-resident, suit must be brought within two years of final settlement.⁶ In Maine action may be brought against heirs and devisees upon a covenant or contract not enforceable during administration within one year after it becomes due;⁷ and in like time in Minnesota⁸ and Wisconsin.⁹ In other States, the law simply gives the same time within which such a claim may be enforced after it has accrued as is given for the presentation of claims against the executor or administrator.¹⁰ In the federal courts, whose jurisdiction to entertain actions against executors and administrators cannot be affected by State laws,¹¹ it is held that the failure of a non-resident creditor to present his claim for allowance to the commissioners appointed to audit claims against the estate of his non-resident debtor constituted no bar to a bill in equity, in a federal court, against the heirs, to subject the real estate descended to the payment of the ancestor's debt; but that such failure is evidence of *laches*, throwing

¹ As to this species of limitation, see *ante*, § 400.

² *Pendleton v. Phelps*, 4 Day, 476, 481; *Neil v. Cunningham*, 2 Port. 171; *Burton v. Lockert*, 9 Ark. 411, 416; *State v. Buck*, 63 Ark. 218; *Logan v. Dixon*, 73 Wis. 533.

³ *Walker v. Byers*, 14 Ark. 246.

⁴ In which case equity will afford relief: *Bennett v. Dawson*, 15 Ark. 412; *Hendricks v. Keese*, 32 Ark. 714.

⁵ *Leonard v. Blair*, 59 Ind. 510. But if the claim of one under such disability be presented and adjusted in the ordinary course of administration, as it may, it stands upon the same footing afterwards

as other adjusted claims: *Silver v. Canary*, 114 Ind. 129, 132.

⁶ *Fisher v. Tuller*, 122 Ind. 31.

⁷ *Baker v. Bean*, 74 Me. 17, 20.

⁸ *McKeen v. Waldron*, 25 Minn. 466, 471.

⁹ *Mann v. Evarts*, 64 Wis. 372, 378.

¹⁰ *Ante*, § 394, and authorities there cited; *Finney v. State*, 9 Mo. 227, 229; *Miller v. Woodward*, 8 Mo. 169, 176; *Chambers v. Smith*, 23 Mo. 174, 180.

¹¹ *Suydam v. Broadnax*, 14 Pet. 67, 76; *Union Bank v. Jolly*, 18 How. (U. S.) 503, 507; *Payne v. Hook*, 7 Wall. 425, 429; *Chewett v. Moran*, 17 Fed. Rep. 820, 822.

upon the plaintiff the burden to excuse the same; ¹ and that a court of equity will not exercise its jurisdiction to reach the assets of a deceased debtor which have already been subjected to administration and distribution, unless the debt be clear and undisputed, and satisfactory excuse be given for the failure to present the claim, in the mode prescribed by law, to the representative of the estate before distribution.²

In North Carolina, the statute was construed as barring all actions against either executors, administrators, next of kin, or heirs, upon the expiration of seven years after the qualification of the executor or administrator, and of six years after the final accounting, even if the claim be contingent and had not accrued before the expiration of these periods,³ saving to *femes covert* *a like period after removal of disability; ⁴ but subsequently the court held that the decisions must not be so construed, and that "if there be anything in the opinions which countenances such a doctrine in the slightest degree, it was unnecessary, and certainly does not meet with our approval; ⁵ and in later cases the court squarely overrules the case as authority.⁶ A similar decision is found in an early Tennessee case.⁷ In South Carolina, an action by a specialty creditor to subject lands of the intestate debtor to the satisfaction of his demand is not barred within twenty years at law, nor in equity if no *laches* be found, although the heir has been in possession of the land for sixteen years.⁸ The heir cannot acquire title as against the ancestor's debts by the claim of adverse possession against the title descended, unless he claim in his own right.⁹ But heirs may meet the demand upon promissory notes of the ancestor (without seal) by the plea of limitation applicable to simple contract debts, and they are not bound by the judgment rendered against the administrator to which they were not parties.¹⁰

The general Statute of Limitation is held to run upon an action by a creditor against a legatee having received assets from the estate of the debtor, as upon an action for money had and received.¹¹ There

¹ *Chewett v. Moran*, 17 Fed. Rep. 820; *Public Works v. Columbia College*, 17 Wall. 521, 530.

² *Public Works v. Columbia College*, 17 Wall. 521, 530. And as to the jurisdiction of federal courts, see further, *ante*, § 156, p. *357, where the subject is more fully treated.

³ *Andres v. Powell*, 97 N. C. 155. The dissenting judge calls attention to the absurdity involved in this construction, as providing for the bar of a claim that has not become actionable: p. 164; a result which the majority of the court seem to hold compatible with justice, in view of

the importance of securing quiet and repose to the estates of dead men.

⁴ *Briggs v. Smith*, 83 N. C. 306.

⁵ The statute runs from date of accrual: *Miller v. Schaaf*, 110 N. C. 319.

⁶ *Lee v. McKoy*, 118 N. C. 518.

⁷ *Peck v. Wheaton*, 1 *Martin & Yerg.* 353, 360.

⁸ *Wheeler v. Floyd*, 24 S. C. 413, 420; *Mobley v. Cureton*, 2 S. C. 140.

⁹ *Wheeler v. Floyd*, *supra*.

¹⁰ *Gilliland v. Caldwell*, 1 S. C. 194, 198, and authorities.

¹¹ *Lanier v. Griffin*, 11 S. C. 565, 582; *Brewster v. Gillison*, 10 *Rich. Eq.* 435,

is said to be no limit to the liability of the legatee in such case, except that of time.¹

A statute providing that land of heirs and devisees may be taken to pay the debt of their ancestors or testators gives a remedy only; and since the cause of action is founded on the obligation of the latter to pay the debt, the Statute of Limitations is available to the heir or devisee only as it would have been to the ancestor or testator.²

In New York, as we have seen, the three years following the decedent's death, during which the heir or devisee cannot be sued, is not counted as a part of the period of the general Statute of Limitation.³ Since the executor or administrator, having title to all the personal property of the decedent and a contingent power to sell the real property, is the proper person against whom the debts of the deceased should be proved, it follows that no action can be maintained against the heirs so long as the time for presenting claims against the estate has not expired.⁴

§ 579. **Nature of the Action against Heirs and Devisees, Distributees, and Legatees.** — Courts of probate have no power to compel payment of debts of deceased persons after the close of administration, except as to newly discovered property constituting assets. But in some instances the executor or administrator who has conveyed the personalty in obedience to the order of the probate court (not by his voluntary act), may bring a bill in equity to compel the heirs who received such estate to contribute, to the extent of the property received, and pay a debt newly * accrued, and [* 1271] the expenses of the representative in defending the claim. And this, although there be real estate in possession of the heirs or their alienees not sold by order of the probate court.⁵

The general remedy of a creditor, whose right of action accrued after the time in which claims may be presented against the estate

<p>Remedy for creditor is, generally, a bill in equity; but in some States action at law lies.</p>	<p>while under administration, is by bill in equity against the recipients of property from a solvent estate, for contribution to the extent of the estate received by them;⁶ yet, while in some of the States an action at law is expressly denied,⁷ the heirs are held liable, in others, at law; and in such case there is no recourse to equity.⁸</p>
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citing South Carolina and English cases; *Leake v. Leake*, 75 Va. 792, 808.

¹ *Fripp v. Talbird*, 1 Hill Ch. 142, 145.

² *Pyatt v. Waldo*, 85 Fed. R. 399.

³ See end of preceding section and cases cited.

⁴ *Selover v. C  e*, 63 N. Y. 438; *Platt v. Platt*, 105 N. Y. 488, 497.

⁵ *Davis v. Vansands*, 45 Conn. 600, 604.

⁶ *Booth v. Starr*, 5 Day, 419, 426;

Marshall, C. J., in *Riddle v. Mandeville*, 5 Cranch, 322, 330; *Gordon v. Gilfoil*, 94 U. S. 168; *Chewett v. Moran*, 17 Fed. Rep. 820; *Gillespie v. Hauenstein*, 72 Miss. 838.

⁷ *Hendricks v. Keese*, 32 Ark. 714, 177; *Rex v. Creel*, 22 West Va. 373, 380.

⁸ *Hawley v. Botsford*, 27 Conn. 80, 83; *Mutual Life Ins. Co. v. Hopper*, 43 N. J. Eq. 387.

In New York it was held by a federal court that at common law the heir of an heir is liable, to the extent of the real estate received, for the specialty debt of the ancestor, and that this liability can be enforced in equity.¹

Since a judgment rendered in favor of a creditor against the personal representative is not conclusive upon the heir, nor even evidence against him, because there is no privity between them,² a purchaser from an heir or devisee, after the expiration of the time during which the real estate may be subjected to the payment of the debts of the decedent in the probate court, and before suit brought by a creditor against the heir, obtains a title which is superior to the right of the creditor;³ but the devisee himself, by accepting the devise, makes himself personally liable to the creditor to the extent of the value of the land devised.⁴ A sale of land by the heir or devisee before the expiration of the time limited for the presentation of claims against the deceased, is necessarily invalid to deprive a creditor of his remedy against the same.⁵ It is mostly provided by [* 1272] statute, that where the heir or devisee * has aliened his share of the property descended or devised, he becomes personally liable to the ancestor's creditor to the amount of its value.⁶ In some States the creditor's action is held to authorize a personal judgment against the heir or devisee only, so that an order to sell the specific land descended is erroneous;⁶ but in others, the judgment is directed to be satisfied out of the lands descended, if they have not been aliened;⁷ and it is error to render a personal judgment where the heirs have neither aliened nor collected rents, nor received anything from the estate.⁸ So it is held in Kentucky⁹ and North Carolina,¹⁰ that

Purchaser's title acquired after expiration of time in which real estate is liable for debts in probate court, is superior to that of a creditor.

Statutory provisions rendering vendors liable personally to the value of the descended property sold.

Secus, in other States.

¹ *Pyatt v. Waldo*, 85 Fed. R. 399, 340.

² *Ferguson v. Broome*, 1 Bradf. 10, 15, citing numerous cases; *Watts v. Taylor*, 80 Va. 627, 631; *Curry v. Peebles*, 83 Ala. 225, 227. See on this point *ante*, § 466.

³ *Berton v. Anderson*, 56 Ark. 470, 475; *Platt v. Platt*, 105 N. Y. 488, 496; *Brandon v. Phelps*, 77 N. C. 44; *Den v. Jaques*, 10 N. J. L. 259; *Van Bibber v. Reese*, 71 Md. 608; as to the rights of creditors to follow the lands aliened by the heir, see a collection of cases made by the reporter in 43 N. J. Eq. pages 207-209.

⁴ *Armstrong v. McKelvey*, 104 N. Y. 179, 184; *Covell v. Weston*, 20 John. 414,

419; *Winfield v. Burton*, 79 N. C. 388, 394; as explained and modified in *Bunn v. Todd*, 115 N. C. 138.

⁵ *Ante*, § 471, pp. * 1041 and * 1045. *Renan v. Banks*, 83 N. C. 483, 485; and the heir is not liable to refund to such disappointed purchaser from him: *Armstrong v. Loomis*, 97 Mich. 577.

⁶ *Mayes v. Jones*, 62 Tex. 365; *Webster v. Willis*, 56 Tex. 468, 475; *Hopkins v. Ladd*, 12 R. I. 279, 281.

⁷ *Williams v. Ewing*, 31 Ark. 229, 235.

⁸ *Branger v. Lucy*, 82 Ill. 91.

⁹ *Ready v. Stephenson*, 7 J. J. Marsh. 351, 354; *Leathers v. Meglasson*, 2 T. B. Mon. 63, 64.

¹⁰ *Tremble v. Jones*, 3 Murphy, 579.

the heir does not become liable to a personal judgment, as at common law, by pleading a false plea or making default, but may exonerate himself by surrendering the property received, and cannot be made liable for more than its value in a judgment personally against him, if he has aliened it.

It is said to be well settled in England, that the creditor may obtain a decree in equity compelling the heir to account for rents and profits, as well as for the sale of the descended or devised lands;¹ and it has been so held in America;² but if the heirs are infants, and the guardian has expended the rents and profits, or any portion thereof, in the necessary maintenance of the heirs, the creditors can reach the unexpended portion only.³

¹ In *Davies v. Topp*, 1 Bro. C. C. 524, it was held by the Master of the Rolls, that, in case the personal estate and proceeds of sale of the real estate descended should not be sufficient for the payment of the creditor, the rents and profits of the said estate were to be applied to make good the deficiency, and an account and application of such rents and profits was directed: p. 526. See *Washington v.*

Sasser, 6 Ired. Eq. 336, in which Ruffin, C. J., reviews the English authorities on this point.

² *Washington v. Sasser*, *supra*; *Sibley v. Simonton*, 20 Fed. R. 784; *Thompson v. Brown*, 4 John. Ch. 619, 645; but see *ante*, § 576, p. *1265.

³ *Moore v. Shields*, 68 N. C. 327; *Thompson v. Brown*, *supra*.

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